Warren Court Incrementalism and Indigent Criminal Appellants' Right to Trial Transcripts

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The Warren Court is often characterized as progressive and vigorous in the pursuit of its vision of just legal doctrine.[1] There is another view, however, that their decisions were typically characterized by caution and incrementalism.[2] In

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1. Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273, 295 (2010) ("More particularly, why were the sit-in cases, in Schmidt's (2008) fitting phrase, "the great aberration of the Warren Court" (3)—narrow, cautious rulings from a normally fearless and activist Court?"); Neal Devins, Chapter 6 Group Formation and Precedent, 33 IUS Gentium 101, 108 (2013) ("There were two Warren Courts. The 1962-1968 Terms featured, as Lucas Powe put it, 'history's Warren Court.' That Court was a coherent Court willing both to overturn precedent and to make significant doctrinal advances. The 1953–1961 Terms tell a far different story. During that period, the Court rarely overturned precedents (doing so only 11 times) and was sharply divided."); *see also* Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 272 (1991) (discussing plurality opinions in the Warren Court).

2. *See, e.g.,* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the*

cases ranging from 1955's "all deliberate speed" enforcement decision in *Brown v. Board of Education*[3] to 1968's *Terry v. Ohio*,[4] granting constitutional sanction to "stop and frisk," the Court deferred to states and offered flexibility in enforcing constitutional rights in ways that ultimately permitted widespread evasion and discrimination. In *Miranda v. Arizona*[5] itself, Chief Justice Warren explained at length that the warnings mandated in the opinion were required only conditionally:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.[6]

In other cases, Warren Court majorities similarly assured Congress and the states that they could change procedures to avoid requirements that the Court embraced.[7]

This article examines and criticizes a particular instance of Warren Court caution and incrementalism. As a precursor to the Warren Court's 1963 holdings that those who could not afford to pay were entitled to appointed counsel at trial,[8]

Court, 86 YALE L.J. 1035, 1039–40 (1977) ("It is remarkable that decisions as far reaching as *Gideon v. Wainwright*, In re *Gault*, *Griffin v. Illinois*, *Brady v. Maryland*, *Duncan v. Louisiana*, *Robinson v. California*, *Miranda v. Arizona* and *Mapp v. Ohio* would be announced with no remedial instrument whatsoever acting directly, coercively or prospectively upon the persons whose behavior was purportedly controlled. . . . The absence of a remedy acting directly upon these personnel is startling, especially if we understand state courts and state law-enforcement officials to be the targets of this program for constitutional change.")

3. 349 U.S. 294 (1955).

4. 392 U.S. 1 (1968).

5. 384 U.S. 436 (1966).

6. *Id*. at 467.

7. Avery v. Midland Cty., Tex., 390 U.S. 474, 485 (1968) ("This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."); United States v. Wade, 388 U.S. 218, 239 (1967) ("Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.' But neither Congress nor the federal authorities have seen fit to provide a solution.").

8. Gideon v. Wainwright, 372 U.S. 335 (1963). *See generally* Michael J. Zydney Mannheimer, Gideon, Miranda*, and the Downside of Incorporation*, 12 OHIO ST. J. CRIM. L. 401, 408 (2015) (discussing cases leading to *Gideon*). Mr. Gideon was famously acquitted on retrial. Stephen B. Bright, *The Right to Counsel in Death*

and on initial appeal,[9] the Court decided *Griffin v. Illinois*[10] in 1956. *Griffin* held that indigents appealing a criminal conviction were entitled to necessary trial transcripts at state expense.[11] In a subsequent case the Court explained that

> [i]n all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.[12]

Although the precise doctrinal justification for this principle has wavered—it is not certain whether the right rests on the due process clause, the equal protection clause, or elements of both[13]— subsequent Courts have not questioned the continuing existence of the right to an effective initial appeal, and that it includes both counsel[14] and transcripts.[15]

But the Warren Court qualified and conditioned *Griffin* in two ways. First, the decisions seemed to assume that the defendant would be required to identify issues in advance of the appeal, and would only receive transcripts relevant to those specified issues.[16] Put another way, the defendant would be required to identify appellate issues without first having access to a transcript of the trial proceedings.[17]

Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It, 11 J. L. SOC. 1, 8 (2010).

9. Douglas v. California, 372 U.S. 353 (1963). After an appeal with counsel, the California Supreme Court reversed the conviction. People v. Douglas, 392 P.2d 964 (Cal. 1964).

10. Griffin v. Illinois, 351 U.S. 12 (1956).

11. *Id*. at 19; *see also* Hardy v. United States, 375 U.S. 277, 282 (1964).

12. Draper v. Washington, 372 U.S. 487, 496 (1963).

13. The Court has noted that its "decisions in point reflect 'both equal protection and due process concerns.'" Halbert v. Michigan, 545 U.S. 605, 610 (2005) (quoting M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (internal quotation marks omitted)*; see also* Smith v. Robbins, 528 U.S. 259, 276 (2000) ("our case law reveals that, as a practical matter, the [Due Process and Equal Protection] Clauses largely converge to require that a State's procedure 'affor[d] adequate and effective appellate review to indigent defendants.'") (quoting Griffin v. Illinois, 351 U.S. 12, 20 (1956) (plurality opinion).

14. Lafler v. Cooper, 566 U.S. 156, 165 (2012) ("defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial.") (citing Halbert v. Michigan, 545 U.S. 605 (2005); Evitts v. Lucey, 469 U.S. 387 (1985)).

15. Although *Griffin* itself was a 5-4 decision, by the time of Mayer v. City of Chicago, 404 U.S. 189 (1971), no Justice dissented from the general principle of entitlement to a transcript. *See also, e.g.,* Medina v. California, 505 U.S. 437, 454 (1992) (noting "due process right to trial transcript on appeal") (citing *Griffin* v. Illinois, 351 U.S. 12, 20 (1956) (plurality opinion).)).

16. Archibald Cox, for example, described *Griffin* as applicable to an appellant "who alleges serious errors." Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 92 (1966).

17. Mayer, 404 U.S. at 194–95 (quoting *Draper*, 372 U.S. at 495–96)). The court explained:

> part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds

Second, the Court made clear that a full verbatim transcript was not required if some other means could satisfy the right to an effective appeal:

> Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.[18]

Hardy v. United States,[19] a 1964 decision, tested the first restriction. The result illuminated the Court's cautious approach. Mr. Hardy requested a complete transcript but made only conclusory allegations of error. Justice Douglas for a majority of five held that where new counsel was appointed on appeal, under federal statute law,[20] the defendant was entitled to the entire transcript. This would enable the defendant to search for plain error, that is, errors not objected to below, but which nevertheless might result in reversal. On remand, with the benefit of a full transcript, the D.C. Circuit reversed the conviction based on instructional error occurring in a portion of the transcript initially refused,[21] an event notable enough to merit reporting in the *New York Times*.[22]

Justice Goldberg, concurring for himself, Chief Justice Warren, and Justices

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> unnecessarily in such circumstances. If, for instance, the points urged relate only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted.

Id.

18. Draper v. Washington, 372 U.S. 487, 495 (1963); *see* Francis A. Allen, Griffin v. Illinois: *Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 152 (1957) ("Just what means a State may employ to satisfy the requirements of 'adequate' appellate review for indigent defendants is not wholly clear.").

19. Hardy v. United States, 375 U.S. 277 (1964).

20. Thus, the Eleventh Circuit noted that in *Hardy* "the Court did not 'reach a consideration of constitutional requirements.'" Bush v. Sec'y, Fla. Dep't of Corr., 888 F.3d 1188, 1192 n.9 (11th Cir. 2018) (quoting *Hardy*, 375 U.S. at 282). *But cf. Furnishing Transcripts to Indigents*, 78 HARV. L. REV. 264, 266 (1964) ("Even though the majority opinion purports to rest on statutory grounds and the concurrence of Mr. Justice Goldberg on the supervisory power, the Constitution seemed to lurk behind both opinions, with their stress on fairness to defendants. . . . at least those states that allow appellate courts to notice sua sponte 'plain' or 'fundamental' error will probably be required to furnish indigents complete transcripts.").

21. Hardy v. United States, 335 F.2d 288 (D.C. Cir. 1964) (per curiam).

22. *One Prisoner's Break*, N.Y. TIMES, Nov. 22, 1964, at E10.

Brennan and Stewart, urged the Court to go further:

> I join the Court's opinion which is written narrowly within the framework of prior decisions. I concur separately, however, to state my conviction that in the interests of justice this Court should require, under our supervisory power, that full transcripts be provided, without limitation, in all federal criminal cases to defendants who cannot afford to purchase them, whenever they seek to prosecute an appeal[23] . . . As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.[24]

A full transcript should be provided in all cases, the concurrence argued, not just in cases where new counsel was appointed on appeal. Mr. Hardy's lawyer was noted advocate Mozart G. Ratner; he moved to modify the opinion to remove the restriction to "new counsel on appeal" but the Court declined.[25] Accordingly, the issue was made plain both in the concurrence and in a post-reversal motion. But the cautious, incremental Justice Douglas was not even willing to extend the rule under the supervisory power.

This article proposes that, based on subsequent developments in judicial procedure and understanding of the duty of counsel, the standard Justice Goldberg proposed to adopt as a matter of the Supreme Court's supervisory power is actually required by the due process and equal protection clauses of the Constitution itself.[26] First, the requirement of pre-appeal identification of issues, for both paid appellants and those appealing as indigents, has largely disappeared. Federal and state courts and legislatures have determined that appellate issues normally should be raised in appellate briefs rather than in separate assignments of error, bills of exceptions, or other filings in advance of the briefs. This development makes sense for several reasons: efficient processing of appeals, the importance of plain error review of errors not objected to at trial, the fallibility of memory, even among trial lawyers, and the rise of appellate specialists who take over cases when a trial results in conviction. Consistent with these changes, the Supreme Court has made clear that appellate counsel's duty is, first, to review any part of the record where

23. Hardy v. United States, 375 U.S. 277, 282 (1964) (Goldberg, J., concurring).

24. *Id.* at 288.

25. Hardy v. United States, 376 U.S. 936 (1964).

26. We focus primarily although not exclusively on federal practice and procedure because of variations in state law.

reversible error may be found, and, second, to draft and file a brief identifying errors, not the other way around.

Second, in practice, accurate and economical alternatives to transcripts of testimony, hearing, and argument have not materialized. To the contrary, alternatives are virtually never used except when technical or other circumstances make production of a verbatim transcript literally impossible. It turns out U.S. District Judges, federal prosecutors, and defense attorneys are not eager, for example, to settle an agreed statement of trial proceedings when a more accurate and cheaper alternative can be had by asking the court reporter to print out a copy of a verbatim transcript of proceedings prepared with the aid of voice recognition software. Decades ago, it might have been conceivable that a concern for speedy and inexpensive resolution of appeals counselled in favor of considering substitutes for a verbatim transcript. Today, the fastest and cheapest solution for obtaining a record on appeal is technologically aided production of a transcript.

To a significant extent, this argument is uncontroversial. Because of these changes, the only way under prevailing appellate procedures to give an indigent an appeal comparable to that available to a paid appellant is to provide a complete transcript of all proceedings where reversible error might occur. Most, or perhaps nearly all, courts agree that under the Constitution an indigent appellant is entitled to a complete transcript in order to prepare an appellate brief.

However, there are significant exceptions. An important one exists in the federal court system itself, where appointed counsel for indigent appellants are not automatically afforded a complete transcript of the trial. Instead, private attorneys appointed for appeals under the Criminal Justice Act[27] can obtain a transcript by filing Criminal Justice Act (CJA) Form 24.[28] That form requires the signature of a judicial officer in order to obtain transcripts of substantial portions of the trial, including voir dire, prosecution and defense opening statements and closing arguments, and jury instructions.[29] Apparently, only the trial evidence is obtainable

27. Jon Wool & Clair Shubik, *Good Practices for Panel Attorney Programs in the U.S. Court of Appeals*, VERA INST. OF J. (2006), *available at* http://www.uscourts.gov/sites/default/files/verareport2006_2.pdf (on file with *The University of the Pacific Law Review*); *see also* 18 U.S.C. § 3006A(d)(1) (providing that "[a]ttorneys may be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.").

28. *Decentralization of Payments for Criminal Justice Act Transcripts*, *in* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD IN WASHINGTON, D.C. MARCH 16 AND 17, 1982 AND SEPTEMBER 22 AND 23, 1982 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT 57 (1982), *available at* https://books.google.com/books?id=SEfS-R9IWdkC&lpg=PA57&ots=teErbAAg72&dq=Criminal%20Justice%20Act%20%22Form%2024%22%20circuit&pg=PA57#v=onepage&q=Criminal%20Justice%20Act%20%22Form%2024%22%20circuit&f=false (on file with *The University of the Pacific Law Review*). For rates, *see Federal Court Reporting Program*, UNITED STATES COURTS https://www.uscourts.gov/services-forms/federal-court-reporting-program (last visited Apr. 22, 2020) (on file with *The University of the Pacific Law Review*).

29. *See Authorization and Voucher for Payment of Transcript*, UNITED STATES COURTS, *available at* http://www.uscourts.gov/sites/default/files/cja24.pdf (on file with *The University of the Pacific Law Review*); *see also Appendix A, CJA Form 24*, *available at* http://www.uscourts.gov/sites/default/files/cja24.pdf. (on file with

as of right pursuant to CJA Form 24. This restriction accords with a 1971 Resolution of the Judicial Conference,[30] and is now incorporated in the *Guide to Judiciary Policy*.[31]

This policy is flatly inconsistent with the Supreme Court's decision in *United States v. Hardy*, which grants persons represented by new counsel on appeal a full transcript without a showing of need. More fundamentally, now that appellate practice generally does not require advance demonstration of issues, and the search for substitutes for transcripts has been abandoned, compliance with the *Griffin* principle requires providing indigent appellants a complete transcript in order to give them an effective appeal. CJA Form 24 should be revised to conform to the decisions of the Court interpreting federal law and the Constitution itself.

I. THE CONSTITUTIONAL RIGHT TO TRANSCRIPTS

In *Griffin v. Illinois*,[32] the Supreme Court found it unconstitutional to deny appeals to defendants who could not afford to purchase transcripts. Illinois law granted transcripts at government expense only to those sentenced to death;[33] it also offered transcripts for collateral review, but only state and federal constitutional claims were cognizable in those proceedings.[34] Any indigent appellant not on death row could challenge a criminal conviction based on a state law claim only if they could afford to purchase a transcript. The Court could simply have invalidated the transcript requirement, holding that an appeal could not be

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30. *Resolution of Expediting Appeals*, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES HELD AT WASHINGTON D.C., MARCH 15–16, 1971, AND OCTOBER 28–29 1971, 62 (including recommendation that "[a]ll counsel should be required to exhaust all efforts to perfect appeals without full trial transcripts, by use of such traditional devices as preparation of an agreed statement or other summary of the evidence").

31. GUIDE TO JUDICIARY POLICIES: COURT REPORTING, § 550.40 Transcripts, *available at* https://www.uscourts.gov/sites/default/files/guide_vol06.pdf (on file with *The University of the Pacific Law Review*) ("In the absence of prior special authorization, trial transcripts should exclude: prosecution and defense opening statements, prosecution argument, defense argument, prosecution rebuttal, voir dire, and the jury instructions.").

32. Defender organizations such as Federal Defenders obtain their transcripts at their own discretion, without having to use Form 24. *See* GUIDE TO JUDICIARY POLICY, DEFENDER SERVICES, Vol. 7, Pt. A: Guidelines for Administering the CJA and Related Statutes, § 430.10(a) ("All defender organizations have general authorization to procure transcripts, provided that total expenditures for transcripts do not exceed the funding available in the budget object code (BOC) for transcripts."), *available at* https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-4-ss-430-transcripts-investigative-expert (on file with *The University of the Pacific Law Review*).

The United States may be charged for transcripts, but, unlike all other litigants, may not be required to pre-pay for them. 28 U.S.C. § 753(f). The Department of Justice, of course, needs no court approval to spend its funds in connection with its statutory responsibilities, including expenditures for transcripts and other litigation expenses. U.S. JUSTICE MANUAL 3-8.100 (operational expenses), 3-8.420 (court reporters), *available at* https://www.justice.gov/jm/jm-3-8000-financial-management#3-8.420 (on file with *The University of the Pacific Law Review*); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion).

33. *Griffin*, 351 U.S. at 14.

34. *Id*. at 15.

denied entirely, and in those circumstances some sort of appeal must be allowed without transcripts.[35] However, the Court went further, concluding: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[36] The Court later explained that *Griffin's* "principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."[37]

The Warren Court explored the contours of this principle in a series of cases. *Eskridge v. Washington State Board of Prison Terms and Paroles*,[38] 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 in Washington who can afford the expense of a transcript."[39] *Lane v. Brown*[40] invalidated a law giving the public defender discretion as to which appellants would be entitled to a transcript, and thus an appeal. In several cases, the Court applied the right to transcripts to state post-conviction procedures.[41] The Warren Court applied the *Griffin* right to a misdemeanor conviction[42] in a holding ratified in a unanimous Burger Court decision.[43] Beyond appeals, the court held that an indigent defendant was entitled to a transcript of a preliminary hearing where critical witnesses testified.[44] On the other hand, the Burger Court made clear that counsel need not be appointed for appeals subsequent to the first level of appellate review.[45]

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35. It is not clear how meaningful an appeal would be even with a transcript, because at that time there was no constitutional right to appellate counsel, and the right to access to a law library was vestigial. Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1187 (2013) (noting that "many courts remained profoundly skeptical of prison law libraries").

36. *Griffin*, 351 U.S. at 19. There seems to have been a majority on this point. *Id.* at 24 (Frankfurter, J., concurring in the judgment) ("petitioners must be accorded an appeal from their conviction, either by having the State furnish them a transcript of the proceedings in the trial court, or by any other means, of which we have not been advised, that may be available under Illinois law, so that the errors of which they complain can effectively be brought for review to the Illinois Supreme Court.").

37. Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1971); *see also* Bounds v. Smith, 430 U.S. 817, 822 (1977) ("Because we recognized that 'adequate and effective appellate review' is impossible without a trial transcript or adequate substitute, we held that States must provide trial records to inmates unable to buy them.").

38. 357 U.S. 214 (1958).

39. *Id*. at 216.

40. Lane v. Brown, 372 U.S. 477, 481 (1963).

41. Gardner v. California, 393 U.S. 367, 370 (1969) (Douglas, J.) (new habeas petition to California Supreme Court after denial in Superior Court); Long v. Dist. Ct. of Iowa, in & for Lee Cty., Fort Madison, Iowa, 385 U.S. 192, 194 (1966) (per curiam).

42. Williams v. Oklahoma City, 395 U.S. 458, 458–60 (1969) (per curiam) (petty offense).

43. Mayer v. City of Chicago, 404 U.S. 189, 195–96 (1971).

44. Roberts v. LaVallee, 389 U.S. 40, 40–41 (1967).

45. Ross v. Moffitt, 417 U.S. 600, 619 (1974) (no right to appointed counsel for discretionary appeal to state supreme court or to U.S. Supreme Court on certiorari).

The Court protected the right in several other ways. In *Entsminger v. Iowa*,[46] the Court reversed based on what modern jurisprudence would term ineffective assistance of appellate counsel, when appointed counsel failed to file a transcript that had been prepared, and therefore the state appeal was decided based on docket entries, resulting, not surprisingly, in an affirmance. In *Rinaldi v. Yeager*,[47] the Court invalidated a New Jersey statute requiring unsuccessful appellants sentenced to prison to reimburse the state for their transcripts, but not requiring repayment from those sentenced to probation, a fine, or a suspended term. In the Caryl Chessman case, the Court held that appellants were entitled to due process when a state court reconstructed a defective transcript.[48] The Court did not stand in the way of applying the rule to cases long since final.[49] In a remarkable dissent to a denial of certiorari near the end of his service, Justice Douglas voted to hear an appeal based on a challenge to a rule allowing indigents additional time to file their transcript; preferring the poor, it appeared, might be unconstitutional discrimination.[50]

Nevertheless, the Warren Court never wavered in its holdings that an appellant was entitled only to transcripts relevant to assignments of error or points raised on appeal, or that a state could provide an equally effective alternative in lieu of a verbatim transcript. As explained below, both limitations are obsolete.

A. Conditioning the Right on Issue Identification

Historically in the federal courts, 28 U.S.C. § 1915(a) required a person seeking leave to appeal in forma pauperis (IFP) to identify the issues to be reviewed and demonstrate that those issues were not frivolous.[51] Appeals often involved

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46. 386 U.S. 748, 752 (1967).

47. 384 U.S. 305, 309 (1966).

48. Chessman v. Teets, 354 U.S. 156, 164 (1957) ("By no means are we to be understood as saying that the state record has been shown to be inaccurate or incomplete. All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand.").

49. Patterson v. Medberry, 290 F.2d 275 (10th Cir. 1961) (granting relief with respect to Medberry v. People, 108 P.2d 243 (Colo. 1940)), *cert. denied,* 368 U.S. 839 (1961). *But see* Norvell v. Illinois, 373 U.S. 420, 423 (1963).

> We do not say that petitioner, having had a lawyer, could be found to have waived his rights on appeal. We only hold that a State, in applying Griffin v. Illinois to situations where no transcript of the trial is available due to the death of the court reporter, may without violation of the Due Process or Equal Protection Clause deny relief to those who, at the time of the trial, had a lawyer and who presumably had his continuing services for purposes of appeal and yet failed to pursue an appeal.

Id.

50. Hadley v. Alabama, 409 U.S. 937, 937–38 (1972) (Douglas, J., dissenting) ("The question petitioner Hadley raises here and raised in the Alabama Supreme Court below, is whether by case law, a State can give more time for filing of a transcript for a person without funds than for a person of wealth.").

51. Gilbert v. United States, 278 F.2d 61, 62 (9th Cir. 1960) ("Section 1915 provides that the affidavit to

protracted litigation over whether the court would grant IFP status.[52] Rulings on IFP applications were made with the assistance of appointed counsel and piecemeal production of partial transcripts. Motions, briefing, rulings in the district court, and, if adverse, often appeals to the court of appeals and Supreme Court addressed not whether there was error in the trial, but the preliminary, threshold question of whether IFP status would be granted, allowing an appeal without payment for a transcript and other costs or printing the record.[53] In 1962, the Court noted "[d]uring the past five Terms of the Court, we have found it necessary to vacate and remand for reconsideration 14 cases in which a Court of Appeals has applied an erroneous standard in passing on an indigent's application for leave to appeal."[54] Dean Abraham Goldstein suggested that "the cost to the government in man-hours of arguing whether the appeal should be permitted and whether the transcript should be given to the accused probably exceeds the cost of routine processing of the appeal."[55] It was difficult to defend the proposition that elaborate

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be made in support of such an application shall, among other things, 'state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.' In order to constitute a sufficient statement of the nature of the appeal, the affidavit must present some issue which is not plainly frivolous."); *see also* Albert A. Ridge, *The Indigent Defendant: A Procedural Dilemma for the Courts*, 24 F.R.D. 241 (1960); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019) (discussing contemporary IFP policies in federal court).

52. *See, e.g.,* Coppedge v. United States, 369 U.S. 438, 445 (1962) ("If the District Court finds the application is not in good faith, and therefore denies leave to appeal in forma pauperis, the defendant may seek identical relief from the Court of Appeals.").

53. Farley v. United States, 354 U.S. 521, 522–23 (1957).

> If the allegations made by petitioner and his counsel are correct then it seems quite clear to us that his appeal cannot be characterized as frivolous. Before his allegation of errors can be accurately evaluated, however, to ascertain if they do have any merit he should be furnished with a transcript of the trial record—unless counsel can agree on a statement of the relevant facts or some other means are devised to make the minutes of the trial available to petitioner—so that he has an opportunity to substantiate his allegations and point out their significance and so that they can be appraised on a dependable record.

Id.

Johnson v. United States, 352 U.S. 565, 566 (1957).

> Since here the Court of Appeals did not assign counsel to assist petitioner in prosecuting his application for leave to appeal *in forma pauperis* and since it does not appear that the Court of Appeals assured petitioner adequate means of presenting it with a fair basis for determining whether the District Court's certification was warranted, the judgment below must be vacated and the case remanded to the Court of Appeals for proceedings not inconsistent with this opinion.

Id.

54. *Coppedge*, 369 U.S. at 441 n.1.

55. Abraham S. Goldstein, Report of the Attorney General's Committee on Poverty and the Administration

litigation of procedural issues, overlapping with but preliminary to the merits, was a useful expenditure of judicial resources.[56]

Identification of appellate issues as a prerequisite to IFP status is obsolete in the federal system.[57] The Federal Rules of Appellate Procedure now provide that anyone granted IFP status in the district court retains that status on appeal.[58] In addition, any defendant who has been appointed counsel under the Criminal Justice Act, and therefore has a lawyer filing a CJA Form 24, will have already surmounted the hurdle of IFP status, so there would be no occasion for identifying appellate issues in a petition under § 1915.

Reformation of IFP status was part of a broader simplification movement in direct appeals as of right. Appeals, like trial pleading, once had multiple, overlapping, formal, expensive, and unnecessary steps. These included, before filing an appellate brief, filing assignments of error or bills of exception previewing the issues and facts which would appear in a brief. As one informed commentator wrote in 1942:

> The Federal Rules of Civil Procedure and some systems modeled upon them answer that the old, repetitive, overlapping, inelastic tangle is fit only for the junk pile. A single, rational opportunity for the trial court to right itself upon a particular point and a single, rational presentation of it to the appellate court should be enough.

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of Federal Criminal Justice. Washington, D.C.: Government Printing Office, 16 STAN. L. REV. 494, 496 (1964).

56. As Judge Frank explained, "without a transcript or the equivalent, an appellate court cannot tell whether or not a particular poor man's appeal has substance. Here, then, is an apparent dilemma: In order to know whether to grant a forma pauperis appeal, which carries with it a right to a transcript supplied gratis, usually the upper court must have before it a transcript or its equivalent." United States v. Johnson, 238 F.2d 565, 571 (2d Cir. 1956) (Frank, J., dissenting), *vacated*, 352 U.S. 565 (1957).

57. GUIDE TO JUDICIARY POLICY, Vol 7 Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes, 320.30.10(b) ("In a direct appeal in a case in which counsel is assigned under the CJA, neither the CJA nor 28 U.S.C. § 753(f) requires the signing of a pauper's oath or certification by the court that the appeal is not frivolous in order to obtain a transcript."), *available at* https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-320-authorization-investigative-expert#a320_30 (on file with *The University of the Pacific Law Review*).

58. FED. R. APP. P. 24(a)(3).

> Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:
>
> (A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or
>
> (B) a statute provides otherwise.

Id.

> And so exceptions are being dropped, bills of exceptions are being supplied by the court reporter's transcript, assignments of error are occasionally being abolished, and the brief is being turned into a simple, understandable argument.[59]

In the federal system, assignments of error as part of the notice of appeal itself were abolished with the Federal Rules of Criminal Procedure,[60] a policy carried forward in the Federal Rules of Appellate Procedure.[61] Of course, these reforms applied to direct appeals as of right. In discretionary appeals, such as certiorari to the U.S. Supreme Court,[62] identification of the issues warranting review remains essential.[63]

For these reasons, the observation in the *Griffin* line of cases that a defendant is entitled only to those parts of the transcript associated with the specified issues is anachronistic. In federal courts and most, though not all, other U.S. jurisdictions,[64] neither indigent or non-indigent defendants in initial, direct criminal appeals as of right are required to identify issues in advance of filing an appellate brief.

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59. Robert W. Stayton, *Appellate Procedure in Civil Cases*, 20 TEX. L. REV. 513, 514 (1942).

60. George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 237 (1947) ("Petitions for allowance of appeal, citations and assignments of error are abolished by subdivision (a)(1), dealing with the Notice of Appeal. The requirement of former Criminal Appeals Rule III that the notice contain 'a succinct statement of the grounds of appeal' is likewise omitted."); Lester B. Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure*, 22 TEX. L. REV. 194, 204 (1944) ("assignments of error in cases governed by this rule are abolished").

61. *Preliminary Draft of Proposed Federal Rules of Appellate Procedure*, 34 F.R.D. 263, 273 (1964) ("The petition for allowance (except for appeals governed by Rules 5 and 6), citations, assignments of error, summons and severance—all specifically abolished by earlier modern rules (see FRCP 37(a)(1); FRCP 74 and 75(d))—are assumed to be sufficiently obsolete as no longer to require pointed abolition."); *Statement of Issues Presented for Review*, 14 CYC. FED. PROC. § 66:16 (3d ed.) ("Assignments of error in the historical sense have, in effect, been abolished. The principle, however, has been continued by the appellate rules and by rules provisions of the courts of appeals requiring the brief of the appellant to contain a statement of the particular issues presented for review, or a designation of the errors relied upon.").

62. U.S. Sup. Ct. R. 10; R. 14(1)(a).

63. Findlay v. Commonwealth, 752 S.E.2d 868, 871 (Va. 2014) ("The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which [the] appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignments, [the] appellee would be unable to prepare an effective brief in opposition to the granting of an appeal").

64. While a full survey of state appellate practices is beyond the scope of this article, the authors believe that only a handful of jurisdictions require pre-brief identification of issues. *See, e.g.,* LA. CODE CRIM. PROC. § 884 (assignments of error); N.M. RULES APP. P., Rule 12–208 (docketing statement). *See also* State v. Sharp, 35,714 (La. App. 2 Cir. 2/27/02), 810 So. 2d 1179, 1194 ("Neither Sharp nor his attorney have assigned as error any issues dealing with the jury voir dire. Sharp's generic allegations that his counsel used all of his peremptory challenges and his need for the transcript to prepare his assignments of error amounts to a fishing expedition and is insufficient to require a supplementation of the record."); State v. Ibarra, 1993-NMCA-040, ¶ 9, 864 P.2d 302, 305 ("We believe this standard leaves an appellate court free to determine the nature and extent of the trial record necessary to fully review the issues raised in each case and require a transcript in only those cases where it would advance appellate resolution of the issues raised."); State v. Fernandez, 877 P.2d 44 (N.M. 1994).

The reasons for dispensing with pre-brief identification of issues were compelling in terms of efficiency, equality, and justice.[65] Full review of trial proceedings is also consistent with the modern Court's understanding of the duty of appellate counsel under the Constitution.[66] In *McCoy v. Court of Appeals of Wisconsin*,[67] the Court explained that an appointed "attorney's obligations as an advocate" require that counsel "provide his or her client precisely the services that an affluent defendant could obtain from paid counsel—a thorough review of the record and a discussion of the strongest arguments revealed by that review. In searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client."[68] The Court also explained that "[t]he appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal."[69] Similarly, in *Penson v. Ohio*,[70] the Court explained that counsel had a "duty carefully to search the case for arguable error."[71] As the Supreme Court understands the duty of appellate counsel, it is to search the trial record for error, rather than arguing issues identified from some other source.[72]

The scope of counsel's duty under the Constitution is also shown by decisions

65. Federal and state appeals as of right serve the purpose of "error-correction." Halbert v. Michigan, 545 U.S. 605, 617 (2005). *See also* Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49 (2010). Of course, a reversal may be had only where a conviction was obtained erroneously. Imprisonment, probation, parole, and other sentences cost money. Accordingly, there are economic and systematic reasons to have appeals decided correctly, based on the actual underlying events at trial, in addition to considerations of fairness to individual defendants. A recent Bureau of Justice Statistics study shows that criminal convictions were reversed, remanded or modified in 12% of criminal appeals in state courts. Nicole L. Waters et al., *Criminal Appeals in State Courts*, BJS BULL. (Sept. 2015), *available at* https://www.bjs.gov/content/pub/pdf/casc.pdf (on file with *The University of the Pacific Law Review*).

66. In several cases, the Court held that the right to assistance of counsel on an initial appeal, like the right to the assistance of counsel at trial, meant effective assistance. *See* Lafler v. Cooper, 566 U.S. 156, 165 (2012) ("defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial." (citing Halbert v. Michigan, 545 U.S. 605 (2005); Evitts v. Lucey, 469 U.S. 387 (1985)).

67. McCoy v. Court of App. Wisc., 486 U.S. 429, 444 (1988).

68. *Id*. at 444.

69. *Id*. at 438–39.

70. Penson v. Ohio, 488 U.S. 75 (1988).

71. *Id*. at 82; *see*. *See also, e.g.,* ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-9.3(d) (4th ed. 2017) ("Before filing the brief, appellate counsel should ordinarily examine the docket sheet, all transcripts, trial exhibits and record documents, not just those designated by another lawyer or the client"); STANDARDS AND EVALUATION DESIGN FOR APPELLATE DEFENDER OFFICES I(E)(5) (NLADA) ("The public defender shall cooperate with the courts and court reporters to ensure the prompt completion of the appropriate record on appeal. The public defender shall not determine the merit of any case without the careful review of such records.").

72. *See, e.g.,* Halbert v. Michigan, 545 U.S. 605, 621 (2005) ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.") (quoting Evitts v. Lucey, 469 U.S. 387, 393 (1985)); Peguero v. United States, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) ("If the district judge had fulfilled his obligation to advise the defendant of his right to appeal, and the defendant had wanted to appeal, he would have had a lawyer to identify and develop his arguments on appeal.").

evaluating *Anders*[73] motions to withdraw after appellate defense counsel concluded the case presents no nonfrivolous issues. Many cases deny motions for failure of counsel to have reviewed the entire record. As one court explained:

> counsel did not discharge her obligations as new, appellate counsel prior to filing her first *Anders* brief. She was obligated to review the entire transcript for plain error. She could not have discharged this obligation because she failed to obtain the authorization necessary to have the opening and closing arguments and the district court's instructions to the jury transcribed. Her conversation with the trial attorney regarding these proceedings did not constitute a sufficient search for plain error. The transcripts of these proceedings are now a part of the record, however, and counsel has represented that she has reviewed these transcripts and finds no appealable issues. Thus, counsel has now fulfilled her obligations.[74]

Many other decisions are to the same effect.[75]

Although arising in the context of *Anders* motions, where there are ultimately found to be no issues of arguable merit, the same rationale applies even when counsel has discovered one or more nonfrivolous issues early in the review of whatever parts of the record happen to be available. As the Court made clear in

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73. Anders v. California, 386 U.S. 738, 744 (1967).

74. United States v. Osorio-Cadavid, 955 F.2d 686, 688 (11th Cir. 1992).

75. *See, e.g.,* United States v. Cumming, 30 F.3d 126 n.1 (1st Cir. 1994) (per curiam) ("Counsel's previous withdrawal motion was denied pending review of the change-of-plea and sentencing transcripts."); United States v. Zuluaga, 981 F.2d 74, 75 (2d Cir. 1992)

> This brief conclusory statement does not fulfill counsel's obligations under *Anders*, which requires that counsel conduct a 'conscientious examination' of possible grounds for appeal and submit a "brief referring to anything in the record that might arguably support the appeal," including references both to the record and to potentially applicable legal authorities. *Anders*, 386 U.S. at 744. Counsel's conclusory statement is inadequate under this standard. Nell v. James, 811 F.2d 100, 104 (2d Cir. 1987) (requiring *Anders* briefs to evidence an independent and conscientious examination of the record).

Id.; United States v. Youla, 241 F.3d 296, 300 (3d Cir. 2001) ("The duties of counsel when preparing an *Anders* brief are (1) to satisfy the court that counsel has thoroughly examined the record in search of appealable issues, and (2) to explain why the issues are frivolous."); United States v. Palmer, 600 F.3d 897, 899 (7th Cir. 2010) (per curiam) ("and when presented with an *Anders* motion, we are not free to assume that counsel combed the entire record but found nothing else worth discussing."); United States v. Clark, 944 F.2d 803, 804 (11th Cir. 1991) ("Because counsel did not fulfill the first requirement of *Anders*, i.e., a 'conscientious examination' of the entire record below, his request for leave to withdraw is hereby DENIED."). In other cases, courts note that they grant *Anders* motions after they "have reviewed the entire record and have found no unwaived meritorious grounds for appeal." United States v. Hardy, 555 F. App'x 272, 273 (4th Cir. 2014).

McCoy, counsel's duty is to identify the strongest issues, rather than to stop when one or more plausible claims turns up. In *Griffin* and its progeny, the Court said that indigents were entitled to the same general approach as those who can pay their lawyers;[76] no competent lawyer would stop reviewing the trial record simply because a single nonfrivolous issue had been discovered, unless it was that rarest of birds, an absolutely certain winner.

Consistent with the idea that the transcript provided indigent appellants is to be used to search for error as opposed to proving up error identified through a bill of exceptions, assignments of error or some other means, in 1976, the Supreme Court described the right created by this line of cases as involving an "unconditional free transcript."[77] Many decisions of the U.S. Courts of Appeal have understood *Hardy* to require provision of a complete trial transcript.[78]

While preparing this article, the authors consulted with several experts on criminal appeals. Their descriptions of appropriate practice support complete review of the record as part of the duty of counsel. New York attorney Stanley Neustadter explained:

> I always, and without exception, examine every single document that is part of the record on appeal. Voir dire contains not only rulings on juror challenges, but during lulls, will often include binding in limine rulings on evidentiary issues likely to arise during the trial. Jury instructions —-particularly when trial judge denies defense requests to charge on lesser included offenses, defenses, and missing witnesses —- provide meritorious claims on appeal. Closing arguments by prosecutors not also provide

76. *See* Draper v. Washington, 372 U.S. 487, 496 (1963); Griffith v. Illinois, 351 U.S. 12, 19 (1956).

77. United States v. MacCollom, 426 U.S. 317, 325 (1976).

78. *See, e.g.,* United States v. Workcuff, 422 F.2d 700, 702 (D.C. Cir. 1970) ("there can be little doubt that the absence of a complete and accurate transcript impairs the ability of appellate counsel to protect his client's basic rights."); United States v. Ofray-Campos, 534 F.3d 1, 20 (1st Cir. 2008) ("[a] criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial."); United States v. Huggins, 191 F.3d 532, 536 (4th Cir. 1999) ("A criminal defendant has a right to a meaningful appeal based on a complete transcript."); United States v. Upshaw, 448 F.2d 1218, 1223 (5th Cir. 1971) ("We think *Hardy* required that Bethune's appellate counsel be furnished a complete transcript, including statements and arguments of all counsel, prosecution and defense."); Jackson v. Renico, 179 F. App'x 249, 252 (6th Cir. 2006) ("a new court-appointed attorney who represents an indigent attorney on appeal (but not at trial) is entitled to the entire trial transcript at public expense"); United States v. Carrillo, 902 F.2d 1405, 1409 (9th Cir. 1990) ("A criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial."); United States v. Cashwell, 950 F.2d 699, 703 (11th Cir. 1992) ("A criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial. Hardy v. United States, 375 U.S. 277 (1964); United States v. Stefan, 784 F.2d 1093, 1102 (11th Cir.), cert. denied, 479 U.S. 1009 (1986)."). *See also, e.g.,* Palomino v. State, 270 So. 3d 432 (Fla. Dist. Ct. App. 2019) ("The State filed a confession of error, acknowledging that a "defendant is entitled to a full transcript containing appealable issues." We agree. See Robinson v. State, 262 So.3d 826, 826 (Fla. 4th DCA 2019) (citing inter alia *Hardy*, 375 U.S. 277 (1964));));)); State v. Quinn, 2018-0664 (La. App. 1 Cir. 3/27/19), 275 So. 3d 360, 373–74 ("A criminal defendant has a right to a complete transcript of the trial proceedings, particularly, whereas here, appellate counsel was not counsel at trial") (citing *Hardy*, 375 U.S. 277 (1964) and State v. Robinson, 387 So.2d 1143 (La. 1980)).

> claims to reversal in and of themselves, but also because they exploit and aggravate an erroneous ruling that is also being briefed on the appeal, giving counsel fodder to argue the absence of harmless error. Failure to examine these segments of the appellate record is equivalent to surgeon who removes a liver without first examining the scans and x-rays.[79]

Pace Law Professor Lissa Griffin, an experienced appellate advocate and author of a treatise on federal criminal appeals,[80] stated: "The only person who can present a coherent view of the correctness and fairness of the lower court proceedings is the defendant's appellate lawyer, and that can't be done unless the lawyer knows everything that's in the record."[81] Professor Mark Godsey of the Ohio Innocence Project stated: "Jury instructions are where many key mistakes are made that gives rise to appellate arguments. I would consider that essential. Also, opening and closing statements are areas where prosecutors may commit misconduct by misstating the burden of proof, etc. Any good attorney should START off by reading the opening and closing statements, because in addition to being areas ripe for appellate issues, they give the best summary of the case to get you acclimated before you dive in."[82] Professor Barry Scheck agreed:

> The prosecution's theory of the case is expounded during

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79. Email from Stanley Neustadter to author (Aug. 18, 2017) (on file with *The University of the Pacific Law Review*).

80. LISSA GRIFFIN, FEDERAL CRIMINAL APPEALS (2019).

81. Email from Lissa Griffin to author (Feb. 13, 2020) (on file with *The University of the Pacific Law Review*).

> There is no question that a lawyer handling a criminal appeal must read and review every part of the record. It's that lawyer's job to know everything that happened before. The theory of the case and of the defense are best uncovered by reading openings, closings and the instructions to the jury. At the same time, appealable errors can occur with respect to almost any ruling and at almost any time – during voir dire, before the day's proceedings begin, between witnesses, during an adjournment, in an unexpected sidebar. The same is true of prosecutorial misconduct or overreaching. Equally important, most claims of error or misconduct require a showing that the defendant was prejudiced, which means they must have had an impact on the verdict. This requires an appellate lawyer to pull together a full picture of the significance of the error in the context of the entire record: what was said by the court at any point and the prosecutor in openings and closings, what was said by the defense lawyer, was the error repeated or isolated, was it exacerbated by or related to other errors, did it seem to bother the jury, how long did the jurors deliberate, what did they ask?

Id.

82. Email from Mark Godsey to author (Aug. 9, 2017) (on file with *The University of the Pacific Law Review*).

> openings, closings, and, quite frequently, in voir dire. To the extent there is any error at trial, especially undisclosed exculpatory evidence and unreliable scientific evidence, counsel cannot competently argue the materiality of such errors without reviewing the opening, closing, and voir dire. In the reviews the Innocence Project (IP) and the National Association of Criminal Defense Lawyers (NACDL) conducted in co-operation with the FBI and the US Department of Justice of cases involving erroneous testimony by FBI agent examiners in microscopic hair comparison cases and composite bullet lead analysis it was standard practice to review the openings and closings both to determine whether the testimony at issue was erroneous (the prosecutor's explanations on opening and closing are relevant in interpreting ambiguous expert testimony) as well as materiality reviews. Voir dire in most of those old cases was not available but would have been reviewed. Finally, it should go without saying that misstatements of evidence, misstatements of law, and unfair inflammatory remarks during opening and closing can, in and of themselves, constitute reversible error or form the basis of an ineffective assistance of counsel claim if there was no objection and request for curative instructions. Similarly, without reviewing the voir dire counsel cannot make a *Batson* challenge.[83]

Decisions in the federal courts suggest these experts are correct. Supreme Court decisions make clear that reversible error can occur during any portion of the trial. The Supreme Court has reversed for events taking place at hearings before trial or otherwise outside the presence of the jury,[84] and jury selection,[85] opening

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83. Email from Barry Scheck to author (Aug. 18, 2017) (on file with *The University of the Pacific Law Review*).

Another small datapoint: In a completely unscientific study, in connection with the drafting of this article, a colleague who is a federal appellate defender sent an email to all federal appellate defenders through the national "Help Desk" listserv. The email asked for information about any federal defender appeals policies or practices, if any, which provide the following: "In appeals seeking a new trial (rather than just raising sentencing issues) transcripts of jury selection, opening statements, closing arguments, and jury instructions are not automatically or routinely reviewed; instead, transcripts of one or more of these parts of the trial are ordered or reviewed only if some specific claim or potential issue is suspected. If your office has such a policy, or if you know of one, would you please let me know?"

While several responded to report that their office practice was to order the entire transcript, none responded that they knew of policies involving review of less than the entire transcript.

84. *See, e.g.,* McWilliams v. Dunn, 137 S. Ct. 1790, 1791 (2017) (denial of meaningful expert assistance); Hinton v. Alabama, 571 U.S. 263 (2014) (expert assistance); Lafler v. Cooper, 566 U.S. 156 (2012) (ineffective assistance of counsel during plea negotiations); Dunaway v. New York, 442 U.S. 200 (1979) (motion to suppress); Geders v. United States, 425 U.S. 80, 82 (1976) (instruction to defendant not to talk to attorney during recess).

85. Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (exclusion of jurors on the basis of race); Presley v. Georgia, 558 U.S. 209 (2010) (exclusion of public from voir dire); Turner v. Murray, 476 U.S. 28 (1986) (questioning of jurors about bias); Crist v. Bretz, 437 U.S. 28, 38–39 (1978) (Blackmun, J. concurring) (double jeopardy attaches when first juror is sworn; "Other interests are involved here as well: repetitive stress and anxiety

statements,[86] closing argument,[87] jury instructions,[88] and sentencing.[89]

More fundamentally, reversible error may occur at these stages even in the absence of a motion or objection by defense counsel, making clear that the opportunity to consult with trial counsel about the objections they raised is insufficient. Under Federal Rule of Criminal Procedure 52(b), appeals courts may notice plain error even if there has been no objection below. As the Court explained, "[i]n criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception."[90] The Court itself has reversed on plain error based on defective warrants[91] and indictments,[92] insufficiency of the evidence,[93] the

upon the defendant; continuing embarrassment for him; and the possibility of prosecutorial overreaching in the opening statement.").

86. McCoy v. Louisiana, 138 S. Ct. 1500, 1506 (2018) (defense counsel conceded guilt during opening); Martinez v. Illinois, 572 U.S. 833, 839 (2014) (prosecutor declined to open or present evidence).

87. Arizona v. Fulminante, 499 U.S. 279, 297–98 (1991) (involuntary confession mentioned in closing argument); Wainwright v. Greenfield, 474 U.S. 284, 287 (1986) ("In his closing argument, over defense counsel's objection, the prosecutor reviewed the testimony of Officer Pilifant and Detective Jolley and suggested that respondent's repeated refusals to answer questions without first consulting an attorney demonstrated a degree of comprehension that was inconsistent with his claim of insanity."); Skipper v. South Carolina, 476 U.S. 1, 3 (1986) ("After hearing closing arguments—during the course of which the prosecutor contended that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners, id., at 13–14—the jury sentenced petitioner to death."); Doyle v. Ohio, 426 U.S. 610, 626 (1976) (Stevens, J., dissenting) (disagreeing with reversal but noting that defendants objected to reference to post-Miranda silence in "both the prosecutor's cross-examination and his closing argument").

88. United States v. Gaudin, 515 U.S. 506, 523 (1995) (omission of an element); Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam) (improper reasonable doubt instruction), *disapproved of on other grounds*, Estelle v. McGuire, 502 U.S. 62 (1991); Carter v. Kentucky, 450 U.S. 288, 300 (1981) ("the Fifth Amendment requires that a criminal trial judge must give a "no-adverse-inference" jury instruction when requested by a defendant to do so"); Sandstrom v. Montana, 442 U.S. 510, 524 (1979) ("Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in Mullaney, or a conclusive presumption like those in Morissette and United States Gypsum Co., and because either interpretation would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional."); Taylor v. Kentucky, 436 U.S. 478 (1978) (presumption of innocence).

89. Alabama v. Shelton, 535 U.S. 654, 654 (2002) (probation revocation and sentence to incarceration where no counsel); Taylor v. Hayes, 418 U.S. 488 (1974) (bias in hearing on contempt); Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (imposition of costs as sentence after acquittal); In re Oliver, 333 U.S. 257, 258 (1948) (nonpublic trial and sentence by grand jury).

90. Crawford v. United States, 212 U.S. 183, 194 (1909) (citing Wiborg v. United States, 163 U.S. 632, 659 (1896));); Rosenberg v. United States, 346 U.S. 273, 299–300 (1953) (Black, J., dissenting) ("I am aware also of the argument that . . . we should not now consider the point here involved because the Rosenbergs' lawyers had not originally raised it on appeal. I cannot believe, however, that if the sentence of a citizen to death is plainly illegal, this Court would allow that citizen to be executed on the grounds that his lawyers had 'waived' plain error. An illegal execution is no less illegal because a technical ground of 'waiver' is assigned to justify it.").

91. Silber v. United States, 370 U.S. 717, 718 (1962) (per curiam).

92. Giordenello v. United States, 357 U.S. 480, 484 (1958).

93. Fowler v. United States, 563 U.S. 668, 678 (2011); Clyatt v. United States, 197 U.S. 207, 221–22 (1905) ("While no motion or request was made that the jury be instructed to find for defendant, and although such

composition of a court,[94] the validity of a plea,[95] double jeopardy,[96] the Eighth Amendment,[97] jury instructions,[98] and sentencing.[99]

Few criminal cases reach the Supreme Court, but many convictions are reversed on plain error in direct appeals to the U.S. Courts of Appeals.[100] Every

a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet Wiborg v. United States, 163 U. S. 632, 658 justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant.").

94. Nguyen v. United States, 539 U.S. 69, 80 (2003).

95. United States v. Vonn, 535 U.S. 55, 59 (2002) ("We hold that a silent defendant has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights.").

96. United States v. Gaddis, 424 U.S. 544, 546 (1976). *See generally* Gabriel J. Chin, *Double Jeopardy Violations As "Plain Error" Under Federal Rule of Criminal Procedure 52(b)*, 21 PEPP. L. REV. 1161 (1994).1161 (1994) (arguing courts should review double jeopardy claims under the "plain error" doctrine of Federal Rule of Criminal Procedure 52(b)).

97. Weems v. United States, 217 U.S. 349, 362 (1910) ("It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the courts below, but a consideration of them is invoked under rule 35, which provides that this court, 'at its option, may notice a plain error not assigned.'").

98. Brasfield v. United States, 272 U.S. 448, 449 (1926); *see also* United States v. Gaudin, 515 U.S. 506, 527 (1995) (Rehnquist, C.J., concurring) (noting that the Court, affirming reversal, did not review decision of Ninth Circuit to reverse instructional error removing element from jury based on plain error).

99. Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018) ("[P]lain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief under Rule 52(b)."); Molina-Martinez v. United States, 136 S. Ct. 1338 (2016); Henderson v. United States, 568 U.S. 266, 277 (2013); Tapia v. United States, 564 U.S. 319 (2011).

100. Note that the plain error standard, according to many courts of appeal, is in the nature of a defense and is waived if not raised by the government. *See* United States v. Encarnacion-Ruiz, 787 F.3d 581, 586 (1st Cir. 2015) ("When a party fails to raise an argument in the district court, we generally review the claim under the plain error standard of review. *See* United States v. Pagán–Ferrer, 736 F.3d 573, 593 (1st Cir. 2013). However, in this case, the government has not asked us to review Encarnación's argument for plain error and, instead, agrees to de novo review. When the government fails to request plain error review, we, and many of our sister circuits, review the claim under the standard of review that is applied when the issue is properly preserved below.

circuit has reversed based on plain errors in summation,[101] jury instructions,[102] and sentencing.[103] There are also plain error reversals in the Courts of Appeals for

101. United States v. Doe, 903 F.2d 16, 23 (D.C. Cir. 1990) (reference to Jamaican drug dealers); United States v. Ayala-Garcia, 574 F.3d 5, 18 n.10 (1st Cir. 2009) ("Defendants did not explicitly object at trial to the "do your job" language. Since the defendant did not make a contemporaneous objection, we apply the demanding plain error standard, and it is far from clear that the "do your job" language, although inappropriate, would warrant reversal on its own. Still, we give it weight for its cumulative effect when combined with the other statements suggesting violence."); United States v. Moore, 375 F.3d 259 (3d Cir. 2004) (evidentiary error coupled with improper summation constituted plain error); United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993) (reference to conviction of brother for same crime); United States v. Smith, 814 F.3d 268, 276 (5th Cir. 2016); United States v. Acosta, 924 F.3d 288, 306 (6th Cir. 2019); United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1978); United States v. Massey, 594 F.2d 676, 679 & n.2 (8th Cir. 1979) (evidentiary ruling and references in summation); United States v. Alcantara-Castillo, 788 F.3d 1186, 1195 (9th Cir. 2015) ("While Alcantara timely objected to the prosecutor's improper rebuttal argument, and arguably timely objected to the prosecutor's improper cross-examination, we need not decide whether to apply harmless error analysis here. Even under the more restrictive plain error standard the combined misconduct requires reversal."); United States v. Green, 119 F. App'x 133, 134 (9th Cir. 2004) ("Although Green failed to object at trial to the AUSA's vouching, this prosecutorial misconduct rises to the level of plain error. Indeed, vouching is especially problematic in cases-such as this-where the witnesses' credibility is crucial."); United States v. Rios, 611 F.2d 1335, 1342 (10th Cir. 1979) ("Here there was a motion for a mistrial with several objections directed to the rebuttal argument, although none specified these particular remarks. In any event, in conformity with our recent Siviglia opinion which held such comments to be plain error, we must hold there was prejudicial error here as well."); United States v. Arnold, 425 F.2d 204, 206 (10th Cir. 1970); United States v. Foster, 626 F. App'x 820 (11th Cir. 2015).

102. United States v. Lawton, 995 F.2d 290 (D.C. Cir. 1993) (expansion of indictment); United States v. Latorre-Cacho, 874 F.3d 299 (1st Cir. 2017); United States v. Gordon, 875 F.3d 26, 38 (1st Cir. 2017) (multiplicity); United States v. Prado, 815 F.3d 93 (2d Cir. 2016); United States v. Mazza, 594 F. App'x 705, 709 (2d Cir. 2014); United States v. Angell, 588 F. App'x 161 (3d Cir. 2014) (omission of element of offense); United States v. Coniglio, 417 F. App'x 146 (3d Cir. 2011) (elements of honest services fraud); United States v. Ramirez-Castillo, 748 F.3d 205, 215 (4th Cir. 2014) (verdict form); United States v. Fairley, 880 F.3d 198 (5th Cir. 2018); United States v. Henry, 797 F.3d 371 (6th Cir. 2015); United States v. Rogers, 474 F. App'x 463 (7th Cir. 2012) (omission of mens rea from verdict form); United States v. Morrissey, 895 F.3d 541 (8th Cir. 2018); United States v. Arias, No. 17-10191, 2019 WL 3717903 (9th Cir. Aug. 7, 2019) (erroneous conspiracy instruction); United States v. Murphy, 824 F.3d 1197 (9th Cir. 2016) (error in instruction); United States v. Scott, 747 F. App'x 728 (10th Cir. 2018) (constructive possession); United States v. Madden, 733 F.3d 1314 (11th Cir. 2013) (constructive amendment of indictment); see also United States v. Adams, 354 F. Supp. 3d 63, 69 (D.D.C. 2019) (omission of an element constituted plain error), on reconsideration, No. CR 15-44 (JEB), 2019 WL 1746387 (D.D.C. Apr. 18, 2019).

103. United States v. Head, 817 F.3d 354, 361 (D.C. Cir. 2016) (application of sentencing guidelines); United States v. Ortiz, 741 F.3d 288 (1st Cir. 2014) (criminal history calculation); United States v. Cabrera-Rivera, 893 F.3d 14 (1st Cir. 2018) (supervised release conditions); United States v. Burden, 860 F.3d 45 (2d Cir. 2017) (factors life term of supervised release); United States v. Payano, 930 F.3d 186, 199 (3d Cir. 2019); United States v. Carthorne, 878 F.3d 458 (4th Cir. 2017) (sentencing guidelines); United States v. Boykin, 669 F.3d 467 (4th Cir. 2012); United States v. Mudekunye, 646 F.3d 281, 289 (5th Cir. 2011) (application of Sentencing Guidelines); United States v. Borders, 489 F. App'x 858 (6th Cir. 2012) (probation condition); United States v. Halliday, 672 F.3d 462, 475 (7th Cir. 2012) (speculation about motives of defendant); United States v. Harris, 908 F.3d 1151 (8th Cir. 2018); United States v. Grandison, 781 F.3d 987 (8th Cir. 2015); United States v. Daniels, 760 F.3d 920 (9th Cir. 2014); United States v. Courtney, 816 F.3d 681, 684 (10th Cir. 2016) (forfeiture Amount); Deonarinesingh v. United States, 542 F. App'x 857 (11th Cir. 2013) (appellate counsel ineffective for failing to raise sentencing issue).

events taking place before trial,[104] during voir dire,[105] and opening statements.[106]

Impressionistically,[107] plain error reversals based on events during voir dire and opening are less common than in summation, jury instructions and at sentencing. However, along with jury selection and opening statements, the parties enter into stipulations,[108] make binding concessions, and waive and invoke rights in these phases of the trial.[109] In addition, prospective and seated jurors are instructed.[110] Accordingly, knowledge of these parts of the trial are important to

104. *See, e.g.,* United States v. Peoples, 698 F.3d 185, 193 (4th Cir. 2012) (additional charges at contempt trial); United States v. Segines, 17 F.3d 847, 852 (6th Cir. 1994).

105. *See, e.g.,* United States v. Coleman, 552 F.3d 853 (D.C. Cir. 2009) ("[R]eading of the unredacted indictment to the prospective juror pool, revealing defendant's prior felony convictions for crimes of violence, including robbery with a deadly weapon, was plain error. . . ."); United States v. Negron-Sostre, 790 F.3d 295, 306 (1st Cir. 2015); United States v. Parse, 789 F.3d 83, 120 (2d Cir. 2015); United States v. Withers, 618 F.3d 1008, 1018 & n.4 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g*, 638 F.3d 1055 (9th Cir. 2011), *on remand*, United States v. Withers, 231 F. Supp. 3d 524, 529 (C.D. Cal. 2017); United States v. Baez, 703 F.2d 453 (10th Cir. 1983).

106. *See, e.g.,* United States v. Signer, 482 F.2d 394, 400 (6th Cir. 1973) ("Even though the cartoon was not objected to by the defendant, we may notice it as a plain error affecting the substantial right of the defendant to a fair trial."); Leonard v. United States, 277 F.2d 834, 841 (9th Cir. 1960) ("The record is clear that the trial judge was aware of the fact that the fair boundaries of an opening statement to the jury were being flagrantly breached, but expected appointed counsel for appellant to object. The court then denied appellant's motion for a mistrial on the ground that appellant had failed to make timely objection."); *see also* United States v. Kostoff, 585 F.2d 378, 379 (9th Cir. 1978) ("The total lack of jury instructions on mail fraud is plain error. The indictment charged a two-pronged conspiracy, bank credit fraud and mail fraud. The indictment was given to the jury during its deliberations. In the opening statements of counsel and throughout final arguments both sides presented the mail fraud issue to the jury.").

107. In comprehending the system of appeals, it would be useful to know how many appellants in criminal cases received relief based on plain error as compared to preserved error. The authors are unaware of any such systematic data. For existing data on appeals, *see* Michael Heise et. al., *State Criminal Appeals Revealed*, 70 VAND. L. REV. 1939, 1940 (2017); Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQUETTE L. REV. 825 (2009); Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933 (2019).

108. United States v. Broadnax, 601 F.3d 336, 345 (5th Cir. 2010); United States v. Diaz-Garcia, 26 F. App'x 615, 616 (9th Cir. 2001); United States v. Shifman, 124 F.3d 31, 39 (1st Cir. 1997).

109. United States v. Williams, 827 F.3d 1134, 1143 (D.C. Cir. 2016) ("A month later, during jury selection, the Government offered a revised plea agreement to Bowman."); United States v. Coleman, 552 F.3d 853 (D.C. Cir. 2009); United States v. Dixon, 913 F.2d 1305, 1315 (8th Cir. 1990) ("Although the specific information that one government witness had been granted immunity for two homicides had not been mentioned during voir dire, any prejudicial impact on the government would probably have been negligible because information about the grants of immunity and plea agreements had already been raised and thoroughly discussed during voir dire."); United States v. Presley, 349 F. App'x 22, 25 (6th Cir. 2009) ("Defendant notes that the district court told the jury during voir dire that the use of agreements to testify in exchange for a potentially lesser sentence is "a very common practice," and that the prosecutor referred to this statement in his opening statement.").

110. United States v. Beckman, 222 F.3d 512, 519 (8th Cir. 2000) ("[O]]n a number of occasions during voir dire in this case, the district court generally addressed the issues of presumption of innocence and governmental burden."); United States v. Saeteurn, 74 F. App'x 766, 768 (9th Cir. 2003) ("The court gave appropriate limiting instructions, both during voir dire and at the close of the trial."); United States v. Bates, 590 F. App'x 882, 889 (11th Cir. 2014) ("[W]e cannot be confident that the District Court's limiting instructions were enough to guard against the potential for a juror's prejudice to taint his decision to convict"); United States v. Nash, 910 F.2d 749, 755 (11th Cir. 1990) ("[T]he district court here gave the following admonition during voir dire concerning the proper weight to be given law enforcement officers' testimony vis-a-vis that of lay witnesses . . . .").

understand the trial as a whole.

Many cases find impropriety but decline to reverse on plain error.[111] Such errors are nevertheless significant to evaluating an appeal, because "[u]nder the cumulative-error doctrine, 'an aggregation of nonreversible errors . . . can yield a denial of the constitutional right to a fair trial, which calls for reversal.'"[112] Because several errors, harmless in themselves, can add up to grounds for reversal, there is a tremendous advantage for an appellant to be able to scrutinize the entire trial record.

Another important consideration is that the Supreme Court has held that the question of whether various forms of constitutional[113] and non-constitutional error[114] are harmless or warrant reversal turns on review of the entire record. Accordingly, an appellant who has reviewed some part of the record may indeed identify seemingly promising issues. But surely the prosecution will order missing parts of the transcript if they are concerned that the appellant has raised potentially reversible issues; a gap in the evidence or an exhibit admitted without foundation may turn out, for example, to duplicate evidence admitted unobjectionably at some other point in the trial.[115] Another possibility is that some apparent defect—a missing element or missing foundation—was stipulated to or judicially admitted

111. United States v. Feldman, 931 F.3d 1245, 1261 (11th Cir. 2019) (reference to Jewish defendant as "Fagin" not plain error); United States v. Garcia-Guizar, 160 F.3d 511, 521 (9th Cir. 1998) ("Although we note that no curative instruction was offered sua sponte by the judge, and separately hold that the evidence supporting one of Garcia's aiding and abetting convictions is insufficient, the isolated remark by the prosecutor was not serious enough to undermine Garcia's other convictions under the plain error standard."); United States v. Ballard, 727 F. App'x 6, 9 (2d Cir. 2018) (declining to reverse based on unobjected to comments, but reversing based on statements as to which there was an objection); United States v. Necoechea, 986 F.2d 1273, 1280 (9th Cir. 1993) ("Even though we agree with Necoechea that there were two instances of vouching, we do not agree that they amount to plain error.").

112. United States v. Hesser, 800 F.3d 1310, 1329–30 (11th Cir. 2015) (quoting United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005), *abrogated on other grounds by* Davis v. Washington, 547 U.S. 813, 821 (2006) (citation omitted)). *See also, e.g.*, United States v. Preston, 873 F.3d 829, 835 (9th Cir. 2017) (noting that the "cumulative effect of multiple trial errors 'can violate due process even where no single error . . . would independently warrant reversal.'" (quoting Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citation omitted)); *see also* GRIFFIN, *supra* note 80, § 4:88.

113. United States v. Hasting, 461 U.S. 499, 509 n.7 (1983) ("[W]e hold that *Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.").

114. United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004) ("We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding."); Berger v. United States, 295 U.S. 78, 82 (1935) ("[I]f, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless.").

115. United States v. Beck, 557 F.3d 619, 621 (8th Cir. 2009) ("Given that Schwerb's testimony was duplicative of, and corroborated by, the testimony of Chambers and Long, the exclusion of the proposed cross-examination had little impact on the Government's case. Accordingly, we cannot say the district court abused its discretion in precluding this line of impeachment. For the same reason, even if the district court had erred, its error was harmless.").

at some other point in the trial, which would mean there was no error at all.[116] Accordingly, without a complete transcript, an appellant might only be able to suggest possible reversible error, and could be misled into wasting time on hopeless issues rendered harmless by unreviewed portions of the trial.[117]

Another development suggesting the correctness of the view that the Constitution requires provision of a complete transcript is the rise of appellate public defenders.[118] Of course, there is a complex body of appellate law and procedure; a distinguished Utah commission concluded that "trial and appellate attorneys require different skills and expertise."[119] Almost 50 years ago, Jonathan Casper writing in the *Stanford Law Review* noted the trend toward "further development of specialized appeals arms" of public defender organizations.[120] The vast majority of states now have appeals specialists as part of their indigent defense program, whether as appellate units in general public defenders offices, freestanding appellate public defenders, separate trial and appeals panels for appointed private counsel, or some combination.[121] This is not to say that in these

116. United States v. Aptt, 354 F.3d 1269, 1280 (10th Cir. 2004) ("[A]dmission of a stipulated exhibit is not error at all, even if it would not be admissible in the absence of such a stipulation.").

117. United States v. Brody, 705 F.3d 1277, 1280–81 (10th Cir. 2013) explains:

An appellant's "failure to file a trial transcript precludes review of a conviction for sufficiency of the evidence. By failing to file a copy of the trial transcript as part of the record on appeal, the appellant waives any claims concerning the sufficiency of the evidence at trial." *United States v. Vasquez*, 985 F.2d 491, 495 (10th Cir. 1993). Further, outside of the context of a sufficiency-of-the-evidence claim, when an appellant fails to provide necessary parts of the record from the court below, our review is limited to the incomplete record that has been provided; and if the record provided is insufficient, this court must affirm the judgment of the court below. *See United States v. Dago*, 441 F.3d 1238, 1251 (10th Cir. 2006) ("Because the evidentiary record before us is insufficient to permit an assessment of [the appellant's] claim, we must affirm the judgment of the district court denying the relief that [the appellant] seeks."); *Scott v. Hern*, 216 F.3d 897, 912 (10th Cir. 2000) ("Where the record is insufficient to permit review we must affirm.") (citation omitted); *see also McGinnis v. Gustafson*, 978 F.2d 1199, 1201 (10th Cir. 1992) ("[F]ailure to file the required transcript involves more than noncompliance with some useful but nonessential procedural admonition of primarily administrative focus. It raises an effective barrier to informed, substantive appellate review.").

118. Chad M. Oldfather & Michael M. O'Hear, *Criminal Appeals: Past, Present, and Future*, 93 MARQ. L. REV. 339, 341 (2009) (noting that "criminal appeals often involve specialized appellate lawyers on both the prosecution and defense sides").

119. FINAL REPORT, UTAH JUDICIAL COUNCIL STUDY COMMITTEE ON APPELLATE REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS Appx. A at 4 (2011).

120. Jonathan D. Casper, *Lawyers Before the Supreme Court: Civil Liberties and Civil Rights, 1957-66*, 22 STAN. L. REV. 487, 509 n.41 (1970).

121. A 2017 report indicates that states with specialized appellate programs or units included Arkansas, California, Florida, Georgia, Idaho, Illinois, Michigan, North Carolina, South Carolina, Vermont, West Virginia, and Wisconsin. David Carroll, *Right to Counsel Services in the 50 States An Indigent Defense Reference Guide for Policymakers,* SIXTH AMEND. CTR. (Mar. 2017) https://www.in.gov/publicdefender/files/Right%20to%20Counsel%20Services%20in%20the%2050%20States.pdf (on file with *The University of the Pacific Law Review*). In addition, appellate defenders are contemplated by the laws of Iowa (Iowa Code § 814.11), Kansas (Kan. R. 27 Dist. Rule 12), Montana (Mont. Code § 47-1-301), and New Mexico (N.M. Stat. § 31-15-8). Alabama authorizes but seems not to require creation of an appellate defender office. Ala. Code § 41-4-323(d)(1). Examination of websites reveals that specialized appellate units operate in many other states and counties, including the Appellate Division of the Alaska Public Defender Agency https://doa.alaska.gov/pda/home.html, the Felony Appeals Team of the Pima County, Arizona, Public Defender https://webcms.pima.gov/cms/One.aspx?portalId=169&pageId=480234, the Appellate Division of the Colorado

states appellate specialists litigate all indigent criminal appeals; there are variations within states and offices.[122] Nevertheless, employment of specialized appellate defense lawyers is clearly now routine, and perhaps predominant. Their widespread employment suggests that they are helpful to clients and to appellate courts.[123] Appellate defenders cannot identify appellate issues based on their own memories of trials which they did not attend.

Perhaps the leading contrary authority is *Moore v. Wainwright*[124] from the Fifth Circuit which held, on habeas, that an individual appealing a criminal conviction was not entitled to a complete trial transcript to look for error. According to the court:

State Public Defender http://www.coloradodefenders.us/offices/appellate-division/, the Legal Services Appellate Unit of the Connecticut Division of Public Defender Services https://portal.ct.gov/OCPD/Legal-Services/Legal-Services-Appellate-Unit, the Appellate Division of the Delaware Office of Defense Services https://ods.delaware.gov/our-services/, the Appellate Division of the Georgia Public Defender Council http://www.gapubdef.org/index.php/divisions/appellate-division, the Appellate Branch of the Hawaii Office of the Public Defender http://publicdefender.hawaii.gov/contact-us/, the Post-Trial Division of the Kentucky Department of Public Advocacy https://dpa.ky.gov/who_we_are/post_trials/Pages/default.aspx, the Louisiana Appellate Project http://appellateproject.org/, the Appeals & Post-Conviction Review Panel of the Maine Commission on Indigent Legal Services https://www.maine.gov/mcils/procedures/index.html, the Appellate Division of the Maryland Public Defender http://www.opd.state.md.us/appellate, the Appeals Unit of the Public Defender Division of the Massachusetts Office of Public Counsel Services https://www.publiccounsel.net/pd/appeals-unit/, the Appellate Office of the Minnesota Board of Public Defense https://www.pubdef.state.mn.us/appellate, the Indigent Appeals Division of the Mississippi Office of the State Public Defender http://www.ospd.ms.gov/Indigent_AppealsNOV2016.html, the Division of Appellate/Post-Conviction Relief of the Missouri State Public Defender https://publicdefender.mo.gov/legal-divisions/appellatepcr/, the appeals unit of the Clark County, Nevada, Public Defender http://www.clarkcountynv.gov/public-defender/Pages/FirmProfile.aspx, the Appellate Defender Office of the New Hampshire Public Defender https://www.nhpd.org/offices/, the Appellate Section of the New Jersey Office of the Public Defender https://www.nj.gov/defender/structure/appellate/, the Criminal Appeals Bureau of the Legal Aid Society of New York https://www.legalaidnyc.org/programs-projects-units/criminal-appeals-bureau/, the Appellate Services/Legal Department of the Ohio Public Defender https://opd.ohio.gov/Appellate-Services/Legal-Department, the General Appeals Division of the Oklahoma Indigent Defense System https://www.ok.gov/OIDS/Divisions/index.html#GEN, Appellate Division of the Oregon Office of Public Defense Services https://www.oregon.gov/opds/appellate/Pages/default.aspx, the Appeals Division of the Allegheny County (Pittsburgh) Public Defender https://www.alleghenycounty.us/public-defender/staff/deputy-director-appeals.aspx, the Appellate Division of the Rhode Island Public Defender http://www.ripd.org/officedivisions.html, the Appellate Division of the Harris County (Houston), Texas, Public Defender's Office http://harriscountypublicdefender.org/about/staff/bob-wicoff/, and the Washington Appellate Project. http://www.washapp.org/Default.aspx.

122. David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 344 (2017).

123. A study of criminal appeals in Iowa showed that appellate defenders performed better than appointed private counsel, which would make them attractive to clients, and similarly to privately retained counsel "except for the appellate defenders' dramatically lower number of procedurally and technically defective filings," which would be advantageous to courts. Tyler J. Buller, *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience*, 16 J. APP. PRAC. & PROC. 183, 185 (2015). Just as appeals with lawyers as opposed to pro se litigants make the work of appellate courts easier and more accurate, employment of appellate lawyers, as opposed to those inexperienced in that field, also probably improved the process. Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163 (2000) ("The requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court.").

124. Moore v. Wainwright, 633 F.2d 406 (5th Cir. 1980).

> This argument is flawed because it overlooks the role in the appellate process that Florida has mandated for the trial counsel. Trial counsel is not permitted to withdraw from a case until assignments of error are filed. Once assignments are filed, pertinent portions of the transcript may be obtained at state expense. Other appellate counsel may then handle the appeal based on these assignments of error.[125]

The court explained that "[a] state is not required to furnish complete transcripts so that defendants and their counsel may conduct 'fishing expeditions' to seek out possible errors at trial."[126] Fifth Circuit and district court decisions continue to follow *Moore*.[127]

Regrettably, *Moore* did not mention that it turned on law which had changed.[128] In 1978, two years before *Moore* was decided, the Florida Supreme Court noted that the Florida Appellate Rules had abolished assignments of error and, instead, issues assertedly warranting reversal were to be raised in briefs.[129] Accordingly, the basis of the *Moore* decision, that indigent and nonindigent appellants alike had the duty to file assignments of error in the trial court which would limit the scope of their appeals, was obsolete on the day it was decided.[130] *Moore* is relevant precedent only in the jurisdictions, to the extent that any continue to exist, where assignments of error or bills of exception are still required for indigent and nonindigents and restrict the issues cognizable on appeal, and where

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125. *Id*. at 408–09.

126. *Id*. at 409 (citing Hines v. Baker, 422 F.2d 1002 (10th Cir. 1970); United States v. Taylor, 223 F. Supp. 773 (S.D. Cal. 1963)).

127. Kunkle v. Dretke, 352 F.3d 980, 985–86 (5th Cir. 2003) ("[N]or is the state required to furnish complete transcripts so that the defendants . . . may conduct 'fishing expeditions' to seek out possible errors at trial.") (quoting Jackson v. Estelle, 672 F.2d 505, 506 (5th Cir.1982) (quoting *Moore*, 633 F.2d at 409)); Dussett v. Vannoy, No. CV 16-12663, 2017 WL 9512463, at *20 (E.D. La. Aug. 4, 2017) ("Further, it is well settled that the State is not "required to furnish complete transcripts so that the defendants . . . may conduct 'fishing expeditions' to seek out possible errors at trial.") (quoting Jackson v. Estelle, 672 F.2d 505, 506 (5th Cir. 1982)), *report and recommendation adopted*, No. CV 16-12663, 2018 WL 2717767 (E.D. La. June 6, 2018).

128. Writing of an earlier state decision in the litigation, the Florida Court of Appeals later explained: "To the extent that the *Moore* decision relied upon appellate rules which have since been superseded, it must be considered no longer applicable to the procedure which now controls the preparation of the record for indigent appellants." Reed v. State, 378 So. 2d 899, 900 (Fla. Dist. Ct. App. 1980).

129. Ratner v. Miami Beach First Nat. Bank, 362 So. 2d 273, 274 (Fla. 1978) ("Our recently adopted Appellate Rules have continued the liberalizing trend, eliminating entirely the requirement for filing assignments of error. Fla. App. Rule 9.040(e). . . . The new rules require that alleged errors committed by the lower court be specified as issues in the briefs. Fla. App. Rule 9.210.").

130. In addition, the Florida courts later held that Moore, serving a life sentence, had received ineffective assistance of appellate counsel for failure to perfect an appeal on the merits. Moore v. State, 485 So. 2d 1368 (Fla. App. 1986). Once the transcript was prepared and an appeal argued, the conviction was affirmed, 2-1, because, contrary to Mr. Moore's contentions, while the transcript did not show counsel's and defendant's presence at a critical stage of the trial, it did not affirmatively show their absence. Moore v. State, 504 So. 2d 1311 (Fla. App. 1987).

such pleadings must be prepared without the aid of transcripts.

The other major contrary authority is Criminal Justice Act Form 24. Promulgated by the Administrative Office of U.S. Courts,[131] its use is required by court rules in several circuits.[132] Few court decisions interpret its requirements, although what exists suggests that complete transcripts are not automatically granted.[133] Its apparent requirement for special permission to obtain transcripts of jury selection, openings, closings, and jury instructions is undesirable no matter how it is applied. Some lawyers, taking the form at face value, will not seek all parts of the transcript, to the detriment of their clients' appeals. If in some or all jurisdictions transcripts are automatically granted to all who request it, then seeking permission is pointless make-work, a waste of time of lawyers and judges all of whom are paid by the government. If, on the other hand, in some districts all applicants, including new counsel on appeal, are required to show particularized need, then in the cases where permission is granted based on a showing of need the form requires unnecessary make-work. In cases where permission is denied, there is an unlawful impediment to the appellate process in contradiction of the Supreme Court's ruling in *Hardy*.

A more complicated question would be presented if trial counsel continuing as appellate counsel were required to prove some specific need or rationale for a complete transcript. Even in that event, a preliminary showing of merit should not be required. Perhaps after reviewing the transcript, continuing counsel will be able to identify their own plain errors. If so, the transcript is as useful to continuing counsel as it would be to new counsel on appeal. On the other hand, if continuing counsel cannot be expected to identify plain errors they failed to perceive at trial,[134]

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131. *Authorization and Voucher for Payment of Transcript, supra* note 29.

132. 1st Cir. R. 10.0(c); 2d Cir. Amended CJA Plan, Part A, IX(B); 5th Cir. CJA Plan Sec. 6; 8th Cir. Int. Op. Proc. III(H)(3); 9th Cir. R. 10-3.2(a); 11th Cir. CJA Plan, Addendum IV (f)(1).

133. United States v. Niebla, 545 F. App'x 914, 918 (11th Cir. 2013) ("Mr. Peraza contends that CJA Form 24, the form used to request trial court proceedings, is unconstitutional because it does not provide for the automatic transcription of critical trial court proceedings. Because Mr. Peraza did not raise this constitutional challenge in the district court, and because he does not attempt to show how he was harmed by the existence of the CJA Form 24, we will not consider the issue on appeal."). *See also* United States v. King, No. 3:06-CR-212-J-33MCR, 2007 WL 4522210, at *1 (M.D. Fla. Dec. 19, 2007); United States v. Huckabee, No. 7:11-CR-107-FL, 2012 WL 628807, at *6 (E.D.N.C. Feb. 27, 2012), *aff'd*, 510 F. App'x 258 (4th Cir. 2013).

134. The limitations of trial counsel continuing as appellate counsel are well recognized. "As many courts and scholars have recognized, counsel cannot be expected to plead his own ineffectiveness. For this reason, . . . the defendant [should] receive new appellate counsel as soon as the trial and sentencing are complete." Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 706–07 (2007). The phenomenon of motivated reasoning may make it less likely that even conscientious lawyers will be capable of recognizing their own mistakes. Tigran W. Eldred, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473 (2013). By contrast, new counsel "brings a fresh mind to bear on the record and who may discover errors overlooked by the trial counsel." Joseph Taraska, *Procedural Safeguards in the Administration of Military Justice Insuring the Effective Assistance of Defense Counsel: A Model for Civil Jurisdictions*, 15 A.F. L. REV. 52, 58 (1973). The benefits of trial counsel's familiarity with the case can be obtained through consultation. ABA STANDARDS FOR

then a process reasonably calculated to lead to accurate results requires appointment of new counsel, who, under *Hardy*, would be entitled to a full trial transcript. For these reasons, CJA Form 24 should be replaced by a process allowing automatic production of the parts of a transcript where error may be found in every criminal case in which an appeal is pursued.

B. A Transcript or A Substitute for Federal Criminal Appeals?

Notwithstanding *Griffin*'s broad language, the Court has denied that its cases mean indigent appellants are automatically entitled to a complete transcript. *Griffin* explained that verbatim transcripts would not necessarily be required in every case: "The [Illinois] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases."[135] Justice Frankfurter concurred, explaining: "It is not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion."[136] In the unanimous Burger Court case of *Mayer v. Chicago*, holding that the right to transcripts extended to misdemeanor appeals, the Court reiterated that "[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript."[137]

Chief Justice Burger concurred in *Mayer*, but added that he was concerned about the practice of appellants seeking full transcripts for criminal appeals. His concern was not cost; "[a]n affluent society ought not be miserly in support of justice, for economy is not an objective of the system; the real vice is the resulting delay in securing transcripts and hence determining the appeal."[138] Concern about

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CRIMINAL JUSTICE, DEFENSE FUNCTION, Standard 4-9.2(a) (4th ed. 2017) ("Appellate defense counsel should seek the cooperation of the client's trial counsel in the evaluation of potential appellate issues. A client's trial counsel should provide such assistance as is possible, including promptly providing the file of the case to appellate counsel."). *See also* Charles B. Blackmar, *Representing Death-Sentence Appellants*, 5 J. APP. PRAC. & PROCESS 275, 279 (2003) ("A lawyer may hesitate to argue for plain-error review on points which were not raised before the trial court, and may be harassed by the appellate judges if unpreserved points are argued. I suggest, then, that at the very minimum, another lawyer be assigned to assist in the appeal by studying the record in depth and consulting with trial counsel. If a decision is made to have new counsel on appeal, the trial counsel should likewise be available for consultation."); Dennis Owens, *New Counsel on Appeal?*, 15 LITIG. 1 (1989).

135. Griffin v. Illinois, 351 U.S. 12, 20 (1956). *See also* Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 216 (1958) ("We do not hold that a State must furnish a transcript in every case involving an indigent defendant.").

136. Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

137. Mayer v. City of Chicago, 404 U.S. 189, 194–95 (1971).

138. Mayer v. City of Chicago, 404 U.S. 189, 201 (1971) (Burger, C.J., concurring).

delay may explain why, in 1971, the same year as *Mayer*, the Judicial Conference, headed by Chief Justice Burger, urged the use of agreed statements for federal criminal appeals in lieu of verbatim transcripts.[139]

The U.S. Code requires recording of all federal criminal proceedings.[140] Alternative methods of developing the record are not employed in the absence of unusual circumstances such as a lost transcript or unrecorded hearing[141] or a stipulated reversal.[142] *Mayer* was decided in 1971. A search in the Westlaw Briefs and Cases databases reveal precisely zero instances since 1970 in which a bystander's bill of exceptions has been the basis for a criminal appeal in any federal court.[143] Another alternative mentioned in *Mayer*, preparation of a narrative statement based on the trial judge's minutes, seems not to have captured the imaginations of U.S. District Judges; it is not clear why a judge would engage in "the laborious task of obtaining the needed information without a transcript when one is easily accessible."[144] Research has found only one appeal based an agreed

139. *See Resolution of Expediting Appeals*, *supra* note 30.

140. 28 U.S.C. § 753(b) provides:

Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

141. United States v. Moises Rivera, Defendant-Appellant., 2003 WL 23300814 (C.A.9), 20 n.5, United States v. Rivera, 137 F. App'x 994 (9th Cir. 2005) ("Along with this brief, counsel has filed a notice to the Court of her intention to submit an agreed statement, pursuant to FRAP 10(d), setting out what transpired at the [unrecorded] instruction settlement conference which took place on the afternoon of October 7, 2002.").

142. *See, e.g.,* United States v. Orlando, 823 F.3d 1126, 1130 (7th Cir. 2016) (discussing earlier reversal based on joint motion of the parties). However, there is great risk to an appellant in relying on an agreement with the government, because the appellate court, "of course, is not bound to accept the Government's concession that the courts below erred on a question of law." Orloff v. Willoughby, 345 U.S. 83, 87 (1953).

143. The state court cases involving bystander's bills apparently exclusively involve how such bills were not used, or were improperly prepared, and therefore could not be considered as part of the appellate record. *See, e.g.,* Goodrich v. State, 671 S.W.2d 920, 923 (Tex. App. 1984) ("Appellant made a purported bystander's bill of exception to support his contention. However, appellant failed to lay the proper predicate for a bystander's bill."); Sutton v. State, 580 S.W.2d 195, 196 (Ark. 1979) ("Also, a bystander's bill of exceptions is a method to properly make a record where none exists. That method was not utilized. *See* Graham v. State, 572 S.W.2d 385 (Ark. 1978).").

144. United States v. Sevilla, 174 F.2d 879, 880 (2d Cir. 1949) (Frank, J.). Judge Frank explained the process; where a transcript cannot be purchased it is the lawyer's duty to present to the district judge a statement of the evidence and of the events at the trial, 'made up from the best sources available,' in the manner stated by the Supreme Court in *Miller v. United States*, 317 U.S. 192, 198 (1942). It 'will then become the duty of the district judge to assist in amplifying, correcting, and perfecting' that statement from 'the best sources available' to him. He may, to that end, interrogate the witnesses, the counsel who appeared at the trial for the government and for the defendant, and any other persons having reliable information. Among such persons are the court reporters who took stenographic notes of the testimony and remarks at the trial; the judge may properly require them to read their notes to him.

statement of the case in accordance with Federal Rule of Appellate Procedure 10(d); in that case, a transcript was ultimately produced anyway.[145] Attorneys experienced in federal criminal appeals in a number of circuits have been consulted, and they report that an agreed-statement appeal is not used when a transcript is available.[146] In any event, even if some other method were used, a transcript would still normally be prepared. As the Supreme Court explained in 1942, "[i]t has become the usual, because the more convenient, method to prepare a bill of exceptions by the use of a stenographic transcript of the evidence."[147]

CJA Form 24 itself suggests the superiority of a transcript; it nowhere suggests use of alternative methods of reporting the events at trial. The federal system's preference for transcripts is unsurprising. A transcript is more precise, complete, and efficient than the other forms of creating a trial record. Often, the validity of a question, the weight of an answer, or the accuracy of a jury instruction will turn on the exact language used.[148] It is not clear why any party would voluntarily elect a paraphrase if they believed their trial record to be strong, or why a court of appeals, striving to decide cases correctly, would forego an opportunity for the best available information in favor of a rough substitute.

Of course, a different question is presented when a transcript is unavailable

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Id. at 879–80. Or, the judge could simply order the transcript.

145. Brief for the United States in Smith v. United States of America, 1976 WL 194409 (U.S.), 5 n.1, 431 U.S. 291 (1976) ("Our statement of the facts relies principally upon the agreed statement of the record on appeal filed in the court of appeals under Rule 10(d), Fed. R. App. P., which lists by number (identified at App. 13-16) the exhibits relating to the mailings. We are also lodging with the Court a copy of the trial transcript which has subsequently become available."); *see also* Rivers v. Lucas, 477 F.2d 199, 200 (6th Cir.) (collateral review; "Pursuant to Rule 10(d), Federal Rules of Appellate Procedure, the parties filed the following agreed statement of the case"), *vacated*, 414 U.S. 896 (1973), and *overruled by* Hawk v. Berkemer, 610 F.2d 445 (6th Cir. 1979).

146. The reason for this is obvious. If an honest and diligent prosecutor or defense attorney believed that an agreed statement would result in an adverse ruling, they would fight tooth and nail to obtain a verbatim transcript where some way to avoid that loss might be found. This is inevitable artifact of the adversary system. United States v. Mageno, 762 F.3d 933 (9th Cir. 2014), *opinion vacated on reh'g*, 786 F.3d 768, 770 (9th Cir. 2015) (recalling mandate reversing conviction based on accurate transcript presented by government on rehearing; the government independently decided to order and pay for the entire transcript).

147. Miller v. United States, 317 U.S. 192, 198–99 (1942). Many state cases make clear that an appellant uses the transcript to prepare a bill of exceptions. *See, e.g.,* Territory v. Duvauchelle, 28 Haw. 188, 191 (1925) ("In *Weinzheimer v. Kahaulelio*, 23 Haw. 374, the defendants were granted '20 days after the preparation and filing with the clerk of this court, by the official stenographer of this court, of the transcript of evidence adduced at the hearing of said cause, within which to prepare and present to this court their bill of exceptions.'"); State v. Johnson, 237 So. 2d 389, 392 (La. 1970) ("Herein, the proceedings were reported. It was therefore incumbent upon the trial judge to order that the testimony taken during the trial of this prosecution be transcribed as required by law. It was then incumbent upon him to see that his court reporter deliver same to the Clerk of the Criminal District Court as required by law. It follows that defense counsel was then to be furnished the transcript of the testimony or those portions thereof necessary for the perfection of his bills of exceptions."); Ferber v. Leise, 151 N.W. 307, 309 (Neb. 1915) ("It is apparent from the petition that the plaintiff was not at fault, and that her failure to present the bill of exceptions within the time limited was due wholly to the inability of the official stenographic reporter to prepare the transcript of the evidence.").

148. United States v. Jonas, 540 F.2d 566, 572–73 (7th Cir. 1976) ("[I]f the defense attorney had the transcript present to make an exact evaluation of the inconsistent testimony, his method of cross-examination may have been quite different.").

because of, for example, failure of technology or death of a court reporter.[149] As the Maryland Court of Appeals explained:

> It is one thing to discriminate against the indigent by not providing the tools available to paying defendants or to thwart basic notions of fairness by failing to require the presence of a court reporter or stenographer per Rule 1224. It is quite another to provide the means to preserve the record of trial to all defendants fairly and equally and then to have those means prove defective through no fault of the prosecution.[150]

In 1971, concern about delay or cost might have been a reason to consider avoiding preparation of transcripts.[151] However, technology now allows real time digital recording and transcription, with or without a court reporter.[152] Using judges, prosecutors and defense attorneys to perform trial summarization tasks that can be done better, faster, and more cheaply by a computer program makes little

149. State v. McFarland, 287 N.W.2d 162, 162 (Iowa 1980) (noting that "[t]he reporter became ill and was unable to prepare the transcript before his death. Since he was a shorthand reporter, no one else was able to transcribe his notes."); Watts v. State, 717 So. 2d 314, 316 (Miss. 1998) ("Ruth Bell–Green was the official court reporter responsible for preparing the record of the trial in this cause. However, because of a physical disability, Bell–Green retired and was unable to complete the record in this cause. Another reporter, LaLisa Ledlow Linemann, was assigned to complete the record for appeal but was unable to decipher Bell–Green's shorthand notes and was forced to rely on cassette tapes to complete the record. However, the cassette tapes were incomplete, and therefore, portions of the trial were unable to be transcribed.").

150. Smith v. State, 433 A.2d 1143, 1147 (Md. 1981). Inability to reconstruct the transcript of a missing proceeding may require a new trial. Johnson v. State, 805 S.E.2d 890, 897–98 (Ga. 2017) ("Johnson asserts that there may have been errors made by the trial court or his trial counsel during the trial, but that without an adequate transcript he has no way of knowing. We agree."); *see also* Catherine T. Struve, *Alternatives to a Transcript*, 16A FED. PRAC. & PROC. JURIS. § 3956.3 (5th ed.) (explaining when Rule 10(c) is an option, including in cases of reporting technology failure).

151. Ernest H. Short & Walter G. Leight, *A Study of Court Reporting Systems*, 12 JURIMETRICS J. 211, 212 (1972) ("Difficulty in obtaining enough qualified reporters has been increasing; long delays have been experienced, due in part to backlogs in transcript production; and the costs of producing transcripts have risen considerably.").

152. BRIAN A. JACKSON ET AL., FOSTERING INNOVATION IN THE U.S. COURT SYSTEM: IDENTIFYING HIGH-PRIORITY TECHNOLOGY AND OTHER NEEDS FOR IMPROVING COURT OPERATIONS AND OUTCOMES 28-29 (RAND 2016); Greg Downey, *Constructing "Computer-Compatible" Stenographers: The Transition to Real-Time Transcription in Courtroom Reporting*, 47 TECH. & CULTURE 1, 3 (2006). Court reporters' fees have been criticized by some. Emma Copley Eisenberg, *Public Record, Astronomical Price*, SLATE (Mar. 22, 2017), https://slate.com/news-and-politics/2017/03/outrageous-trial-transcript-fees-are-bad-for-defendants-journalists-and-democracy.html (on file with *The University of the Pacific Law Review*). Without fully exploring the contours of that issue, we observe that if the government, perhaps assuming that most consumers of transcripts are wealthy litigants, has for its own reasons chosen to compensate reporters through fees dramatically above market and cost, that should not be a reason to impair the rights of indigent litigants. *See also* Cassandra Caldarella, *10 Reasons I love my Career as a Court reporter*, THEJCR.COM (Com July 16, 2018), https://www.thejcr.com/2018/07/16/10-reasons-love-career-court-reporter/ (on file with *The University of the Pacific Law Review*) ("Once we report a matter, we can continue to get paid for the work for months and years after it's done. It's analogous to earning royalties from intellectual property such as books and patents.").

sense.

For the most part, courts do not deny transcripts on the ground that an alternative was available. However, there are notable exceptions. In a capital case involving a defendant who has since been executed, the court found denial of a transcript of earlier witness testimony not to be reversible error when the defendant's lawyers purchased portions of the transcript out of their own pockets.[153] In another case, denial of transcripts was excused because, among other reasons, the fact that new counsel had the opportunity to "consult with the lawyers and persons present during the Rankin County trial."[154]

II. CONCLUSION

Notwithstanding the Warren Court's initial caution, for good reason, the contemporary legal system neither requires pre-appeal identification of issues nor seeks substitutes for verbatim transcripts of trials. Accordingly, there is no longer a reason for the qualifications of the right identified in the *Griffin* line. And, the Court has offered no indication that it intends to offer indigent appellants "a watered-down version of constitutional rights"[155] in the context of an initial appeal as of right. Given the social utility of accurate appellate decisions and considered development of the law, and the substantial investment in government-paid prosecutors, defense attorneys and judges in a criminal appeal, there is little evidence that the Supreme Court is interested in revising the *Griffin* line to offer indigent appellants something less than an ordinary appellate review.

If *Griffin* and *McCoy* correctly describe the scope of an indigent's rights and counsel's duty in in an initial appeal of a criminal conviction, the persistence of CJA Form 24 and the lack of litigation over it become somewhat mysterious. A possible explanation is the following. In some districts, the requirement of a judicial signature may be a formality, every request is granted. In districts where particularized justification is required, conscientious attorneys may investigate to come up with a plausible justification for preparation of a complete transcript. Other attorneys may make creative, universally true claims of need which are not based on specific facts about the case but are nevertheless sufficient to get a signature. If a court then denies access to a transcript, a dedicated attorney might pay for a transcript out of her own pocket rather than prepare an appeal without compliance with professional standards. All of these have in common creation of delay and a waste of government funds.

Another group of attorneys might take CJA Form 24 seriously, and not investigate at all, or stop after consulting with trial counsel and client. It may be that lawyers who are not conscientious enough to find a way to get a complete transcript or make a request for a transcript might also not be adversarial enough

153. *Ex parte* Lindsey, 456 So. 2d 393, 394 (Ala. 1984).

154. Fisher v. State, 532 So. 2d 992, 999 (Miss. 1988).

155. Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

to raise the lack of a transcript as an issue on appeal. They might erroneously assume that because CJA Form 24 requires articulation of a reason for obtaining a complete transcript, it is constitutional to require articulation of a reason for obtaining a complete transcript.

Justice Goldberg's concurrence in *Hardy v. United States* drew the right balance, and anticipated the Supreme Court's description of counsel's duty under the Constitution in *McCoy*. Court rules and practices, for good reason, generally do not require advance identification of issues or showing of merit. Equivalent alternatives to transcripts generally do not exist, or are more expensive and less efficient. Accordingly, in this context, transcripts are ideal. Fair to appellants, more accurate for the legal system, and cheaper for the taxpayers, under *Griffin*, indigent appellants should be allowed complete trial transcripts in all criminal appeals of right.

Appendix A
CJA Form 24 (Revised March 2018)
https://www.uscourts.gov/sites/default/files/cja24.pdf

CJA 24 AUTHORIZATION AND VOUCHER FOR PAYMENT OF TRANSCRIPT (Rev. 03/18)

1. CIR./DIST./ DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER

3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER

7. IN CASE/MATTER OF *(Case Name)*	8. PAYMENT CATEGORY	9. TYPE PERSON REPRESENTED	10. REPRESENTATION TYPE
	☐ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal	☐ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	*(See Instructions)*

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*

REQUEST AND AUTHORIZATION FOR TRANSCRIPT

12. PROCEEDING IN WHICH TRANSCRIPT IS TO BE USED *(Describe briefly)*

13. PROCEEDING TO BE TRANSCRIBED *(Describe specifically). NOTE: The trial transcripts are not to include prosecution opening statement, defense opening statement, prosecution argument, defense argument, prosecution rebuttal, voir dire or jury instructions, unless specifically authorized by the Court (see Item 14).*

14. SPECIAL AUTHORIZATIONS	JUDGE'S INITIALS
A. Apportioned Cost _____ % of transcript with *(Give case name and defendant)*	
B. ☐ 14-Day ☐ Expedited ☐ 3-Day ☐ Daily ☐ Hourly ☐ Realtime Unedited	
C. ☐ Prosecution Opening Statement ☐ Prosecution Argument ☐ Prosecution Rebuttal ☐ Defense Opening Statement ☐ Defense Argument ☐ Voir Dire ☐ Jury Instructions	
D. In this multi-defendant case, commercial duplication of transcripts will impede the delivery of accelerated transcript services to persons proceeding under the Criminal Justice Act.	

15. ATTORNEY'S STATEMENT

As the attorney for the person represented who is managed above, I hereby affirm that the transcript requested is necessary for adequate representation. I, therefore, request authorization to obtain the transcript services at the expense of the United States pursuant to the Criminal Justice Act.

_____ _____
Signature of Attorney Date

_____
Printed Name

Telephone Number: _____

☐ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

16. COURT ORDER

Financial eligibility of the person represented having been established to the Court's satisfaction the authorization requested in Item 15 is hereby granted.

_____
Signature of Presiding Judge or By Order of the Court

_____ _____
Date of Order Nunc Pro Tunc Date

CLAIM FOR SERVICES

17. COURT REPORTER/TRANSCRIBER STATUS

☐ Official ☐ Contract ☐ Transcriber ☐ Other

18. PAYEE'S NAME AND MAILING ADDRESS

19. SOCIAL SECURITY NUMBER OR EMPLOYER ID NUMBER OF PAYEE

Telephone Number: _____

20. TRANSCRIPT	INCLUDE PAGE NUMBERS	NO. OF PAGES	RATE PER PAGE	SUB-TOTAL	LESS AMOUNT APPORTIONED	TOTAL
Original						
Copy						
Expense *(Itemize)*						
					TOTAL AMOUNT CLAIMED:	

21. CLAIMANT'S CERTIFICATION OF SERVICE PROVIDED

I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment *(compensation or anything of value)* from any other source for these services.

Signature of Claimant/Payee _____ Date _____

ATTORNEY CERTIFICATION

22. CERTIFICATION OF ATTORNEY OR CLERK I hereby certify that the services were rendered and that the transcript was received.

_____ _____
Signature of Attorney or Clerk Date

APPROVED FOR PAYMENT — COURT USE ONLY

23. APPROVED FOR PAYMENT	24. AMOUNT APPROVED
_____ _____ Signature of Judge or Clerk of Court Date	