CRIMINAL PROCEDURE—THE RIGHT TO COUNSEL IN DISCRETIONARY APPEALS: AN INDIGENT IS NOT ENTITLED TO STATE-APPOINTED COUNSEL BEYOND THE INITIAL APPEAL AS OF RIGHT

Ross v. Moffitt [1]

Claude Franklin Moffitt was convicted of forgery in two separate trials in North Carolina courts. In each case his conviction was upheld on appeal by the North Carolina Court of Appeals.[2] As an indigent, Moffitt was represented by court-appointed counsel in both trials and both appeals.[3] Following the affirmance of his convictions by the court of appeals, he sought discretionary review by the North Carolina Supreme Court. In one case he was provided with a state-appointed attorney to prepare the petition for review and in the other case he was not. Both petitions were denied and he unsuccessfully sought state-appointed counsel to prepare an application for a writ of certiorari to the United States Supreme Court. Moffitt then applied to the Federal District Court for the Western District of North Carolina for habeas corpus relief, claiming that his sixth amendment right to counsel had been denied by failure of the state to provide him with counsel to prepare the writ of certiorari to the United States Supreme Court and the Supreme Court of North Carolina. The district court refused to issue the writ.[4] He then appealed to the Court of Appeals for the Fourth Circuit, which reversed the judgments of the district court. The circuit court could find no basis to distinguish the need for court-

1. 417 U.S. 600 (1974). Rehnquist, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, White, Blackmun, and Powell, JJ., joined. Douglas, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined.

2. Moffitt was convicted in the Superior Court of Mecklenburg County of forgery and uttering a forged instrument. In a subsequent trial he was convicted of forgery and uttering in the Superior Court of Guilford County. State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970) (Mecklenburg); State v. Moffitt, 11 N.C. App. 337, 181 S.E.2d 184 (1971) (Guilford). Both convictions were upheld on appeal.

3. U.S. CONST. amend. VI states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Gideon v. Wainwright, 372 U.S. 335 (1963), held that an indigent defendant must be provided with counsel in felony trials. Douglas v. California, 372 U.S. 353 (1963), held that an indigent in a criminal case must be provided with counsel in the first appeal as of right.

4. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972). As a basis for refusing to grant the writ, the court cited *Douglas:*

> Douglas v. California deals only with the appeal of right situation; in *Douglas* there was only one such appeal of right. In this case, petitioner was represented by counsel during all stages of his trial and appeal of right. Thus he is not entitled to habeas corpus relief on this claim.

341 F. Supp. at 854.

appointed counsel for indigents in cases of discretionary appeals from the need in cases of appeals as of right [5] which the Supreme Court had held to be a fundamental requirement of the fourteenth amendment.[6] Prior to the instant case, three other circuit courts had considered the question of whether a state was required to provide counsel for indigents in discretionary appeals. All answered in the negative.[7] In order to resolve a conflict between the circuits, the Supreme Court granted certiorari and reversed.

At common law there was no appellate process as we know it.

> [U]nder the old practice at common law a suitor, if dissatisfied, might either (1) proceed by way of writ of error for errors on the record, or by writ of error on a bill of exceptions. If the court of error thought that there had been any misdirection, however trifling, it was bound to order a new trial. Or (2) he might move the court en banc for a new trial. From a refusal to grant a new trial there was no appeal.[8]

The issuance of a writ of error was a discretionary power of the King. There was no right to the writ. Furthermore, in deciding to issue the writ, the court could only review matters of law contained in the record, which did not contain rulings on evidence or the charge to the jury.[9]

In Blackstone's time an accused had no right to be represented by counsel in a criminal trial. "Formerly every suitor was obligated to appear in person, to prosecute or defend his suit . . . . This is still the

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5. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974) (Haynsworth, C.J.):

> A conversion by a state from a single tier appellate system to a double tier system, however, does not alter the fact that the state's highest court remains the ultimate arbiter of the rights of its citizens. . . . A defendant with adequate resources to engage counsel has a meaningful right to seek access to the state's highest court. An indigent should be afforded counsel to give him a comparably meaningful right. . . . [T]he technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate. .

483 F.2d at 653. *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1961). The North Carolina statute provided for assignment of a lawyer to represent an indigent on

> [d]irect review of any judgment or decree, including review by the United States Supreme Court of final judgments or decrees rendered by the highest court of North Carolina in which a decision may be had.

N.C. Session Laws 1969, ch. 1013, § 1 [1969] (superceded 1975).

6. Douglas v. California, 372 U.S. 353 (1963); *see* p. 33 & note 3, *supra*.

7. United States *ex rel* Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969); Peters v. Cox, 341 F.2d 575 (10th Cir. 1965); and United States *ex rel* Coleman v. Denno, 313 F.2d 457 (2d Cir. 1963). Judge Haynsworth's opinion in Moffitt v. Ross would have required states to appoint counsel for indigents seeking writs of certiorari to the United States Supreme Court as well as state courts. 483 F.2d at 655. *See also* 11 HOUSTON L. REV. 725 (1974), 4 MEMPHIS ST. L. REV. 616 (1974), 27 VAND. L. REV. 365 (1974), 9 WAKE FOREST L. REV. 579 (1973).

8. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 643 (7th ed. 1956).

9. *See* L. ORFIELD, CRIMINAL APPEALS IN AMERICA 23-24 (1939).

law in criminal cases."[10] This harsh rule was relaxed somewhat in practice. Counsel was often permitted to argue points of law or even question witnesses.[11] The right to counsel was granted by most of the colonies prior to the enactment of the sixth amendment.[12] As the right to counsel and the right to appeal became recognized as important elements of the judicial system, it was inevitable that the two should converge in the issue of the right to appointed counsel on appeal.

In 1956, the Supreme Court began making appeals of criminal convictions more accessible to indigents with the decision of *Griffin v. Illinois*[13] in which the Court held that indigents seeking to appeal a criminal conviction were entitled to a transcript of the trial at state expense. Speaking for a plurality of the Court[14] Justice Black said:

> [A]t all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. . . .

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10. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38 (W. Hammond ed. 1890).

11. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 9-11 (1972) [hereinafter referred to as BEANEY].

12. J. GRANT, OUR COMMON LAW CONSTITUTION 10 (1960).

> [W]hen the first Congress met to draft the amendments that were to become the federal Bill of Rights, a full right to counsel in all criminal cases was a widely accepted feature of the American legal scene and the first steps toward supplying counsel to those unable to employ counsel had been taken.

Prior to 1791 at least 11 states had granted the right to counsel: Pennsylvania (1701), Delaware (1701), South Carolina (1731), Connecticut (by judicial decision 1750), Maryland (1776), New Jersey (1776), North Carolina (1777), New York (1777), Vermont (1777), Massachusetts (1780), and New Hampshire (1784). *But see* BEANEY, *supra* note 9, at 22, suggesting that the right to counsel in practice may not have been any broader in the newly independent colonies than it had been in England.

The development of the right to counsel in criminal trials is traced by Sutherland, J., speaking for the Court in Powell v. Alabama, 287 U.S. 45, 60-64 (1932). *See also* Faretta v. California, 422 U.S. 806 (1975), where the Court held that the sixth amendment guarantees a defendant an independent constitutional right of self-representation, and he may defend himself without counsel when he voluntarily and intelligently elects to do so. Noting that the right to defend one's criminal prosecution is personal, the Court vacated Faretta's conviction and held that, in forcing the defendant to accept against his will a state-appointed public defender, the state courts deprived him of his constitutional right to self-representation.

13. 351 U.S. 12 (1956). Griffin was convicted of armed robbery in the county court of Cook County, Illinois. Asserting that he was indigent and incapable of paying for a transcript, he asked the court to furnish him with a copy to enable him to prosecute his appeal. An Illinois statute provided that free transcripts were to be given only to defendants sentenced to death. Griffin's request was therefore denied by the Illinois court. *Id.* at 15.

14. The plurality consisted of Black, Douglas, and Clark, JJ., and Warren, C.J. Frankfurter, J., concurred, emphasizing that the basis for the decision was that the Illinois procedure denied indigents a right granted to others based solely on their poverty. 351 U.S. at 20-26 (concurring opinion). Burton, Minton, Reed, and Harlan, JJ., dissented on the ground that while the result is desirable, it is not constitutionally required that the states provide free transcripts to indigents. 351 U.S. at 26-27 (dissenting opinion).

> [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . [A] denial [of a free transcript to an indigent] is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.[15]

The Court followed *Griffin* by striking down state statutes requiring fees of indigents attempting to appeal a conviction,[16] or seeking a writ of habeas corpus.[17] In 1963 the Court invalidated state laws which gave discretion to the public defender,[18] or to the trial judge[19] to determine if an indigent would receive a free transcript. This same rationale has been applied in civil cases.[20]

Griffin and the cases which followed it dealt with financial barriers imposed by the state which would bar an indigent from obtaining review of a conviction. Until this time the Court had been concerned with state statutes which prevented access to appellate courts by those without funds. In *Douglas v. California*[21] the Court placed an affirmative burden on the states, holding that the state must provide counsel for an indigent in his first appeal as of right. Citing *Draper* and *Griffin*, the Court[22] said "the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.'"[23]

Douglas was followed by decisions requiring the state to provide counsel for indigents at a delayed sentencing or revocation of probation hearing,[24] and holding that an indigent would not be deemed to have

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15. Griffin v. Illinois, 351 U.S. at 18, 19.
16. Burns v. Ohio, 360 U.S. 252 (1959).
17. Smith v. Bennett, 365 U.S. 708 (1961).
18. Lane v. Brown, 372 U.S. 477 (1963).
19. Draper v. Washington, 372 U.S. 487 (1963).
20. *See generally* Lindsey v. Normet, 405 U.S. 56 (1972) and Boddie v. Connecticut, 401 U.S. 371 (1971).
21. 372 U.S. 353 (1963). Douglas was convicted of 13 felonies in a California court. As an indigent he requested court-appointed counsel on appeal. The California district court examined the record and determined that "no good whatever could be served by appointment of counsel." 372 U.S. at 355. *Cf.* Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963).
22. Douglas, J., spoke for the Court. Warren, C.J., and Black, Brennan, White, and Goldberg, JJ, concurred. Clark, J., found a distinction between the state's obligation to furnish a transcript to an indigent, which he had supported in *Griffin*, and the obligation to provide counsel to indigents appealing a criminal conviction. 372 U.S. at 358-60 (Clark, J., dissenting). Harlan, J., joined by Stewart, J., could find no basis in either the equal protection or due process clauses for requiring a state to provide counsel for indigents on appeal. Justice Harlan's attempt to distinguish between due process and equal protection in this context foreshadowed the Court's decision in *Ross v. Moffitt*. 372 U.S. at 360-67 (Harlan, Stewart, JJ., dissenting).
23. 372 U.S. at 355 (citation omitted).
24. Mempa v. Rhay, 389 U.S. 128 (1967).

waived his rights under *Douglas* by failing to request counsel.[25] *Douglas* was given retroactive effect.[26] It has been argued that states should be required to provide attorneys in civil cases in an opinion granting certiorari in *Lindsey v. Normet*.[27]

In *Ross v. Moffitt* the Court was faced with the issue specifically reserved in *Douglas:* [28] the right of an indigent to state-appointed counsel in discretionary appeals. In refusing to extend *Douglas*, the Court, speaking through Justice Rehnquist, attempted for the first time in the *Griffin/Douglas* line of cases to distinguish between the requirements of due process and equal protection. Due process requires that a state deal fairly with the individual. While the right to counsel at a criminal trial, where loss of liberty is involved, has been held to be fundamental,[29] the Court found that "there are significant differences between the trial and appellate stages of a criminal proceeding." [30] The Court described an attorney's function as a shield at the trial stage but as a sword on appeal. While a state must provide a defendant with a shield to defend his presumed innocence against a state-initiated criminal trial, due process does not require that the state provide an indigent with an offensive weapon, a sword, for use on appeal. Because a state need not provide for an appeal,[31] essential fairness does not require that a state provide an indigent with counsel at every stage of the appellate process if it provides one at trial.

The equal protection clause of the fourteenth amendment provides that no state shall deprive any person within its jurisdiction the equal protection of the law. In the context of an appeal, the Court in *Ross* defined equal protection in terms of meaningful access to the appellate process. "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' nor does it require the state to

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25. Swenson v. Bosler, 386 U.S. 258 (1967).
26. Daegle v. Kansas, 375 U.S. 1 (1963).
27. 405 U.S. 56 (1972).
28. 372 U.S. at 356.
29. Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).
30. 417 U.S. at 610.
31. McKane v. Durston, 153 U.S. 684 (1894). McKane was convicted of violating laws of New York relating to elections and registration of voters. In accordance with New York law, he was confined to prison pending determination of his case on appeal. He sought a writ of habeas corpus from the federal court, alleging that he had been deprived of liberty without due process of law and arguing that due process of law required that execution of the judgment against him be stayed until the appeal was decided. The Supreme Court rejected this argument and held that an appeal of a criminal conviction is not an element of due process of law and a state is not required to provide one. "It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper." *Id.* at 687-88.

equalize economic conditions." [32] Equal protection is a relative concept, to be viewed in terms of degrees rather than absolutes. North Carolina afforded Moffitt with meaningful access to the appellate process by providing him with counsel in the first appeal as of right. Equal protection requires no more. When presenting his petition to the highest state court, the defendant will have a record of the trial proceedings, a brief on his behalf in the court of appeals, and often an opinion of the court of appeals. The Supreme Court felt that this would be enough "to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review." [33]

Justice Douglas' dissent was based on two considerations. First, he felt that due to the complex requirements for discretionary review, a defendant needs an attorney to overcome "the hazards which one untrained in the law could hardly be expected to negotiate." [34] A petitioner must allege more than that there was error in the decision by the court below. He must bring his case within one of the three grounds under which the Court will grant certiorari. The North Carolina statute provided that the supreme court of the state could grant review in the following situations:

> (1) The subject matter of the appeal has significant public interest, or
> (2) The cause involves legal principles of major significance to the jurisprudence of the state, or
> (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.[35]

Only the third point was likely to be covered in a brief in an intermediate appellate court, leaving the indigent to fend for himself as to the other two bases for granting review.[36]

The majority effectively countered this argument by pointing out that while an indigent may be put at a disadvantage without counsel, "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." [37]

Justice Douglas' second criticism of the majority strikes at the heart of the decision. He could see no logical basis to distinguish between appeals as of right and discretionary appeals. The Court made this distinction based not upon logic, but rather upon a desire not to extend the

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32. 417 U.S. at 612 (citation omitted). *See also* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), where the Court held, *inter alia*, that poverty is not a suspect classification per se.
33. 417 U.S. at 615.
34. *Id.* at 621.
35. N. C. Gen. Stat. § 7A-31(c) (1969).
36. 417 U.S. at 620 n.12 (dissenting opinion).
37. *Id.* at 616; *cf.* the dissent of Burton, J., in *Griffin*, 351 U.S. at 26-27.

right to counsel ad infinitum. A further extension of the *Douglas* principle could lead to providing counsel for the indigent at state expense for the rest of his life.[38] After he exhausted his appeals, he would be afforded free counsel for any collateral attack he wanted to make on his conviction for as long as he was interested in making such attacks. Such a result would not only insure adequate legal representation to the indigent, but it would also give him a decided advantage over those who could afford to retain their own counsel. The Court was motivated by a desire to draw the line beyond which the Constitution would not require the states to provide counsel to an indigent and by an equally strong conviction that such policy decisions should be left to the bodies best equipped to make them, the state legislatures.[39]

Equal protection forbids classifications involving invidious discrimination [40] and requires that all persons in like situations be treated in a like manner. In its discussion of this clause, the Supreme Court seemed to overlook the fact that in North Carolina criminal defendants are sometimes provided with counsel to prepare an application for discretionary review and sometimes not. In his two appeals, Moffitt was provided with state-appointed counsel in one case and not in the other.[41] At the least, this gives rise to an inference that all those in like situations are not being treated in a like manner.[42]

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38. *See* United States *ex rel.* Coleman v. Denno, 313 F.2d 457, 460 (2d Cir. 1963):
> Were this scheme carried to its logical conclusion, the State would have to assign personal counsel for each of the inmates of its various prisons. To represent their clients properly, these State-appointed counsel would have to review at least on a weekly basis the decisions of the Supreme Court and other appellate courts looking for some case which might cause some doubt as to the constitutionality of the procedures which were used to bring their clients to their present abodes.

39. In its concluding statement in *Ross v Moffitt* the Court stated:
> We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review. Some states which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time.

417 U.S. at 618.

40. Griffin v. Illinois, 351 U.S. 12 (1956); *see* p. 35 & note 11 *supra*. Invidious discrimination is defined as a classification which is arbitrary, has no rational basis, and is not reasonably related to a legitimate governmental purpose. *See generally* Schilb v. Kuebel, 404 U.S. 357 (1971); McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

41. Upon being asked by Chief Judge Haynsworth if there were any judicial guidelines as to whether or not to provide counsel, the state Assistant Attorney General responded that "he knew of none." Moffitt v. Ross, 483 F.2d at 652.

42. Chief Judge Haynsworth recognized the possible problem:
> This record provides an insufficient basis for a finding or a conclusion that North Carolina's administration of her statute works a denial of equal protection of the laws to some indigent appellants. It may not be amiss, how-

Having decided to draw a line to avoid carrying the right to state-appointed counsel to an extreme, the Court did so at the only place it could, at discretionary review. While this case did not give the Court an opportunity to reconsider *Douglas*, and the *Douglas* decision was cited as authoritative, one cannot help but think that the present Court would not have decided *Douglas* the way it was decided in 1963.[43] Language relied upon in *Ross* to the effect that the appellate system must be "free of unreasoned distinctions" [44] and that states must provide an indigent defendant with more than a "meaningless ritual" [45] could have supported a different result in *Douglas*.[46] By refusing to provide counsel for an indigent in the initial appeal as of right, the state arguably has not denied a defendant an appeal based on his indigency. He still has the opportunity to present his argument pro se, and the appellate court would have available the record of his trial proceedings. The same considerations that led this Court to deny Moffitt the right to counsel at state expense could have led to a similar denial to Douglas. *Douglas v. California* was a high water mark in this area and we can expect in the future to see a chipping away at the right to state-appointed counsel.[47]

—*W. E. Findler*

> ever, to note that such a problem may be lurking in this case, for, if judges of courts whose judgments are sought to be reviewed are deciding whether or not to assign counsel to prepare and file an application for permissive review, and there are no standards or guidelines to govern their determination, it may well be that some indigents are denied the assistance of counsel in situations entirely comparable to those in which other indigents are furnished the assistance of counsel.

Id. at 652.

43. Logically, it makes more sense to make a distinction between trials and appeals than between appeals as of right and discretionary appeals. In this context, it is appropriate to note that the sixth amendment provides that "In all criminal *prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" (emphasis added). U.S. CONST. amend. VI. The Supreme Court has defined a prosecution as ending when sentence is imposed. Bradley v. United States, 410 U.S. 605, 609 (1973). *See also* Miller v. Aderhold, 288 U.S. 206, 210 (1933). Black and Goldberg, JJ., and Warren, C.J., all of whom voted with the majority in *Douglas*, have since been replaced by Powell and Blackmun, JJ., and Burger, C.J., all of whom voted with the majority in *Ross*. Both decisions were decided by 6-3 margins.

44. Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

45. Douglas v. California, 372 U.S. 353, 358 (1963).

46. 417 U.S. at 612.

47. *See* Gagnon v. Scarpelli, 411 U.S. 778, 783-91 (1973), opting for a case-by-case approach in providing counsel in revocation of parole or probation hearings. In Mempa v. Rhay, 389 U.S. 128 (1967), the Court held that state-appointed counsel must be provided at a revocation of probation hearing when sentence could be imposed. In *Gagnon*, sentence had been imposed at the time of trial and this was the basis for the distinction between the two cases. 411 U.S. at 781.