DePaul Law Review

Volume 24
Issue 3 *Spring 1975*

Article 8

Cost and Judicial Management Considerations in the Right to Counsel for Indigents' Discretionary Appeals - Ross v. Moffitt

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COST AND JUDICIAL MANAGEMENT CONSIDERATIONS IN THE RIGHT TO COUNSEL FOR INDIGENTS' DISCRETIONARY APPEALS—*ROSS v. MOFFITT*

In *Ross v. Moffitt*,[1] the United States Supreme Court held that to deny an indigent defendant the aid of counsel in a discretionary appeal did not violate the due process and equal protection clauses of the fourteenth amendment. This holding appears to clearly answer the question of whether the right to counsel extends to discretionary reviews, a question the Supreme Court left unanswered[2] in *Douglas v. California*.[3] The purpose of this Note is to explore the "right to counsel" analysis in *Ross*, examine some of the questions which remain unanswered, and weigh the Court's decision in terms of cost and judicial management.

The litigation which brought this case to the Supreme Court began with two separate cases. Claude Moffitt was convicted in the superior courts of North Carolina of forgery and uttering a forged instrument. Defense counsel for the indigent Moffitt was appointed in both cases. Upon conviction, Moffitt took separate appeals, again with the assistance of appointed counsel. The North Carolina Court of Appeals affirmed both convictions.[4]

Following the first conviction, appointed counsel was allowed to prepare and file a petition for a writ of certiorari seeking to invoke the discretionary review[5] of the North Carolina Supreme Court. The petition was

1. 417 U.S. 600 (1974).

2. We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court.

Douglas v. California, 372 U.S. 353, 356 (1963).

3. 372 U.S. 353 (1963).

4. State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970); State v. Moffitt, 11 N.C. App. 337, 181 S.E.2d 184 (1971).

5. In this Note an appeal of right refers to the mandatory review procedure granted to a defendant by an intermediate appellate court to review the merits of the case. In North Carolina the right is guaranteed by statute. N.C. GEN. STAT. § 7A-27(b) (Supp. 1973). Permissive review or discretionary review, is exercised at the discretion of the state's highest appellate court. In this case permissive review is governed by N.C. GEN. STAT. § 7A-31(c) (1969) which provides, in part, that certification by the supreme court may be made when:

(1) The subject matter of the appeal has significant public interest, or

denied for lack of a substantial constitutional question.[6] Moffitt then petitioned for appointment of counsel to assist in the preparation of a petition for certiorari to the United States Supreme Court. This petition was also denied.

Following the second conviction, the superior court of appeals refused to appoint counsel to assist in a petition for certiorari in the North Carolina Supreme Court. Having exhausted his state post-conviction remedies,[7] Moffitt filed for a writ of habeas corpus in the United States District Court for the Western District of North Carolina. He alleged that the state's refusals to appoint counsel to assist him in preparing petitions for writs of certiorari in both the North Carolina Supreme Court and the United States Supreme Court were abridgements of his constitutional right to counsel. This petition for habeas corpus was denied and the cases were consolidated on appeal in the Fourth Circuit Court of Appeals.

The Fourth Circuit reversed and remanded the case to the district court stating that an indigent defendant in a criminal case is entitled to assigned counsel on appeal to the state's highest appellate court or to the United States Supreme Court.[8] The court concluded that there was, after all, no basis for differentiating appeals of right and permissive appeals.[9]

The Supreme Court granted certiorari[10] to consider the case in light of *Douglas* and previous conflicting decisions of the Court of Appeals for the Seventh and Tenth Circuits.[11] In reversing the court of appeals, the Court in a six to three decision appears to have closed the door that *Gideon v.*

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(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.

N.C. GEN. STAT. § 7A-31(c) (1969).

6. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 246 (1971).

7. After being denied assistance of counsel in filing a petition for certiorari, Moffitt filed a *pro se* application to the state supreme court. The application for appeal was denied for tardiness. Moffitt v. Ross, 483 F.2d 650, 651 (4th Cir. 1973).

8. *Id.* at 653.

9. *Id.* at 651.

10. Ross v. Moffitt, 414 U.S. 1128 (1974). Counsel was appointed and a motion for Moffitt to proceed *in forma pauperis* was granted. Ross v. Moffitt, 415 U.S. 909 (1974).

11. In Peters v. Cox, 341 F.2d 575 (10th Cir. 1965) the court held that the New Mexico Supreme Court was not required to appoint counsel for indigent criminal defendants seeking appeals from the state supreme court to the United States Supreme Court. In United States *ex rel.* Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969) the court held it was not a denial of equal protection to refuse appointment of counsel for indigent criminal defendants petitioning the state supreme court for discretionary review.

Wainwright[12] had opened to indigent criminal defendants. To understand the importance of the *Ross v. Moffitt* decision, it is necessary to examine the Court's previous decisions pertaining to the right to counsel.

RIGHT TO COUNSEL—SIXTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION

The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[13] The right secured seems narrow enough, but the breadth of the phrase, despite its seemingly narrow language, might be construed so as to apply to any defendant, at any stage of the criminal proceeding.[14] The litigation in this area, therefore, has focused primarily on the applicaton of the sixth amendment's guarantee to the various stages of the criminal process.

In *Powell v. Alabama*[15] the Court extended the right to appointed counsel to indigent defendants in a state criminal trial.[16] *Powell* was the first definitive case in this area,[17] laying the foundation for the subsequent evolution of the right to counsel. Reversing the convictions of four defendants who were denied the benefit of counsel, the Court held that such a denial of counsel in a capital case would be a denial of a "necessary requisite of due process of law."[18]

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12. 372 U.S. 335 (1963).

13. U.S. CONST. amend. VI.

14. *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

15. 287 U.S. 45 (1932).

16. Although the right to counsel appears only in the sixth amendment, the Court has relied heavily on the due process and equal protection clauses of the fourteenth amendment to apply this provision to the states. The right to counsel in federal criminal proceedings was first pronounced in Johnson v. Zerbst, 304 U.S. 458 (1938). The right to counsel was extended to appeals in Johnson v. United States, 352 U.S. 565 (1957). The application of the right to counsel has now been taken from the realm of case law by the Federal Rules of Criminal Procedure which provide:

> (a) Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

FED. R. CRIM. P. 44(a).

17. Although the Court did not directly address itself to the sixth amendment right to counsel until *Powell* in 1932, the Court had ventured into the area when state action offended due process. *See, e.g.*, Cooke v. United States, 267 U.S. 517 (1925); Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915); Andersen v. Treat, 172 U.S. 24 (1898).

18. 287 U.S. at 71. The Court's language has since become a touchstone for sub-

Although *Powell* was the first case to use the "special circumstances" language, the holding of the case was confined to its facts. It was not until the Court decided *Betts v. Brady*[19] that the "special circumstances" referred to in *Powell* were formalized as a judicial test to be applied in subsequent cases.

> Asserted denial [of counsel] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in light of other considerations, fall short of such denial.[20]

The pronouncement of the "special circumstances" test brought with it a number of perplexing problems. There was no statement in the *Betts* decision that due process required the right to counsel to be applied uniformly in future cases involving similar circumstances.[21] As a result, in subsequent cases the Court limited its holding to the specific facts before it. Decisions following *Betts* either found that "special circumstances" existed, or that they did not—the line between the two was indeed a thin one.[22]

Gideon ended the controversy surrounding the application of the "special circumstances" test. The sixth amendment right to counsel was uniformly

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sequent decisions relating to an indigent defendant's right to counsel.

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevent to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 69.

19. 316 U.S. 455 (1942).

20. *Id.* at 462.

21. *Id.* at 461-62.

22. Following the *Betts* rule, the Court found "special circumstances" in Cash v. Culver, 358 U.S. 633 (1959) (defendant was a 20 year old uneducated farm boy); Moore v. Michigan, 355 U.S. 155 (1957) (17 year old defendant only had seventh grade education); Massey v. Moore, 348 U.S. 105 (1954) (defendant was a mental patient confined to a strait jacket); Wade v. Mayo, 334 U.S. 672 (1948) (defendant

applied to the states[23] as a part of due process. The *Betts* decision was expressly overruled;[24] however, the confusion was far from over. Assuming that indigent defendants were always guaranteed the right to counsel in state proceedings, when did the right to counsel begin?

In the cases since *Gideon*, the Court has used the "critical stage" test to answer this question. The crucial factor which differentiates the "special circumstances" test from this test is that with the "critical stage" analysis the right to counsel is not necessarily limited to the facts of the case before the Court. Once the Court has declared that the right to counsel attaches to a particular stage in the criminal process,[25] the assignment of counsel becomes itself a procedural step which must be adhered to in all future cases regardless of the circumstances. This test extends the right to counsel beyond representation at trial.[26]

Although the Court has relied primarily on the due process clause in extending the right to counsel, *Douglas v. California* applied the right to the first appeal[27] by the use of the equal protection clause of the fourteenth amendment.[28] The Court held "[T]hat equality [is] demanded by

was an inexperienced 18 year old youth); Marino v. Ragen, 332 U.S. 561 (1947) (18 year old defendant did not understand English). "Special circumstances" were not found in Quicksall v. Michigan, 339 U.S. 660 (1950) (defendant was 44 years old, had previous convictions and prior court experiences); Bute v. Illinois, 333 U.S. 640 (1948) (charges were stated in simple terms not capable of being misunderstood by defendant, a 57 year old man); Carter v. Illinois, 329 U.S. 173 (1946) (nature and consequences of guilty plea were fully explained in capital case to defendant with no formal education).

23. Although the Court in *Gideon* applied the right to counsel in felony cases, it extended the right to misdemeanor cases in Argersinger v. Hamlin, 407 U.S. 25 (1972). Thus, every indigent defendant is guaranteed the right to counsel in any state criminal prosecution where he faces a possible loss of his liberty.

24. 372 U.S. at 345.

25. It is beyond the scope of this Note to consider the application of the right to counsel in administrative or quasi-criminal proceedings. In a criminal proceeding the Court notes, "that appointment of counsel for an indigent is required at every stage . . . where substantial rights of a criminal accused may be affected." Mempa v. Rhay, 389 U.S. 128, 134 (1967).

26. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970) (state pre-trial hearing); Mempa v. Rhay, 389 U.S. 128 (1967) (combined probation revocation and sentencing hearing); United States v. Wade, 388 U.S. 218 (1967) (line-ups); Miranda v. Arizona, 384 U.S. 436 (1966) (police interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (interrogation while in police custody); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment). *But see* United States v. Ash, 413 U.S. 301 (1973) (counsel denied at pre-trial photographic display of defendant); Kirby v. Illinois, 406 U.S. 682 (1972) (pre-indictment interrogation); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplar).

27. *See* note 2 *supra.*

28. 372 U.S. 353. The Court's analysis relies heavily on its earlier decision in

the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record . . . while the indigent . . . is forced to shift for himself."[29]

The Court in *Douglas* raised as many questions as it answered. Is there a beginning and an end to the concept that equal protection demands the same treatment for the poor man and the rich man? Does equal protection of the law demand that an indigent defendant be able to utilize counsel in the same way as the rich man, from the moment of arrest to the last day of his sentence? The Court, recognizing that these questions exist, stated, "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them."[30] The question remained where and how these lines were to be drawn. *Ross v. Moffitt* draws a very distinct line;[31] a line that perhaps defines the absolute boundaries of an indigent's right to counsel on appeal.

Griffin, Douglas, and *Ross*—INDIGENTS RIGHTS TO APPELLATE REVIEW

In *Ross*, the Court drew heavily on the language and reasoning established in *Griffin v. Illinois*[32] and *Douglas v. California.* Although both of these cases were grounded primarily on denial of equal protection,[33] the Court analyzed Moffitt's claim in terms of both due process and equal protection.[34]

In light of the Court's previous decisions concerning the right to counsel it seems to naturally follow that the due process analysis in *Ross* would

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Griffin v. Illinois, 351 U.S. 12 (1956). Taken together, these two cases form the basis for the Court's subsequent decisions which have broadened the right to counsel.

29. 372 U.S. at 358.

30. *Id.* at 357.

31. [T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

417 U.S. at 616.

32. 351 U.S. 12 (1956).

33. The Court in *Ross* was not completely satisfied with this conclusion, contending that support for both *Griffin* and *Douglas* could be found in the equal protection clause and the due process clause, neither clause by itself being "entirely satisfactory." 417 U.S. at 608-09.

34. The Court of Appeals for the Fourth Circuit analyzed the case in terms of due process. However, in rejecting the equal protection analysis the court stated:

reflect the application of the "critical stage" test. Such is not the case.[35] Although the Court does differentiate between the various stages of adversary proceedings, the "critical stage" language does not appear anywhere. Instead the Court, in diluted terms, simply concludes that "there are significant differences between the trial and appellate stages of a criminal proceeding."[36] Justice Douglas, dissenting, uses more forceful language in relation to the "critical stage" test, but does not use the term specifically. "The right to discretionary review is a *substantial one*, and one where a lawyer can be of *significant assistance* to an indigent defendant."[37]

The apparent rationale behind the majority's conclusion is that it is the "defendant rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below."[38] The Court recognizes and re-emphasizes the importance of counsel at the trial stage, but states that on appeal the attorney is no longer needed as a shield to protect the presumption of innocence; rather, he is used by the defendant "as a sword to upset the prior determination of guilt."[39]

The Court deems this difference significant, despite the fact that *Douglas* looms in the background, proudly declaring that indigent defendants are guaranteed the right to counsel on appeals of right.[40] It would seem, then, within the bounds of reason, and contrary to the Court's decision, that the right to counsel in discretionary appeals is simply a logical ex-

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> 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, however, to note that such a problem may be lurking in this case. . . .

483 F.2d at 652.

35. In oral arguments before the Supreme Court, counsel for the state contended that discretionary review cannot be a "critical stage." 42 U.S.L.W. 3605 (1974).

36. 417 U.S. at 610.

37. *Id.* at 621 (Douglas, J., dissenting) (emphasis added).

38. *Id.* at 610.

39. *Id.* at 610-11.

40. It is not clear on what basis the decision in *Douglas* rested. 417 U.S. at 608-09. *See* note 33 *supra*. *Douglas*' mandate, however, does appear to be clear.

> The clear thrust of *Douglas* is that the indigent criminal appellant must be given a fair method of raising substantial challenges to his conviction. Certainly one standard of fairness is what the state provides for those who can afford to pay their own way. The Court stopped short of this standard. . . . That this is not logically equal protection does not detract from the fact that it is practically due process.

Gerard, *The Right to Counsel on Appeal in Missouri: A Limited Inquiry into the Factual and Theoretical Underpinnings of* Douglas v. California, 1965 WASH. U.L.Q. 463, 481.

tension of the right to counsel in mandatory appeals guaranteed by *Douglas*.[41]

The ramifications of the Court's equal protection analysis are more profound and far-reaching. In *Griffin v. Illinois* the Court held that limiting the appellate process to defendants who could afford to pay for stenographic transcripts violated the equal protection clause of the fourteenth amendment.[42] In so holding the Court stated, "[t]here can be no equal justice where the kind of a trial a man gets depends on the amount of money he has."[43]

In a line of subsequent cases, the Court has held that a state cannot impede the right to appeal by indigent defendants while allowing more affluent persons to appeal unrestricted.[44] Although these cases applied primarily to the right to transcripts and fees, *Douglas* clearly applied this principle to access to the appellate system.

In applying an equal protection analysis to this case, the Court required that North Carolina meet only two conditions: the state appellate system must be "free from unreasoned distinctions"[45] and indigent defendants must be given an adequate opportunity within the appellate system to fairly present their claims.[46] The Court held that North Carolina satisfied both of these requirements by statute.[47]

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41. Chief Judge Haynsworth, speaking for a unanimous court of appeals, stated:

> On principle, however, we can find no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel.

483 F.2d at 653.

Justice Harlan, dissenting in *Douglas*, stated:

> Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review.

372 U.S. at 366 (Harlan, J., dissenting).

42. 351 U.S. at 18-19.

43. *Id.* at 19.

44. The Court has consistently struck down financial burdens placed on indigent defendants. Such restrictions on the right to appeal are violative of equal protection. *See* Mayer v. Chicago, 404 U.S. 189 (1971) (trial transcripts given to indigent only in felony cases); Draper v. Washington, 372 U.S. 487 (1963) (indigent defendant could obtain trial transcript only if he convinced trial judge his appeal was not frivolous); Lane v. Brown, 372 U.S. 477 (1963) (only a public defender could obtain free transcript on *coram nobis* hearing); Smith v. Benett, 365 U.S. 708 (1961) (requirement of filing fees in habeas corpus action); Burns v. Ohio, 360 U.S. 252 (1959) (filing fees); Chessman v. Teets, 354 U.S. 156 (1957) (defendant entitled to have counsel represent him to settle trial transcript).

45. Rinaldi v. Yeager, 384 U.S. 305 (1966). The holding in this case is clearly in the line established by *Griffin*. Here a state statute requiring an unsuccessful appellant to repay transcript costs was applied only to persons incarcerated.

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

47. *See* note 5 *supra*.

In so holding it appears that the Court adopted the position espoused by Justice Harlan in his dissents to *Griffin* and *Douglas*. He argued that the states are prohibited from discriminating between rich and poor as such, but the equal protection clause does not prevent the state from adopting laws which may affect the poor more harshly than the rich.[48] The sole criterion against which the state must measure its actions is whether "[r]efusal to furnish criminal indigents with some things that others can afford . . . fall[s] short of constitutional standards of fairness."[49]

Douglas v. California holds that it is a violation of due process and equal protection to deny an indigent defendant the aid of counsel on his appeal of right; however, *Ross* holds that such denial on permissive appeals violates neither guarantee. There must be a fundamental difference between appeals of right and discretionary appeals which sanction this dichotomy.

INDIGENTS, COUNSEL, AND DISCRETIONARY REVIEW

It is settled law that a state need not accord a defendant an appeal of his conviction.[50] It is equally clear that when a state does provide for appeals, it must do so in accordance with the decision in *Douglas*. Most states have complied with this requirement by statute, allowing the criminal defendant an appeal of right to an intermediate court and allowing for discretionary review by the state's highest court. The Court in *Ross* stated that after the defendant has exhausted his appeal of right he will at least have had

> a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se*, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.[51]

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48. Douglas v. California, 372 U.S. at 361 (Harlan, J., dissenting).

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses.

Id. at 361-62.

49. *Id.* at 363.

50. McKane v. Durston, 153 U.S. 684 (1894). "[W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself." *Id.* at 688.

51. 417 U.S. at 615.

Possession of these resources, then, must be the crucial difference between the need for counsel on mandatory appeals and discretionary appeals. The Court reasons that after an initial appellate review the defendant is equipped with sufficient tools and resources to proceed *pro se* to a fair adjudication of his case.

This rationale is buttressed by the Court's interpretation of the North Carolina statute which provides that the state supreme court must exercise its discretionary review power when the subject matter of the appeal has significant public interest or involves major jurisprudential questions, or when the decision in the lower court conflicts with a decision of the state supreme court.[52] The Court concludes that:

> [O]nce a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.[53]

Although the Court presents its argument in forceful fashion, it admits that an indigent defendant proceeding *pro se* on a discretionary appeal is somewhat handicapped.[54] By exploring the nature of discretionary appeals, the extent of this handicap can be seen.

Proceeding on appeal without the assistance of counsel[55] presents a thorny path to any defendant.[56] Petitions for writs of certiorari should be carefully prepared, contain appropriate references to the trial record, and present whatever data is necessary for an adequate understanding of the issues before the Court.[57] In an address to the Pennsylvania Bar As-

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52. N.C. GEN. STAT. § 7A-31(c) (1969).

53. 417 U.S. at 615.

54. The Court recognizes that "a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would . . . prove helpful to any litigant able to employ him." *Id.* at 616.

55. The Court in its opinion also addresses itself to the issue of the right to counsel on appeals to the United States Supreme Court. Although it rejects the authority of *Douglas* and *Griffin* because they are applicable only to state action, it would seem that an appellant proceeding on appeal to the United States Supreme Court would face the same barriers encountered in the state appellate system. *See* STERN & GRESSMAN, SUPREME COURT PRACTICE (3d ed. 1962). *See generally* Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 159 (1972).

56. "Analyzing and presenting a case from an appellate standpoint . . . calls particularly for the professional judgment of a lawyer, not merely a layman—even a layman having far better education and learning than most indigent defendants." Boskey, *supra* note 14, at 786. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

57. *See* Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n, 242 U.S. 430 (1917).

sociation, Justice Brennan commented on the contents of petitions for certiorari.

> Both the petition and response should identify the federal questions allegedly involved, argue their substantiality, whether they were properly raised in the state courts, whether they were decided by the state court contrary to controlling federal precedents, and whether in any event the state court decision may rest on an independent state ground.[58]

Taking these requirements into consideration, it appears that the factors deemed important by the courts in deciding whether or not to grant certiorari "are certainly not within the normal knowledge and experience of an indigent appellant, unassisted by counsel."[59] Although the defendant has an arsenal of weapons at his disposal on permissive appeals, he may be unable to use them without the assistance of counsel to direct the attack.

The Court in *Ross* reasoned that equal protection demands only that the indigent defendant have an adequate opportunity to present his case fairly through the state's appellate process.[60] Chief Judge Haynsworth, speaking for the appellate court in *Ross*, explained that although the purpose of an intermediate court is to relieve the highest court of burdens, the "[s]tate's highest court remains the ultimate arbiter of the rights of its citizens."[61] In addition, Justice Douglas noted that an intermediate appellate court may be unable or unwilling to review a defendant's claims.

> The North Carolina Court of Appeals, for example, will be constrained in diverging from an earlier opinion of the State Supreme Court, even if subsequent developments have rendered the earlier Supreme Court decision suspect.[62]

If a defendant proceeding without the aid of counsel cannot frame his claims in an acceptable manner, or frame them in a way intelligible to the court,[63] the appellant, contrary to the majority's reasoning in *Ross*, may not have an adequate opportunity to present his case.

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58. Brennan, *State Court Decisions and the Supreme Court*, 31 PA. B. ASS'N Q. 393, 400 (1960).

59. Boskey, *supra* note 14, at 797.

60. 417 U.S. at 616.

61. 483 F.2d at 653.

62. 417 U.S. at 619-20 (Douglas, J., dissenting).

63. *Pro se* petitions are a particular problem for defendants who are incarcerated. Petitions from prisoners are often a jumble of rambling factual assertions and legal conclusions culled from the latest appellate reports that have made the prison rounds. It is often impossible to identify the claims made or to discern their factual or legal bases.
The President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: THE COURTS 54 (1967).

COST AND JUDICIAL MANAGEMENT

Underlying the decision and reasoning in *Ross* are the problems of judicial cost and management created by the extension of the right to counsel.[64] Cost in this context can be looked at from three different perspectives. First, the extension of the right to counsel may be viewed as a further tax on the resources of the state and federal judicial systems.[65] There is no doubt that the expansion of the right to counsel has placed some strain on the courts.[66] Increased caseloads on most dockets have caused delays in the judicial system, and the already heavy caseload before the United States Supreme Court has become increasingly acute.[67] Consequently, one study group has suggested the implementation of a national appellate court to screen cases on the Supreme Court's docket.[68]

The impact of this proposal is mitigated by the fact that lack of counsel on discretionary appeals may be costing the judicial system a great deal in terms of time and resources,[69] which the expertise of counsel could

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64. The states of Florida, Illinois, and Virginia filed amicus curiae briefs addressing themselves to the cost in terms of judicial management if the appellate court's decision in *Ross* were not reversed. 417 U.S. at 602.

65. In oral arguments before the Supreme Court, counsel for the state of North Carolina stated that complying with the appellate court's decision in *Ross* would cost the state three and a quarter million dollars. 42 U.S.L.W. 3605 (1974).

66. Some observers feel that extending the right to counsel further will have severe consequences in terms of judicial management. Dockets become increasingly backlogged, more defendants go to trial rather than pleading guilty, and more appeals are taken. E. FRIESEN, E. GALLAS & N. GALLAS, MANAGING THE COURTS, 48-49 (1971). Others feel that the courts have not effectively grasped the problems of a rapidly expanding right to counsel. "A decade after *Gideon* the Question remains whether we can indeed render effective assistance of counsel." LaFrance, *Criminal Defense Systems For the Poor*, 50 NOTRE DAME LAW. 41, 43 (1974).

67. *In forma pauperis* cases now constitute over half of the cases on the Supreme Court's docket. In 1941, 178 *in forma pauperis* petitions were filed. In 1971, 1,930 such petitions were filed, an increase of over ten-fold. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, 57 F.R.D. 573 (1972).

68. *Id.* Arthur Goldberg, retired Supreme Court Justice, has expressed his opposition to the Study Group's proposal that cases be screened.

> Would *Furman v. Georgia* have reached the Supreme Court under the screening plan by appellate judges proposed in the study group report? . . . Would a national court of appeals have known that the Supreme Court was prepared to overrule *Betts v. Brady* and hold that impoverished criminal defendants must be given lawyers, or might it have dismissed the case of *Gideon v. Wainwright* before it reached the Supreme Court? Would Gideon's Trumpet have been heard?

Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14-15.

69. *See* note 63 *supra.*

> [A]s petitions from prisoners continue to flood the courts, there are no dissenters from the position that both prisoners and courts would benefit if the

greatly decrease.[70] The court of appeals noted in *Ross* that, "[a]s our legal resources grow, there is a correlative growth in our ability to implement basic notions of fairness."[71] The court reasoned that the Bar is now large enough to meet the requirements of *Gideon* and *Argersinger v. Hamlin*[72] and an extension of the right to counsel on discretionary reviews is a relatively minor burden to impose.[73]

A second view is that cost should be accorded no weight in our scheme of justice. Chief Justice Burger commented that an "effective system of justice is as important to the social, economic and political health of the country as an adequate system of medical care is to our physical health."[74] He defined "effective" in terms of "delivery of justice" and admitted that our delivery was "faltering and inadequate."[75] Would providing counsel to indigent defendants cost less when viewed as part of the "delivery of justice"?

> [T]here are few values a civilized society can put above giving a person charged with a crime full process before it deprives him of his liberty or life. If expenditures are required to procure the greatest possible insurance against the abortion of justice, money could hardly be better spent.[76]

A third perspective strikes a balance between the aforementioned views. The Court in *Ross* adopts this position and defers the problem of assigning weights to each side to the state legislatures.

> We do not mean by this opinion to in any way discourage those States which have . . . 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

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petitions were better prepared.
Symposium—Should the Appellate Jurisdiction of the United States Supreme Court Be Changed? An Evaluation of the Freund Report Proposals, 27 RUTGERS L. REV. 937, 949 (1974).

70. Boskey, *supra* note 14, at 802.

71. 483 F.2d at 655.

72. 407 U.S. 25 (1972). *See* note 23 *supra*.

73. Moffitt v. Ross, 483 F.2d at 655. Many members of the legal community felt that the Court's decision in *Argersinger* would strain the availability of counsel to the limit. A recent study on this issue revealed "that *Argersinger* has had a much lesser impact on the legal system than was contemplated before or at the time of the decision." Ingraham, *The Impact of* Argersinger*—One Year Later*, 8 LAW & SOC. REV. 615, 631 (1974).

74. Burger, *Has the Time Come?*, 55 F.R.D. 119, 123 (1972).

75. *Id.* *See* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

76. Day, *Coming: The Right to Have Assistance of Counsel at All Appellate Stages*, 52 A.B.A.J. 135, 138 (1966).

> public funds within or without the criminal justice system preclude the implementation of such a policy at the present time.[77]

In effect the Court is saying that the states may, if they wish, provide for counsel for discretionary review procedures, but they need not do so if other demands are placed on their public funds.

The Court in *Ross v. Moffitt* found that there is no constitutional mandate that counsel be appointed to indigent defendants seeking discretionary review. As a result, the indigent who has exhausted his appeal of right will find further access to the appellate system difficult. As resources within the judicial system become more readily available the door may open again, but for the present, the door is closed.

Daniel R. Formeller

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77. 417 U.S. at 618.