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No Right to Counsel for Indigent Criminal Defendants on Subsequent Discretionary Appellate Review: Due Process Or Unequal Protection

NO RIGHT TO COUNSEL FOR INDIGENT CRIMINAL DEFENDANTS ON SUBSEQUENT DISCRETIONARY APPELLATE REVIEW: DUE PROCESS OR UNEQUAL PROTECTION

INTRODUCTION

Since the Supreme Court decided *Powell v. Alabama*[1] in 1932, the extent to which the fourteenth amendment obligates a state to provide free counsel to indigent criminal defendants has been the source of considerable controversy. A state is now obliged to provide free counsel for indigent criminal defendants: (1) at a post-indictment lineup;[2] (2) at a preliminary hearing to determine the existence of probable cause;[3] (3) during custodial interrogation;[4] (4) at a pre-trial arraignment where certain defenses must be pleaded or lost;[5] (5) upon the entering of a guilty plea at any time;[6] (6) at trial;[7] (7) at sentencing;[8] and, (8) on initial appeals as of right.[9] In *Ross v. Moffitt*,[10] the United States Supreme Court held that the fourteenth amendment does not compel a state to provide free counsel to aid indigent criminal defendants in preparing petitions either for discretionary review in state courts or for certiorari to the United States Supreme Court. *Ross,* therefore, delineates what might be termed the "upper limit" of the right to counsel. This note will analyze the Court's reasoning in *Ross* in light of its other decisions concerning the rights of indigent criminal defendants[11] and will suggest that only the due process clause,[12] rather than the equal protection clause,[13] of the

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1. 287 U.S. 45 (1932).
2. U.S. v. Wade, 388 U.S. 218 (1967). *But see* Kirby v. Illinois, 406 U.S. 682 (1972), which held that there is no right to counsel at a pre-indictment lineup, and United States v. Ash, 413 U.S. 300 (1973), which held that there is no right to counsel at a photographic identification.
3. Coleman v. Alabama, 399 U.S. 1 (1970).
4. Miranda v. Arizona, 384 U.S. 436 (1966).
5. Hamilton v. Alabama, 368 U.S. 52 (1961).
6. Moore v. Michigan, 355 U.S. 155 (1957).
7. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
8. Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948).
9. Douglas v. California, 372 U.S. 353, *rehearing denied,* 373 U.S. 905 (1963).
10. 417 U.S. 600 (1974).
11. Particularly *Douglas v. California, supra* note 9, which held that indigent criminal defendants were denied due process and the equal protection of the laws when the merits of their first appeal as of right were decided without their having the benefit of counsel.
12. U.S. CONST. amend. XIV, § 1.
13. *Id.* The Court relied primarily upon an equal protection analysis in deciding both *Douglas* and *Ross.*

fourteenth amendment can determine the extent to which a state must compensate for the indigency of criminal defendants.

In *Ross,* respondent had been convicted in Mecklenburg and Guilford Counties in North Carolina, on separate charges of forgery and uttering a forged instrument. At his trials, and on his separate appeals as of right to the North Carolina Court of Appeals, respondent was represented by court-appointed counsel. Following affirmance[14] of his Mecklenburg County conviction, respondent sought to invoke the discretionary review procedures of the North Carolina Supreme Court. His court-appointed counsel approached the Mecklenburg County Superior Court about possible appointment to represent respondent on this appeal, but counsel was informed that the State was not required to furnish counsel to petition for such review. Following affirmance[15] of his Guilford County conviction, respondent also sought the discretionary review of the North Carolina Supreme Court. On seeking this review, however, respondent was not denied counsel, but rather was represented by the public defender who represented him at trial. The North Carolina Supreme Court, however, denied certiorari.[16] Respondent then unsuccessfully petitioned the Superior Court for Guilford County for court-appointed counsel to prepare a petition for a writ of certiorari to the United States Supreme Court. Respondent also sought post-conviction relief throughout the state courts. After exhausting state remedies, respondent sought federal habeas corpus relief in the United States District Courts for the Middle and Western Districts of North Carolina. Those courts denied relief,[17] and respondent took an appeal to the United States Court of Appeals for the Fourth Circuit.

The court of appeals reversed the two district court decisions, holding that respondent was entitled to the assistance of counsel at state expense both on his petition to the North Carolina Supreme Court and on his petition to the United States Supreme Court.[18] The court of appeals noted that in *Douglas v. California*[19] the United States Supreme Court held that an indigent, convicted of a felony, was entitled to the assistance of assigned counsel in presenting his appeal to the state's intermediate appellate court. Although *Douglas* was specifically limited to "the one and only appeal an indigent has as of right,"[20] the court of appeals stated: "On principle, however, we can find no logical basis for differentiation between appeals as of right and permissive review procedures in the context of the Constitution and the right to counsel."[21]

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14. State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970).
15. State v. Moffitt, 11 N.C. App. 337, 181 S.E.2d 184 (1971).
16. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 247 (1971).
17. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972). The Middle District case is unreported.
18. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973).
19. 372 U.S. 353 (1963).
20. *Id.* at 357.
21. Moffitt v. Ross, 483 F.2d at 653.

The United States Supreme Court granted certiorari[22] to consider the court of appeals' decision in light of the apparently contrary decisions of the courts of appeals for the Seventh and Tenth Circuits[23] and the Court's own reasoning in *Douglas*. The Court resolved the apparent conflict by reversing the court of appeals and holding that a state is not constitutionally compelled to furnish free counsel to indigent criminal defendants for discretionary review in state courts or for preparation of a petition for certiorari to the United States Supreme Court.

THE *Ross* ANALYSIS

The Court began its analysis in *Ross* by reviewing the law on indigents' rights on appeal. It cited the transcript cases[24] for the proposition that "a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[25] The Court then examined[26] its holding in *Douglas,* that a state does not fulfill its responsibility to an indigent criminal defendant merely by providing him with a free transcript, but must go further and provide counsel for the indigent on his first appeal of right. The Court pointed out that this holding was specifically limited to an indigent's first appeal of right[27] and that a state can, without violating the fourteenth amendment, provide for differences in appellate procedure so long as the result does not amount to a denial of due process or an invidious discrimination.[28]

The Court structured its opinion in an attempt to remedy a fundamental ambiguity in prior cases:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.[29]

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22. 414 U.S. 1128 (1974).

23. Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969), held that Illinois had fully discharged its constitutional obligation by providing assigned counsel for an indigent's appeal of right to an intermediate appellate court and was not required to provide counsel to assist the indigent as he sought access to the Supreme Court of Illinois. Peters v. Cox, 341 F.2d 575 (10th Cir. 1965), held that New Mexico had no obligation to provide an indigent with the assistance of counsel to prepare and file in the Supreme Court of the United States a petition for certiorari to the Supreme Court of New Mexico.

24. Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); and, Griffin v. Illinois, 351 U.S. 12 (1956). In each of these cases the Court held that a transcript, being necessary for adequate appellate review, cannot be required in a manner which disadvantages criminal defendants on account of their poverty.

25. 417 U.S. at 607.

26. *Id.*

27. *Id.* at 608.

28. 372 U.S. at 356–57.

29. 417 U.S. at 608–09.

In a laudable effort to be more precise, the Court in *Ross* addressed the issues of due process and equal protection separately and thus provided a valuable insight into the conceptual differences between these two clauses of the fourteenth amendment.[30]

The Court's due process holding was quite succinct: "We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court."[31] Citing *Gideon v. Wainwright*,[32] the Court stated that the right to counsel at trial is fundamental and binding upon the states by virtue of the sixth and fourteenth amendments. The Court then distinguished *Ross* from *Gideon* by noting that at trial the defendant is being haled into court and hence uses counsel as a shield, while on appeal the defendant initiates the process and uses counsel rather as a sword.[33] The Court further distinguished *Gideon* arguing that, while a state cannot simply dispense with the trial stage of criminal proceedings, it need not provide any appeal at all.[34] If a state does provide an appeal, it does not necessarily act unfairly by refusing to provide counsel to indigents at every step along the way. Unfairness results only if indigents are singled out by the state and denied meaningful access to that system because of their poverty.[35] This problem, the Court determined, is better handled under the rubric of equal protection.

In its equal protection analysis, the Court once again confronted its holding in *Douglas:*

> [W]here the merits on the *one and only appeal* an indigent has as of right are decided without the benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.[36]

Therefore, in order to reconcile its holding in *Ross* with that in *Douglas,* the Court must show why an "unconstitutional line has been drawn be-

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30. " 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding sections." *Id.* at 609.

31. *Id.* at 610.

32. 372 U.S. 335 (1963).

33. This distinction would have more merit had the Court not previously decided in *Douglas* that an indigent criminal defendant has a constitutional right to counsel on his first appeal of right. It would seem that on his first appeal of right the indigent defendant is using counsel as a sword as much as on subsequent appeals. Therefore, if this sword-shield distinction is crucial, why then was it not controlling in *Douglas,* which seems indistinguishable from *Ross* in this respect?

34. 417 U.S. at 611, citing McKane v. Durston, 153 U.S. 684 (1894).

35. It is important to note that the Court speaks not only of access to the appellate system, but of *meaningful* access to that system.

36. 417 U.S. at 611, *quoting Douglas,* 372 U.S. 353, 357 (1963) (emphasis in original).

tween rich and poor"[37] in denying counsel on first appeal while such a line has not been drawn in denying counsel for subsequent appeals. The Court stated that the fourteenth amendment "does not require absolute equality or precisely equal advantages,"[38] nor does it require a state to "equalize economic conditions."[39] The equal protection clause requires only that the state appellate system be "free from unreasonable distinctions."[40] Therefore, if a reasonable distinction can be made between indigent criminal defendants on first appeal and the same indigent criminal defendants on subsequent appeals, then a state may be justified in providing counsel to one and not to the other. The Court then analyzed the North Carolina appellate system and concluded that a rational basis does exist for the distinction.

To support this conclusion, the Court stressed two factors: (1) the amount of information available to a discretionary appellate court; and, (2) the purpose of discretionary appellate review. In preparing for his first appeal of right, the indigent defendant, if denied counsel, would have at most a bare trial transcript, which might or might not adequately demonstrate an error below, and any sort of *pro se* brief that he might have the limited knowledge to prepare. With only this information, the appellate court would have difficulty locating errors below; hence the advice of counsel is desperately needed at this stage. When preparing for discretionary appellate review, however, the indigent criminal defendant has many more resources:

> At that stage he will have, at the very least, 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.[41]

The Court next considered the function of discretionary appellate review in the North Carolina Supreme Court[42] and noted that certiorari may be denied even though the court believes the decision of the court

37. 372 U.S. at 357.

38. 417 U.S. at 612, *quoting* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24 (1973).

39. 417 U.S. at 612, *quoting* Griffin v. Illinois, 351 U.S. 12, 23 (1956).

40. 417 U.S. at 612, *quoting* Rinaldi v. Yaeger, 384 U.S. 305, 310 (1966).

41. 417 U.S. at 615.

42. The Court stated:

> The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case . . . but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the state," or whether the decision below is in probable conflict with a decision of the Supreme Court.

Id.

of appeals to be incorrect,[43] since a decision which appears incorrect may nevertheless fail to satisfy any of the other criteria for granting certiorari.[44] The Court then noted that once a defendant's claims of error are presented in a lawyer-like fashion to the court of appeals, the North Carolina Supreme Court would have an adequate basis for ascertaining whether the case satisfies the standards of review established by the legislature.[45] The Court noted that although the indigent criminal defendant without counsel is somewhat handicapped when compared to the defendant who can afford counsel, the materials available to the reviewing court and the nature of the discretionary review in the Supreme Court of North Carolina "make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*."[46] Thus the Court concluded that North Carolina is not required by the equal protection clause of the fourteenth amendment to provide counsel to indigent criminal defendants for discretionary appellate review in the state courts.

The Court finally considered North Carolina's denial of counsel for preparation of a petition for certiorari to the United States Supreme Court. First, the Court noted that much of the discussion concerning an indigent's right to counsel in seeking discretionary state appellate review is applicable to the question of whether a state must provide counsel to an indigent criminal defendant seeking review by the United States Supreme Court. In determining whether or not to grant certiorari the United States

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43. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

44. 417 U.S. at 615. The Court also stated:

> The choice of cases to be reviewed is not left entirely within the discretion of the Supreme Court but is regulated by statutory standards. Subsection (c) of this [N.C. Gen. Stat. § 7A-31] provision states:
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> > "In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court (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."

Id. at 613–14.

45. This argument loses much of its force, however, when applied to a jurisdiction in which the accuracy of the decision below is a major criterion for determining reviewability.

In Maryland the Court of Appeals may grant certiorari whenever it finds "that review of the case . . . is desirable and in the public interest. . . ." MD. ANN. CODE, Cts. & Jud. Proc. Art., § 12–203 (1974). It may well be argued that reversing a wrong decision, especially in a serious charge where a heavy sentence has been imposed, is "desirable and in the public interest" and therefore that certiorari should be granted. Thus Maryland may be a jurisdiction where accuracy of the decision below is a major criterion the Court of Appeals considers in deciding whether or not to grant certiorari.

46. 417 U.S. at 616.

Supreme Court would have the same transcript, appellate brief, and opinion before it that a state appellate court would have on discretionary review. Also, its review, much like that of the Supreme Court of North Carolina, depends upon a number of factors other than the accuracy of the decision below. The Court finally noted that the source of the right to Supreme Court review is of federal rather than state origin, thereby rendering the *Griffin* and *Douglas* arguments inapplicable.[47] The Court acknowledged that it might be logical under the rationale of *Griffin* and *Douglas* to require that the federal government or the Court provide counsel to indigents seeking certiorari, but stated that this has not been done.[48]

The Court concluded by stating that it did not seek to discourage states from making counsel available at all stages of judicial review, but that its reading of the fourteenth amendment leaves this choice up to the individual states.[49] Thus, the judgment of the Court of Appeals for the Fourth Circuit was reversed.

Mr. Justice Douglas based his dissent[50] upon the analysis of Chief Judge Haynsworth writing for a unanimous court below.[51] He noted the Court's holding in *Douglas* and stated that he, like Chief Judge Haynsworth, "could 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.' "[52] The dissent agreed with Chief Judge Haynsworth that the "indigent defendant proceeding without counsel is at a substantial disadvantage relative to wealthy defendants represented by counsel when he is forced to fend for himself in seeking discretionary

47. There is also a significant difference between the source of the right to seek discretionary review in the Supreme Court of North Carolina and the source of the right to seek discretionary review in this Court. The former is conferred by the statutes of the State of North Carolina, but the latter is granted by statute enacted by Congress. Thus the arguments relied upon in the *Griffin* and *Douglas* cases, that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.

Id. at 417.

48. *Id. See, e.g.*, Drumm v. California, 373 U.S. 947 (1963); Mooney v. New York, 373 U.S. 947 (1963); Oppenheimer v. California, 374 U.S. 819 (1963). It is the present practice of the Supreme Court not to provide counsel for the preparation of petitions for certiorari, but to do so if certiorari is granted.

49. Maryland, by statute, currently provides for representation by the public defender or by an attorney appointed by the public defender in "all stages of the proceedings, including custody, interrogation, preliminary hearing, arraignment, trial, and appeal, if any, and shall continue until the final disposition of the cause, or until the assigned attorney is relieved by the Public Defender or by order of the court in which the cause is pending." MD. ANN. CODE art. 27A, § 4(d) (Cum. Supp. 1974). *See also* MD. R. CIV. P. 719(d).

50. Mr. Justice Brennan and Mr. Justice Marshall concurred in the dissent.

51. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973).

52. 417 U.S. at 619.

review from the State Supreme Court or from this Court."[53] The opinion also noted that it would be a relatively easy matter for the attorney who handled the first appeal to assist the indigent in filing a petition for discretionary review to a higher court.[54] Thus the dissent argued on constitutional as well as practical grounds that a state should be required to furnish counsel for indigent criminal defendants seeking discretionary appellate review.

EQUAL PROTECTION INCONSISTENCIES

The Court sought to distinguish *Ross* from *Douglas* by noting the differences between a first appeal of right and subsequent discretionary appeals. This distinction, when viewed in light of other equal protection decisions, presents certain analytical difficulties. In *Douglas,* the Court based its holding upon the foundation laid by *Griffin.*[55]

> In *Griffin v. Illinois* [citations omitted] we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There . . . the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent.[56]

The holding in *Griffin,* like the holding in *Douglas,* was based primarily upon the equal protection clause. "For there can be no equal justice where the kind of an appeal a man enjoys 'depends upon the amount of money he has.' "[57]

The holding in *Douglas* could more rationally be limited to first appeals of right if *Griffin* had also been so limited.[58] However, in *Burns v. Ohio,*[59] the Court specifically refused to limit the *Griffin* rationale to first appeals of right:

> Although the State admits that petitioner 'in truth and in fact' is a pauper, it presses several arguments which it claims distinguish *Griffin v. Illinois,* 351 U.S. 12, and justify the Ohio practice. First, the State argues that petitioner received one appellate review of his conviction in Ohio, while in *Griffin,* Illinois had left the defendant

53. *Id.* at 620.

54. *Id.* at 621.

55. The Court in *Griffin* held that equal protection required that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19.

56. 372 U.S. at 355.

57. *Id.*

58. *See* Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations,* 48 MINN. L. REV. 1, 12 (1963).

59. 360 U.S. 252 (1958). Although *Burns* dealt specifically with the constitutionality of a filing fee, the Court's logic in refusing to limit the *Griffin* rationale to initial appeals seems to apply with equal force to transcripts.

> without any judicial review of his conviction. This is a distinction without a difference for, as *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. 351 U.S. at 18, 22. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.[60]

A literal reading of *Burns* and *Griffin* might lead to the conclusion that the fourteenth amendment compels the state to provide only equal *access* to appellate review — that it does not speak to the quality of that review.[61] However, the Court in *Douglas* seemed to reject the access-only interpretation when it stated: "In either case [denial of a free transcript on appeal or denial of free counsel on appeal] the evil is the same: discrimination against the indigent."[62] Therefore, if a state is required to afford some quality of appellate review and not merely equal access to the appellate system, the question arises: why is a classification between rich and poor which affects the quality of appellate review unconstitutional when applied to a first appeal, but constitutional when applied to subsequent appeals?

The Court in *Ross* attempted to justify the transformation based upon the distinction between first appeal and subsequent discretionary appeals.[63] However, it is easily arguable that the differences between first appeals and subsequent discretionary appeals are not so great that a distinction between rich and poor which is unconstitutional in the former can be constitutional in the latter. For the indigent criminal defendant, first appeals and subsequent appeals are ultimately identical: either can reverse his conviction and set him free. As Chief Judge Haynsworth noted: "the state's highest court remains the ultimate arbiter of the rights of its citizens."[64] Since only the state's highest court can authoritatively make law, denial of counsel to indigents for discretionary appeals may leave the development of the law entirely within the hands of those who can afford counsel. Finally, "the technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate."[65] Thus the distinctions between first appeal and subsequent discretionary appeals are not so great that counsel, necessary for meaningful appellate review in the former, may be dispensed with without any great harm to the indigent in the latter.

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60. *Id.* at 257. *See also* Lane v. Brown, 372 U.S. 477, 484–85 (1963).

61. *See* Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations,* 48 MINN. L. REV. 1, 13 (1963).

62. 372 U.S. at 355.

63. See text accompanying note 41 *supra.*

64. 483 F.2d at 653.

65. *Id.*

The argument, then, is that *Ross* is inconsistent with the Court's prior equal protection holdings. *Griffin* and *Burns* hold that the equal protection clause compels the states to afford the indigent criminal defendant equal access to its appellate process — with *no* distinction between first appeals of right and subsequent discretionary appeals. *Douglas* holds that access is not enough: the states must provide for meaningful appellate review, and appointed counsel is necessary to achieve it. The distinction which the *Ross* Court draws between first appeals of right and subsequent discretionary appeals is insufficient to support the proposition that meaningful review can occur without counsel in the latter but not in the former.

A MORE FUNDAMENTAL PROBLEM

The point of the argument in the preceding section is not that the Court reached the wrong result in *Ross*. The argument seeks to show only that the equal protection analysis when applied in the area of right to counsel for indigents, has led the Court into an inconsistent position. Furthermore, the Court's application of equal protection in these cases involves a more fundamental difficulty. In *Griffin* the Court held that the refusal of the state to furnish an indigent criminal defendant with a free trial transcript where such a transcript was virtually required for appellate review deprived him of equal protection of the law. It is important to note that Illinois did not deny anyone a transcript solely because of indigency. "The state simply ignored private inequalities of wealth and offered the transcript to everyone on numerically equal terms, that is, at a price which approximated the cost of preparing it."[66] Thus the effect of the decision in *Griffin* was to require, under the guise of equal protection, that the states take affirmative action to remove economic barriers not of their own creation. Realizing that this was a severe departure from traditional notions of equal protection. Mr. Justice Harlan protested in dissent.[67] Indeed, he dissented from the use of equal protection in a few similar cases,[68] including *Douglas,* which based the right to counsel on

66. *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065, 1178 (1969).

67. The Court thus holds that, at least in this area of criminal appeals, the Equal Protection Clause imposes on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. That holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for . . . . It may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.

Griffin v. Illinois, 351 U.S. 12, 34–35 (1956) (Harlan, J., dissenting) (emphasis in original).

68. *E.g.,* Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963). In Boddie v. Connecticut, 401 U.S. 371 (1971), Mr. Justice Harlan, writing for the Court, used the due process clause, rather than the equal protection clause, to evaluate Connecticut's fee requirement for commencement of a divorce action. The Court held the fee unconstitutional when applied to indigent petitioners.

appeal primarily upon equal protection grounds.[69] In that dissent, Mr. Justice Harlan stated:

> Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States an 'affirmative duty to lift the handicaps flowing from different economic circumstances.'[70]

The central point for Mr. Justice Harlan was that the equal protection clause requires the states, absent a rational basis for classification, to treat its citizens equally. However, this requirement of equal treatment does not forbid laws which, while treating all equally, have greater *impact* on some because of their poverty:

> But it is a far different thing to suggest that this provision (the Equal Protection Clause) prevents the State from adopting a law of general applicability than may affect the poor more harshly than it does the rich . . . .[71]

A reading of the equal protection clause which forbids uniform provisions which have a more severe impact on the poor would preclude the possibility of any uniform fine or tax.[72] A parking fine of twenty dollars, for example, has a significantly greater impact on a poor person than on a rich one, but surely the equal protection clause is not offended. The impossibility of a uniform fine or tax under the Court's "impact" theory of equal protection should be taken as a *reductio ad absurdum* of that position.

The equal protection clause of the fourteenth amendment was designed to protect individuals from arbitrary and irrational discriminations on the part of the states. It cannot, however, be used to require the states to take affirmative action to lift the handicaps flowing from varying economic circumstances not of the state's own making.

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69. "In my view the Equal Protection Clause is not apposite, and its application to cases like the present one can lead only to mischievous results." *Douglas*, 372 U.S. at 361 (Harlan, J., dissenting). Perhaps one of the mischievous results to which Mr. Justice Harlan was referring is that the logical consequences of basing an indigent's rights upon this line of analysis is that a state may have to provide the indigent with *everything* that his wealthy neighbor can afford.

70. 372 U.S. at 362.

71. *Id.* at 361.

72. 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. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich.

Id. at 361–62. To say that states are required to take affirmative action to equalize economic disadvantages would, if carried to its logical end, completely cripple state governmental operation. Certainly, this is not a result envisioned by the framers.

A POSSIBLE SOLUTION

Although the equal protection clause does not require states to take affirmative action to remove handicaps resulting from economic inequality, there are nevertheless situations where it would be a denial of due process to allow such handicaps to remain.[73] It is upon the protections afforded by the due process clause that the rights of indigent criminal defendants in all areas must be based. The due process clause was designed to assure every individual a certain amount of decency and fair treatment from his government. Thus a due process inquiry would focus on whether or not an indigent criminal defendant is getting all that he is due from the state, and not on whether or not he is getting everything that his rich neighbor can afford.

This approach was taken by the Supreme Court in *Gideon.*[74] In *Gideon,* decided the same year as *Douglas,* the Court held that the right to counsel in a criminal trial was fundamental and that the states were required by the due process clause of the fourteenth amendment to provide free counsel to indigent criminal defendants at that stage.

An initial hurdle to the extension of this analysis into the area of criminal appeals is *McKane v. Durston,*[75] which was decided by the Supreme Court in 1894. In *McKane,* the Court said that due process does not require a state to provide any appellate review at all. The *Ross* Court used *McKane* to distinguish between trial, where due process requires the assistance of counsel, and appeal, where it heretofore has not:

> This difference [between trial and appeal] is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.[76]

So long as *McKane* stands, the *Gideon* due process rationale cannot be extended into the area of criminal appeals. It is difficult to contend that a state can deny all appeal to an indigent defendant, but that if it grants an appeal, due process requires the provision of counsel. The simple solution is to overrule *McKane* as an eighty-year-old anachronism. Overruling *McKane* would allow extension of the *Gideon* rationale into the area of criminal appeals and eliminate the need to rely on equal protection.

Furthermore, there are certain independent reasons for overruling *McKane.* In our complex criminal justice system fair procedure simply is not exhausted at trial. The increasingly complex state of evidentiary,

73. If the resulting inequality is so unfair that to allow it to remain would be arbitrary, capricious, or unreasonable, then the state would be constrained by due process to equalize the advantage at least to the point where such gross unfairness no longer exists. In *Douglas* and *Griffin,* however, Mr. Justice Harlan stated that the refusal of states to provide free counsel and transcripts to indigent criminal defendants did not violate due process.

74. 372 U.S. 335 (1963).

75. 153 U.S. 684 (1894).

76. 417 U.S. at 611, *citing McKane.*

constitutional and substantive aspects of criminal law, coupled with overcrowded trial dockets, make the possibility of error at the trial stage far greater than it was in 1894. It is submitted that a criminal defendant is now due at least one review of his trial. The Court in *Ross* noted that "no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent . . . ."[77] In 1975 no state should be able to successfully contend that it can do away with its appellate system in its entirety, thereby leaving life, liberty, and property within the unfettered control of a single judge and jury.

Once *McKane* is overruled, the *Gideon* due process rationale can be extended to criminal appeals, and *Griffin, Douglas, Gideon, Burns* and *Ross* can all be logically reconciled. It can easily be contended that fairness requires a state to provide an indigent with a free transcript or free access to every stage of its appellate system. This, after all, costs the state relatively little. However it might strain the notions of fairness and decency to require a state to go further and provide free counsel to the indigent at *every* step along the way. This is where the advantage of due process over equal protection becomes apparent. One need not show that indigents on first appeal and indigents on subsequent discretionary appeals are so different that it is rational within the context of equal protection to classify — and therefore treat — them differently. One merely needs to show that while fairness requires counsel on first appeal it is not so unfair as to violate due process not to provide counsel on subsequent discretionary appeals. In this context the Court's arguments concerning the additional information available to a subsequent reviewing court and the discretionary nature of such a court have more merit. These factors, coupled with the fact that the indigent defendant has already had one appeal with counsel, might reduce any unfairness resulting from a state's refusal to supply counsel for subsequent discretionary appeals to the point where due process is not offended. Thus, with *McKane* overruled, *Gideon, Douglas, Griffin, Burns* and *Ross* could all be reconciled.

CONCLUSION

The Court in *Ross v. Moffitt* reached the rather pragmatic conclusion that states are not required to provide free counsel to indigent criminal defendants seeking subsequent discretionary appellate review. This conclusion is, however, arguably inconsistent with the Court's prior equal protection holdings in *Griffin, Burns,* and *Douglas.* Furthermore, the entire use of equal protection in the area of criminal appeals is inapposite and can only lead to absurd or illogical conclusions. This note has attempted to demonstrate that due process, rather than equal protection, should determine the rights of indigent criminal defendants. Because fairness is an inherently more flexible standard than equality, due process would allow the Court to achieve a proper result without offending logic.

77. *Id.*