10-1973

Ross v. Moffitt

Lewis F. Powell Jr.

Grant

DISCUSS

CA 4 held that right to free counsel on appeal where appeal lies only on discretionary matter (e.g. writ of error or pet. for cert) is same as where appeal is matter of right.

Far reaching decision which would extend Douglas v. Calif.

There is conflict with CA 7 & CA 10

PRELIMINARY MEMO

Jan. 4 Conf.
List 1, Sheet 3

No. 73-786

ROSS (N. Carolina)

v

MOFFITT (prisoner)

Cert to CA 4
(Haynsworth, Craven, Butzner)

Federal/ Habeas corpus

Timely

Remarkable Haynsworth opinion. See holding on p. 4 of memo. Grant, unless the Court is so sure J. Haynsworth is right that the issue can be ducked (which I really doubt). Owens

1. Resp was convicted of forgery and uttering a forged instrument in Mecklenburg County, N.C. With the assistance of appointed counsel, he appealed to the N.C. Ct App which affirmed his conviction. His counsel informed him that the court would not appoint him to represent resp to file a petn for cert in the N.C. SC. Resp sought to prepare his own petn which was denied because of tardiness. After exhausting his state post-conviction remedies, resp filed a writ of HC in USDC W.D. N.C. alleging that the refusal to appoint him counsel was a denial of a federal constitutional right.

Resp was also convicted in Guilford County, N.C of forgery and uttering a forged instrument. With the assistance of the public defender he appealed to the Ct App NC which affirmed his conviction. The public defender was authorized to prepare and file a petn of cert in the SC of N.C. The state AG's motion to dismiss on the ground that no substantial constitutional question was presented was granted. Resp unsuccessfully sought in the superior court and the ct app to have counsel appointed to file a cert petn to this Court. Resp then sought habeas corpus relief in USDC M.D. N.C. and upon denial of relief there, appealed to the CA-4.

2. REASONING OF THE CA 4: The Mecklenburg and Guilford convictions were joined in a single opinion in the CA. The court prefaced its opinion with the statement that this case presented the issue reserved in Douglas v California, 372 US 353, the constitutional right to appointed counsel for an indigent criminal defendant in a discretionary or permissive appeal.

The CA noted that N.C. law provided for an appeal of right from the superior court to the ct app, but there was an appeal of right to the highest state court only in cases involving a substantial constitutional question or where the criminal sentence is death or life imprisonment. In cases like the present one there was only a discretionary right of review by the state sc. The CA also mentioned that in the Guilford conviction resp had been appointed counsel to file a cert petn to the NC SC whereas in the Mecklenburg conviction counsel had been denied. The court concluded that there were no

guidelines to be followed by state judges. However, the court found that the record was insufficient for a finding that the administration of the NC statutes effected a denial of equal protection to some indigent appellants.

The court reasoned that it was continuing where Douglas left off and that there was "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." Discretionary review procedures are necessary for courts to control their dockets, but "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." If, as Douglas holds, deprivation of counsel to an indigent seeking appeal of a felony conviction to an intermediate court "so dilutes the quality of justice that it amounts to a deprivation of due process or equal protection, denial of counsel as he seeks access to the state's highest court would seem a similar and comparable deprivation."

The CA asknowledged that its opinion conflicted with Pennington v Pate, 409 F2d 757 (CA 7, 1969) and Peters v Cox, 341 F.2d 575 (CA 10 1965). The court stated that times change and what is requisite today may not have been required ten years ago or even a few years ago. The court cites the Betts-Gideon-Argersinger development. The court concluded that the result they reached was consistent with Douglas:

> "The majority opinion [in Douglas] talks in terms of equality. If the holding be grounded on the equal

> protection clause, inequality in the circumstances of these cases is as obvious as it was in the circumstances of Douglas. If the holding in Douglas were grounded on the due process clause...due process encompasses elements of equality. There simply cannot be due process of law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain professional assistance and to be benefited by it." (CA op, petn appx. 21-22)

The court held that an indigent criminal defendant with a federal claim must be provided with legal assistance in taking a discretionary appeal (the preparation of a cert petn to this Court or a state appellate court). The court emphasized that nothing said in the opinion has "application in any collateral, civil proceeding, though it may call into question the validity of a previous criminal conviction."

The Mecklenburg case was remanded to the DC with instructions to issue the writ of habeas corpus, unless within a reasonable time, NC shall provide resp with the assistance of counsel to file a cert petn to the state SC, and provided that court shall receive the petn and not dismiss it as untimely. The Guilford case was remanded to the DC with directions to examine the contentions made by resp in the SC of NC and to grant the writ of habeas corpus, if, in the SC of NC, resp asserted a substantial federal question reviewable by this Court on a writ of cert. The court added that "ordinarily an inferior court should not withhold counsel because it thinks a particular question reviewable by a higher appellate court lacks substantiality", but in the circumstances of this case where the issue arises in a HC proceeding and "the only remedy available ... would be the prisoner's release...we think it appropriate."

3. CONTENTIONS: Petr State of N.C. contends that the petn should be granted because the CA opinion conflicts with this Court's opinion in Douglas and the Pennington and Cox cases. It is asserted that the CA decision raises serious problems affecting the structure of criminal justice. Counsel will have to be provided in the second tier of discretionary review in a multi-tier system or beyond the appeal as of right in a single-tier system; counsel must be provided in all petns for cert. to this Court. The impact of this holding upon state and federal courts is obvious.

The resp contends that this is simply the logical extension of Douglas and that the Pennington and Cox cases were prior to this Court's opinion in Argersinger. Therefore, any conflict is "merely illusory."

4. DISCUSSION: The question is obviously of considerable importance and the conflict is real. Assuming the CA opinion is correct, the petn still warrants plenary review by this Court.

There is a response and an amicus curiae brief in support of the petn by the State of Virginia.

12/11/73 Sharp CA 4 op in petn appx.

Conference 1-4-74

Court CA - 4 .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 73-786

Submitted ...., 19... Announced ...., 19...

FRED R. ROSS AND NORTH CAROLINA, Petitioners

vs.

CLAUDE FRANKLIN MOFFITT

11/15/73 Cert. filed.

C.J. thinks CA 4 is "dead" wrong in extending Douglas.

White says in Fed. criminal cases, amend. to statute has settled the issue.

Brennan says CA 4 in conflict with Douglas - but others say Douglas left it open.

Stewart says this is pandora box.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING	Vote on motion to Dispense
Rehnquist, J.		✓												Granted
Powell, J.		✓												5 to 4
Blackmun, J.		✓												
Marshall, J.		✓												
White, J.		✓												
Stewart, J.		✓												
Brennan, J.		✓												
Douglas, J.			✓											
Burger, Ch. J.		✓												

April 20, 1974 Owens

Excellent memo.

LFP

No. 73-786 Ross v. Moffitt

This case presents the issue whether the right to appointed counsel extends to discretionary appellate review (sometimes referred to as the second appeal). In essence, the question is whether an indigent has a right to the assistance of counsel in the preparation of a cert petition, when that petition is to be presented to the highest state court or this Court.

It is important to understand the North Carolina system for appointing counsel in criminal cases for the purposes of appellate review. Judge Haynsworth describes this with clarity, and you should be sure to have that under your belt before you vote. In NC, there is a right of direct appeal to the highest state court in all criminal cases in which the sentence is death (at the moment there are no such cases, due to Furman) or life imprisonment. In all other cases, there is an automatic right of appeal to the intermediate state appellate courts. There is then a further automatic right of appeal to the highest state court in noncapital cases if (1) the case raises a substantial question of federal or state constitutional law (this determination is apparently made by the intermediate appellate court--you should attempt to clarify this at oral argument*) or (2) if there is a dissent at the intermediate appellate court. If there is no substantial question or no dissent, review in the highest state court is discretionary--apparently the system is very similar to a petition for cert in this Court.

ask

Whenever state law provides an automatic right of appeal, it also provides for appointed counsel in preparing

* S/Court of N.C. makes this decision -i.e. whether there is a sub. quest. Q

the appeal papers and in arguing the appeal. Furthermore, if the highest state court grants a cert petition, it apparently provides counsel to argue the case. What is at issue here is whether counsel ought to be provided to prepare a petition for cert. Due to the facts of this case, that issue comes up not only with regard to cert before the NC SC but also before this Court.

This is a state criminal defendant seeking cert before this Court (as well as before the state SC in another criminal case). To date, this Court has not required the assistance of counsel for indigents in seeking cert from state criminal convictions. But apparently the law has developed to the point that a petitioner seeking review from the affirmance of a federal conviction must have the assistance of appointed counsel. This is a result of the 1970 amendment to the Criminal Justice Act of 1964. See Doherty v. United States, 404 U.S. 28 (1971), which you must review before you vote in this case. There the Court did not explicitly decide the issue--rather it remanded the question PC to the CAs to let them decide it in the first instance. But Justice Douglas filed a concurring opinion in which he expressed the view that the 1970 amendment means that a federal criminal defendant, if indigent, must have the assistance of counsel in the preparation of a cert petition. So, today we may have a system under which federal criminal defendants get appointed counsel in preparing cert petitions to this Court, but state criminal defendants do not. That disparity is a product of a federal statute, assuming that Justice Douglas had read the federal statute correctly.

With regard to deciding the abstract issue presented by this case (does the right to counsel extend to discretionary review, where counsel has been provided on the first, or automatic, appeal), your vote is controlled by your separate opinion in Argersinger v. Hamlin, 407 U.S. 25 (1972), and by [redacted] Rodriguez. (Be sure to reread Argersinger before voting.) But there is an underbrush issue here that may decide the case without regard to how the Court comes out on the main issue. I will deal with the underbrush issue last.

Due Process considerations.

It is impossible to tell whether the key case here, Douglas v. California, 372 U.S. 353 (1963), is a due process case or an equal protection case. (Douglas held that appointed counsel must be provided on the first, or automatic, appeal. It reserved the question presented here.) This explains why Judge Haynsworth in the opinion below waffles on revealing the [redacted] constitutional clause that underlies his result. The author of the Douglas opinion, J. Douglas, left [redacted] the issue murky. J. Harlan, joined in dissent by J. Stewart, said it had to be due process. This is probably right, but the Court in this case will have to address both due process and equal protection.

Your due process position is established by your opinion in Argersinger. The right to have appointed counsel varies in direct relationship to the importance of counsel to the task at hand. Under that standard, there is no requirement for appointed counsel here. NC has adopted a rational system for

screening cases to isolate those where counsel is truly required--those cases in which the state grants an automatic right of appeal to the highest state court. And in those cases the state grants counsel. If a case is not important enough to be certified as raising a substantial question or to provoke a dissent at the intermediate court of appeals, then the chances that it is of any moment are remote and the need for counsel is not very great (particularly since counsel has already taken part in presenting the case to the intermediate court of appeals).

Equal Protection considerations.

Wealthy defendants presumably retain counsel for all cert petitons. As a matter of equal protection, must the state therefore extend counsel to all indigents? No. The state has no affirmative duty to eliminate economic disparities, in the absence of a suspect classification (and wealth is not a suspect classification--Rodriguez) or the infringement of a fundamental right. The right to counsel is a fundamental right, but that right can be found to exist here only if the above due process question is decided contrary to the way you would decide it under your Argersinger approach. The Equal Protection clause does not create the right, because as you said in Rodriquez it is not the office of the Court to create fundamental rights in the name of extending equal protection of the law. The state has extended the right to seek cert to all, regardless of wealth. Since no fundamental right or suspect class is at issue, there is no equal protection violation. Certainly the system is not irrational, either, as noted above.

Yick Wo--Equal Protection as-applied.

Be sure to note the early portion of J. Haynsworth's opinion, where he talks about a submerged issue lurking in the case. Although there is, under state law, no requirement to appoint counsel on cert petitions, apparently as a matter of practice counsel are sometimes appointed. The record apparently does not permit a determination of when this happens, how often, for what reason, etc. If the state is extending counsel as a sometime thing, that may well be irrational under traditional equal protection analysis. No matter how this case comes out in principle, it probably ought to be remanded for an evidentiary hearing on this issue.

No. 73-786 ROSS v. MOFFITT (For State of N.C.) Whether counsel must be provided where appeal is not of right. Argued 4/22/74

See Owen memo. of 4/20 for facts & issues.

Case involves two petitions (1) for Cert to S/Ct of N. C. & (2) for Cert. to this Ct.

Safron (Cert A/G N.C.)

CA 4 drew analogy bet. Va & N.C. – but there is no analogy because N.C. system is different.*

Practice in fact is that Petitioner, after losing in Ct/appls, usually files two petitions: (1) one for writ of cert., & (2) one for appeal as matter of right on ground that there is conct. Q.

good point | Pet. for Cert. is not a critical state (Kirby; Simmons). A criminal Δ who is denied appeal can go at once to post conviction remedies or Fed Ct/C

* I agree Va & N. C's procedures differ substantially.

Safrit (cont)

96% of I.F.P. petitions filed in this Court are denied - most because frivolous.

True | If free counsel is provided, this Court will receive petitions for Cert ~~from~~ in a much higher % of cases decided in state courts.

$3.2 were appropriated by N.C. Leg. to pay counsel for indigents this year!

Anderson (for Resp)

Relies on both E/P & D/P

CA 6 has now joined CA 4 - other circuits have not extended Griffin v Colif

No claim is made that counsel or collateral proceedings is required by Court.

Rehnquist noted that Resp's position is stronger as to petition to N.C. S/Ct than as to pet. to this Court - as latter is provided by Congress not N.C. Counsel did'nt agree

Emphasized denial of E/P. Even on 4th or 5th appeal an indigent should not have an advantage over one who can afford counsel. But wealth is not a suspect classification

Anderson (cont).

C/J asked whether counsel also must be provided on motion for rehearing? Anderson ~~answered~~ answered "yes".

Sapp (Rebuttal)

N.C.'s right to counsel statute amended at last session of Leg.

Num. only 8 here in the Court. one.

No. 73-786, ROSS v. MOFFITT Conf. 4/23/74

The Chief Justice Absent

Douglas, J. Affirm

Lawyer must be provided — both in N.C. & Fed. System.

Brennan, J. Affirm

If we extend Gideon to states obviously counsel must be provided on Fed. cert.

Criminal Justice Act was amended to apply to Fed H/C. Thus, a state Δ after exhaustive state remedies may go to Fed H/C & have counsel appointed there.

But despite all else, 6th Amend requires counsel.

Stewart, J. Reverse

not ~~not~~ whether Douglas Calif or E/P or D/P

Would extend Douglas to Va system to provide 1st appeal.* But a 3rd tier of courts is different. Thus ~~[redacted]~~ 3rd court is not a court of error. Thus no right to counsel for 3rd tier.

* Not before us in this case.

White, J. Reverse

Marshall, J. Affirm

Blackmun, J. Reverse
Judgment

Powell, J. Reverse

N.C. system is adequate.

I agree with Potter that a rational solution is to extend Douglas to 1st appeal. ~~Re~~ Counsel is provided for him in N.C.

Rehnquist, J. Reverse

Agree with Potter

I would join

Jack

[I presume the Conference chose not to reach the Kirk two "as-applied" issue noted at the end of my earlier memo.]

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

Circulated: 6-4-74

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 73-786

Fred R. Ross and North Carolina, Petitioners, *v.* Claude Franklin Moffit. } On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[June —, 1974]

Reviewed 6/4-5

Join

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are asked in this case to decide whether *Douglas* v. *California*, 372 U. S. 353 (1963), which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications for review in this Court. The Court of Appeals for the Fourth Circuit held that such appointment was required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1]

I

The case now before us has resulted from consolidation of two separate cases, North Carolina criminal prosecutions brought in the respective circuit courts for the counties of Mecklenburg and Guilford. In both cases respondent pled not guilty to charges of forgery and uttering a forged instrument, and because of his indigency was represented at trial by court-appointed counsel. He then took separate appeals to the North Carolina Court of Appeals, where he was again repre-

[1] *Moffitt* v. *Ross*, 483 F. 2d 650 (1973).

sented by court-appointed counsel, and his convictions were affirmed.[2] At this point the procedural histories of the two cases diverge.

Following affirmance 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 for that petition. Respondent sought collateral relief in both the state and federal courts, first raising his right to counsel contention in a habeas corpus petition filed in the United States District Court for the Western District of North Carolina in February 1971. Relief was denied at time, and respondent's appeal to the Court of Appeals for the Fourth Circuit was dismissed by stipulation in order to allow respondent to first exhaust state remedies on this issue. After exhausting state remedies, he reapplied for habeas relief, which was again denied. Respondent appealed that denial to the Court of Appeals for the Fourth Circuit.

Following his conviction on the Guilford County charges, respondent also sought discretionary review in the North Carolina Supreme Court. On this appeal, however, respondent was not denied counsel but rather was represented by the public defender who had been appointed for the trial and respondent's first appeal. The North Carolina Supreme Court denied certiorari.[3] Respondent then unsuccessfully petitioned the Superior Court for Guilford County and the North Carolina Court

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[2] *State* v. *Moffitt*, 9 N. C. App. 694, 177 S. E. 2d 234 (1970) (Mecklenburg); *State* v. *Moffitt*, 11 N. C. App. 337, 181 S. E. 2d 184 (1971) (Guilford).

[3] *State* v. *Moffitt*, 279 N. C. 396, 183 S. E. 2d 247 (1971).

of Appeals for court-appointed counsel to prepare a writ of certiorari to this Court. After these motions were denied, respondent again sought federal habeas relief, this time in the United States District Court for the Middle District of North Carolina. That court denied relief, and respondent took an appeal to the Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the two District Court judgments, holding that respondent was entitled to the assistance of counsel at state expense both on his petition for review in the North Carolina Supreme Court and on his petition for review in this Court. Reviewing the procedures of the North Carolina appellate system and the possible benefits that counsel would provide for indigents seeking review in that system, the court stated:

> "As long as the state provides such procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court." [4]

This principle was held equally applicable to petitions for review in this Court. For, said the Court of Appeals, "[t]he same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." [5]

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[4] 483 F. 2d, at 654.

[5] 483 F. 2d, at 655. The court then decided to remand the case to the District Court to "appraise the substantiality of the federal claim." The court noted that it had no opportunity to examine the papers filed in the State Supreme Court and said that "[i]n the circumstances of this case . . . , where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus," it was appropriate for the District Court to determine whether respondent's claim was "patently frivolous." 483 F. 2d, at 655.

We granted certiorari, — U. S. —, to consider the Court of Appeals' decision in light of *Douglas* v. *California, supra,* and apparently conflicting decisions of the Court of Appeals for the Seventh and Tenth Circuits.[6] For the reasons hereafter stated we reverse the Court of Appeals.

II

This Court, in the past 20 years, has given extensive consideration to the rights of indigent persons on appeal. In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), the first of the pertinent cases, the Court had before it an Illinois rule allowing a convicted criminal defendant to present claims of trial error to the Supreme Court of Illinois only if he procured a transcript of the testimony adduced at his trial.[7] No exception was made for the indigent defendant, and thus one who was unable to pay the cost of obtaining such a transcript was precluded from obtaining appellate review of asserted trial error. Mr. Justice Frankfurter, who cast the deciding vote, said in his concurring opinion:

> ". . . Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court." 351 U. S., at 22.

The Court in *Griffin* held that this discrimination violated the Fourteenth Amendment.

Succeeding cases invalidated similar financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants. *McKane* v. *Durston,* 153 U. S. 684 (1894). The cases encompassed

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[6] See *Pennington* v. *Pate,* 409 F. 2d 757 (CA7); *Peters* v. *Cox,* 341 F. 2d 575 (CA10).

[7] See 351 U. S., at 13 n. 2.

a variety of circumstances but all had a common theme. For example, *Lane* v. *Brown,* 372 U. S. 477 (1963), involved an Indiana provision declaring that only a public defender could obtain a free transcript of a hearing on a *coram nobis* application. If the public defender declined to request one, the indigent prisoner seeking to appeal had no recourse. In *Draper* v. *Washington,* 372 U. S. 487 (1963), the State permitted an indigent to obtain a free transcript of the trial at which he was convicted only if he satisfied the trial judge that his contentions on appeal would not be frivolous. The appealing defendant was in effect bound by the trial court's conclusions in seeking to review the determination of frivolousness, since no transcript or its equivalent was made available to him. In *Smith* v. *Bennett,* 365 U. S. 708 (1961), Iowa had required a filing fee in order to process a state habeas corpus application by a convicted defendant, and in *Burns* v. *Ohio,* 360 U. S. 252 (1959), the State of Ohio required a $20 filing fee in order to move the Supreme Court of Ohio for leave to appeal from a judgment of the Ohio Court of Appeals affirming a criminal conviction. Each of these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment.

These decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. In *Douglas* v. *California,* 372 U. S. 353 (1963), however, a case decided the same day as *Lane* and *Draper, supra,* the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent's access to the appellate system was adequate. The Court

in *Douglas* concluded that a State does not fulfill its responsibility towards indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right. It is this decision we are asked to extend today.

Petitioners in *Douglas*, each of whom had been convicted by a jury on 13 felony counts, took appeals as of right to the California District Court of Appeal. No filing fee was exacted of them, no transcript was required in order to present their arguments to the Court of Appeals, and the appellate process was therefore open to them. Petitioners, however, claimed that they not only had the right to make use of the appellate process, but that they were entitled to court-appointed and state-compensated counsel because they were indigent. The California appellate court parsed the trial record on its own initiative, following the then existing rule in California, and concluded that "no good whatever could be served by appointment of counsel." 372 U. S., at 355. It therefore denied petitioners' request for the appointment of counsel.

This Court held unconstitutional California's requirement that counsel on appeal would be appointed for an indigent only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. The Court noted that under this system an indigent's case was initially reviewed on the merits without the benefit of any organization or argument by counsel. By contrast, persons of greater means were not faced with the preliminary "*ex parte* examination of the record," 372 U. S., at 356, but had their arguments presented to the Court in fully briefed form. The Court

noted, however, that its decision extended only to initial appeals as of right, and went on to say:

> "We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Griffin* v. *Illinois, supra*, p. 18. Absolute equality is not required; lines can be and are drawn and we often sustain them." 372 U. S. 356–357.

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 of the Due Process Clause of that Amendment.[8] Neither clause by itself

[8] The Court of Appeals in this case, for example, examined both possible rationales, stating:

"If the holding [of *Douglas*] be grounded on the equal protection clause, inequality in the circumstances of these cases is as obvious as it was in the circumstances of *Douglas*. If the holding in *Douglas* were grounded on the due process clause, and Mr. Justice Harlan in dissent thought the discourse should have been in those terms, due process encompasses elements of equality. There simply cannot be due process of the law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain profes-

provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "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.

III

Recognition of the due process rationale in *Douglas* is found both in the Court's opinion and in the dissenting opinion of Mr. Justice Harlan. The Court in *Douglas* stated that "[w]hen an individual is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." 372 U. S., at 357. Mr. Justice Harlan thought that the due process issue in *Douglas* was the only one worthy of extended consideration, remarking: "The real question in this case, I submit, and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure guaranteed by the Due Process Clause." 372 U. S., at 363.

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. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel at his trial is funda-

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sional assistance and to be benefited by it. The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." 483 F. 2d, at 655.

mental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court or jury seeking to persuade them of the defendant's guilt. Under these circumstances ". . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright,* 372 U. S., at 344.

By contrast, it is ordinarily 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. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference 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. *McKane* v. *Durston, supra.* The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the

way. *Douglas* v. *California, supra.* Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty. That question is more profitably considered under a equal protection analysis.

IV

Language invoking equal protection notions is prominent both in *Douglas* and in other cases treating the rights of indigents on appeal. The Court in *Douglas,* for example, stated:

> "[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis in original.) 372 U. S., at 357.

The Court in *Burns* v. *Ohio, supra,* stated the issue in the following terms:

> "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." 360 U. S., at 257.

Despite the tendency of all rights "to declare themselves absolute to their logical extreme," [9] there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District* v. *Rodriquez,* 411 U. S. 1, 24 (1973), nor does it require the State to "equalize economic conditions." *Griffin* v. *Illinois, supra,* at 23 (Frankfurter, J., concurring). It does require that the state appellate sys-

[9] *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908).

tem be "free of unreasoned distinctions," *Rinaldi* v. *Yaeger*, 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adverserial system. *Griffin* v. *California*, *supra*; *Draper* v. *Washington*, *supra*. The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane* v. *Brown*, *supra*, at 481, nor extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas* v. *California*, *supra*, at 358. The question is not one of absolutes, but one of degrees. In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for review in this Court.

A. The North Carolina appellate system, as are the appellate systems of almost half the States,[10] is multitiered, providing for both an intermediate Court of Appeals and a Supreme Court. The Court of Appeals was created effective January 1, 1967, and, like other state courts of appeals, was intended to absorb a substantial share of the case load previously burdening the Supreme Court. In criminal cases, an appeal as of right lies directly to the Supreme Court in all cases which involve a sentence of death or life imprisonment, while an appeal of right in all other criminal cases lies to the Court of Appeals. N. C. Gen. Stat. § 7A–27. A second appeal of right lies to the Supreme Court in any criminal case "(1) [w]hich directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) [i]n which there is a dissent, . . ." N. C.

[10] See Brief for Respondent, p. 9 n. 5.

Rev. Stat. § 7A–30. All other decisions of the Court of Appeals on direct review of criminal cases may be further reviewed in the Supreme Court on a discretionary basis.

The statute governing discretionary appeals to the Supreme Court is N. C. Rev. Stat. § 7A–31. This statute provides, in relevant part, that "[i]n any cause in which appeal has been taken to the Court of Appeals . . . the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals." The statute further provides that "[i]f the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals." 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 provision states:

> "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."

Appointment of counsel for indigents in North Carolina is governed by N. C. Rev. Stat. § 7A–450 *et seq.* These provisions, although perhaps on their face broad enough to cover appointments such as respondent sought here,[11] have generally been construed to limit the right to

[11] For example, subsection (b)(6) of § 7A–451, effective at the time of respondent's appeals, provides for counsel on "[d]irect

appointed counsel in criminal cases to direct appeals taken as of right. Thus North Carolina has followed the mandate of *Douglas* v. *California, supra,* and authorized appointment of counsel for a convicted defendant appealing to the intermediate court of appeals, but has not gone beyond *Douglas* to provide for appointment of counsel for a defendant who seeks either discretionary review in the Supreme Court of North Carolina or a writ of certiorari here.

B. The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims "had once been presented by a lawyer and passed upon by an appellate court." *Douglas* v. *California, supra,* 372 U. S., at 356. We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. 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

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review of any judgment or decree, including review by the United States Supreme Court of final judgments rendered by the highest court of North Carolina in which decision may be had." But this provision apparently has not been construed to allow counsel for permissive appellate procedures. See *Moffitt* v. *Ross,* 483 F. 2d 650, 652 (1973).

adequate basis on which to base its decision to grant or deny review.

We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. 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, see *Griffin* v. *Illinois, supra,* 351 U. S., at 18, 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. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, see *Peasley* v. *Virginia, Iron Coal Coke Co.,* 282 N. C. 585, 194 S. E. 2d 133 (1973), since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above. Once a defendant's claims of error are organized and presented in a lawyer-like 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.

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals

and the nature of 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*. And the 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 purchased by a wealthy criminal defendant in his pursuit of appellate success, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system.

V

Much of the discussion in the preceding section is equally relevant to the question of whether a State must provide counsel for a defendant seeking review of his conviction in this Court. North Carolina will have provided counsel for a convicted defendant's only appeal as of right, and the brief prepared by that counsel together with one and perhaps two North Carolina appellate opinions will be available to this Court in order that it may decide whether or not to grant certiorari. This Court's review, much like that of the Supreme Court of North Carolina, is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.

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 statutes enacted by Congress.

Thus the argument 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.

The suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority. It would be quite as logical under the rationale of *Douglas* and *Griffin*, and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek certiorari here to review state judgments of conviction. Yet this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for certiorari in this Court. See, *e. g.*, *Drum* v. *California*, 373 U. S. 947 (1963); *Mooney* v. *New York*, 353 U. S. 947 (1963); *Oppenheimer* v. *California*, 374 U. S. 819 (1963). In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so.

VI

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 appeal. 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. North Carolina, for example, while it does not provide counsel to indigent defendants seeking discretionary review on appeal, does provide counsel for indigent prisoners in several situations where such appointments are not required by any constitutional decision of this Court.[12] Our reading of the Fourteenth Amendment leaves these choices to the State, and respondent was denied no right secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review.

The judgment of the Court of Appeals' holding to the contrary is

Reversed.

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[12] Section 7A–451 (a) of the N. C. General Statutes provides:

"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

"(1) Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollars ($500.00) fine;

"(2) A hearing on a petition for a writ of habeas corpus under chapter 17 of the General Statutes;

"(3) A post-conviction proceeding under chapter 15 of the General Statutes;

"(4) A hearing for revocation of probation, if counsel was provided at trial or if confinement of more than six months is possible as a result of the hearing;

"(5) A hearing in which extradition to another state is sought;

"(6) A proceeding for judicial hospitalization under chapter 122, article 11 (Mentally Ill Criminals), of the General Statutes;

"(7) A civil arrest and bail proceeding under chapter 1, article 34, of the General Statutes; and

"(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible."

[c. JUNE 4, 1974]

No. 73-786 Ross v. Moffitt

Suggested substitute for next to last sentence in Part IV. (p. 15)

"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."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1974

RE: No. 73-786 Ross v. Moffit

Dear Bill:

Will you please add at the foot of your opinion the following:

"Mr. Justice Brennan dissents and would affirm the judgment of the Court of Appeals for the reasons stated in the opinion of Chief Judge Haynsworth, 483 F. 2d 650 (1973)."

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1974

Re: No. 73-786, Ross v. Moffit

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1974

Dear Bill:

In 73-786, ROSS v. MOFFIT would you kindly add me to Bill Brennan's one line dissent in this case?

William O. Douglas

Mr. Justice Rehnquist

cc: The Conference

June 5, 1974

No. 73-786 Ross v. Moffit

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1974

Re: No. 73-786 - Ross v. Moffit

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1974

Re: No. 73-786 - Ross v. Moffitt

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1974

Re: No. 73-786 -- Major Fred R. Ross v. Moffitt

Dear Bill:

Please join me in your dissent in this one.

Sincerely,

T.M.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1974

Re: 73-786 - Ross v. Moffitt

Dear Bill:

Please join me.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 12, 1974

RE: No. 73-786 Ross v. Moffitt

Dear Bill:

Please join me in your dissent. If you can see your way clear to dropping the word "substantial" in the second line, I'll withdraw my dissenting statement which you have previously joined.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
								4/30/74
Join WHR. 6-12-74	Join WB 6-4-74 Dissent 6-11-74 1pt draft 6-13-74	Dissents (add at bottom of opinion) 6-4-74 Join WOD 6-12-74	Join WHR 6-4-74	Join WHR 6-5-74	Join WOD in Dissent 6-11-74	Join WHR 6/6/74	Join WHR 6-5-74	1st Draft 6-4-74 2nd draft 6/7/74
					73-786 Ross v. Moffitt			