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Ross v. Moffitt: The End of the Griffin-Douglas Line

In 1963, in the landmark case of *Douglas v. California*,¹ the Supreme Court declared that an indigent defendant had a constitutional right to the assistance of counsel on appeal. In the course of its opinion, the majority stated that there could "be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"² Although this statement could be used to support much wider implications, the holding was expressly limited to the assistance of counsel on the first appeal of right,³ the only issue before the Court.⁴

The *Douglas* decision generated significant controversy and commentary.⁵ Since the Court had restricted the reach of the holding, one major focus of the commentary was the extension of the right to the assistance of counsel to further appeals.⁶ Five federal courts of appeals and at least one state supreme court addressed the question with differing results.⁷ Finally,

1. 372 U.S. 353 (1963).

2. *Id.* at 356, quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

3. The oft-quoted limiting passage was: "We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike, from a criminal conviction." *Id.* at 356 (citation omitted).

4. The petitioners in *Douglas* challenged the state practice of the appellate court first conducting an independent review of the record of an indigent's trial before passing on a request for the assistance of counsel.

5. See, e.g., Bennett, *Right to Counsel—A Due Process Requirement*, 23 LA. L. REV. 662 (1963); Clark, *The Sixth Amendment and the Law of the Land*, 8 ST. LOUIS L.J. 1 (1963); Fontron, *Appellate Counsel for the Indigent Accused*, 6 WASHBURN L.J. 417 (1967); Mazor, *The Right to be Provided Counsel: Variation on a Familiar Theme*, 9 UTAH L. REV. 50 (1964).

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

7. See *Mitchell v. Johnson*, 488 F.2d 349 (6th Cir. 1973) (refusal to appoint counsel to assist indigent in preparing application for discretionary review to state supreme court violated constitutional rights); *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973) (indigent defendant entitled to assigned counsel in seeking discretionary review in state's highest court and in United States Supreme Court); *United States ex rel. Pennington v. Pate*, 409 F.2d 757 (7th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (refusal to appoint counsel on appeal to state's highest court not violative of indigent's rights); *Peters v. Cox*, 341 F.2d 575 (10th Cir.), *cert. denied*, 382 U.S. 863 (1965) (refusal of state supreme court to appoint counsel to assist in appeal to United States Supreme Court not violative of the Constitution); *United States ex rel. Coleman v. Denno*, 313 F.2d 457 (2d Cir.) (decided two months prior to *Douglas*), *cert. denied*, 373 U.S. 919 (1963) (two months after *Douglas*) (furnishing of counsel at all stages of the state appellate system except in post-conviction action in federal system, including writ of certiorari to the Supreme Court, upheld as satisfying the *Griffin* principle). The state supreme court decision that directly considers the issue is *Hutchins v. State*, 504 S.W.2d 758 (Tenn. 1974) (indigent defendant entitled to assistance of counsel when seeking discretionary appeal).

last term, the Supreme Court resolved the issue in *Ross v. Moffit*.⁸ The Court held that the rule requiring appointment of counsel on the first appeal as of right did not extend to further discretionary state appeals or to applications for review in the Supreme Court.

Respondent Moffitt, an indigent, was originally tried and convicted of felonies in two separate North Carolina state court actions.⁹ On his appeals of right, the convictions were affirmed.¹⁰ Following further action in the state courts,¹¹ he sought writs of habeas corpus in two federal district courts,¹² alleging a denial of a constitutional right in the state's refusal to appoint counsel to assist him in seeking discretionary review. Both district courts refused to issue the writs. On appeal to the Fourth Circuit, the cases were merged and a constitutional right to the assistance of appointed counsel on discretionary appeals was found.¹³ The Supreme Court granted certiorari and reversed the court of appeals, restricting the right of appointed counsel to the first appeal of right.¹⁴

This Note will examine this denial of the extension of the right to assistance of counsel on second or discretionary appeals in light of the right to such assistance on the first appeal of right as guaranteed by *Douglas*. If an indigent defendant has the right to counsel on the first appeal, why do constitutional dictates not require that this right extend to subsequent appeals?

I. THE *Griffin-Douglas* LINE

Although Supreme Court jurisdiction to review and thereby directly in-

8. 417 U.S. 600 (1974).

9. Moffitt was convicted of forging and uttering forged instruments in two different North Carolina counties, Mecklenburg and Guilford.

10. See *State v. Moffitt*, 11 N.C. App. 337, 181 S.E.2d 184 (Ct. App. 1971) (Guilford); *State v. Moffitt*, 9 N.C. App. 694, 177 S.E.2d 324 (Ct. App. 1970) (Mecklenburg).

11. In the Mecklenburg County case, Moffitt's appointed attorney was denied further appointment to prepare a writ of certiorari to the North Carolina Supreme Court. In the Guilford County case, however, the appointed attorney was authorized to prepare the writ, which he did. The North Carolina Supreme Court dismissed the petition for lack of a substantial constitutional question. *State v. Moffitt*, 279 N.C. 396, 183 S.E.2d 247 (1971). Moffitt then asked the trial and first appellate courts to appoint counsel to assist him in preparing a writ of certiorari to the United States Supreme Court. This request was denied.

12. Petitioner sought the writs in the United States District Court for the Western District of North Carolina (Mecklenburg) and United States District Court for the Middle District of North Carolina (Guilford).

13. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973). The court noted the holding in *Douglas* and stated that it could "find no basis for differentiation between appeals as of right and permissive appeals or between first appeals and second or third stage review." *Id.* at 651.

14. *Ross v. Moffitt*, 417 U.S. 600 (1974).

fluence state criminal procedures was declared early in our history,¹⁵ the almost routine involvement that exists today is of relatively recent origin.¹⁶ Not until the early decades of this century did the Court, first in *Moore v. Dempsey*,¹⁷ and then in *Powell v. Alabama*,¹⁸ clearly begin to evaluate the processes and procedures of state criminal trials. The initial and main ground for this modern involvement was the due process clause of the fourteenth amendment.¹⁹ However, in *Griffin v. Illinois*,²⁰ Douglas' most direct predecessor, the Court was presented with a question involving rights and procedures required on an appeal from a criminal conviction. Since an early Court decision, *McKane v. Durston*,²¹ had held that the Constitution did not require the states to provide any appellate review at all, the Court could not describe the procedure at issue in *Griffin*²² as a failure to provide due process without overruling *McKane*—a step that the *Griffin* Court was unwilling to take.²³ In order to resolve this dilemma, Justice Black, writing for four Justices, made, in the words of one commentator, “a cursory bow to the due process clause”²⁴ but ended by holding that “Illinois denied the petitioners the equal protection of the laws.”²⁵ Justice Frankfurter joined with the plurality to the extent of concurring in the judgment. However, he rejected the due process analysis and based his opinion solely on the equal protection

15. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In *Cohens*, the defendants appealed a conviction in a Virginia court for selling lottery tickets. Virginia asserted that the Supreme Court did not have jurisdiction to hear the appeal. Chief Justice Marshall disagreed and affirmed the Court's power to review state criminal proceedings.

16. An extensive treatment of this evolution is contained in Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191 (1958).

17. 261 U.S. 86 (1923).

18. 287 U.S. 45 (1932).

19. See, e.g., *DeMeerleer v. Michigan*, 329 U.S. 663, 665 (1947) (“petitioner was deprived of rights essential to a fair hearing”); *Hawk v. Olson*, 326 U.S. 271, 278-79 (1945) (“he has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires”); *Williams v. Kaiser*, 323 U.S. 471, 476 (1944) (“petitioner was denied due process of law”); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (“the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process”).

20. 351 U.S. 12 (1956).

21. 153 U.S. 684 (1894).

22. The contested procedure in *Griffin* was the requirement of a transcript of the trial court proceedings as a prerequisite to the granting of appellate review and the denial of a free transcript to indigents.

23. See Willcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 11 n.40 (1957), for the suggestion that this deference to *McKane* was unwarranted since, were the issue of appeals faced squarely today, the Court would decide *McKane* differently.

24. Allen, *supra* note 16, at 198.

25. *Id.*

clause.²⁶

The holding in *Griffin*, and the uncertainty of the basis for the decision, led to extensive discussion.²⁷ One of the key questions centered on the right to have counsel appointed,²⁸ not only on appeal, but also on a uniform basis at state criminal trials.²⁹ These dual concerns were resolved the same day and in a way that helped clarify *Griffin* and distinguish the basis for its holding. On March 18, 1963, the Court decided two "right to counsel" cases, *Gideon v. Wainwright*³⁰ and *Douglas v. California*.³¹ It is of particular significance that, although the two decisions involved the appointment of counsel for indigent defendants and had the similar result of guaranteeing counsel to indigents, the difference in the level at which this right was sought led to completely different analyses. Indeed, in *Gideon*, no mention was made of the language in *Griffin* which noted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"³²—a statement that would seem to bear directly on the question of appointed counsel for an indigent at the trial level raised in *Gideon*.³³ Perhaps even more significant was the failure of the *Douglas* majority even to mention *Gideon*. As expressed by Justice Harlan in his dissent in *Douglas*, if the right to have counsel appointed "may be viewed as one of equal protection . . . the Court's analysis of that right in [*Gideon*] is wholly unneces-

26. "[I]t is now settled that due process of law does not require a State to afford review of criminal judgments." 351 U.S. at 21 (Frankfurter, J., concurring). *But cf.* Willcox & Bloustein, *supra* note 23, at 10: "Frankfurter's concurring opinion . . . said that Illinois had denied equal protection. He may have meant that, by denying equal protection in this kind of case, it had denied due process as well. We think he did."

27. *See, e.g.*, Allen, *supra* note 16; Hamley, *The Impact of Griffin v. Illinois on State Court - Federal Court Relationships*, 24 F.R.D. 75 (1958); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Willcox & Bloustein, *supra* note 23.

28. *See* Schaefer, *supra* note 27, at 10, for his comment, as a Justice of the Illinois Supreme Court, that "[t]he analogy to the right to counsel is close indeed: if a state allows one who can afford to retain a lawyer to be represented by counsel, and so to obtain a different kind of trial, it must furnish the same opportunity to those who are unable to hire a lawyer."

29. Subsequent to *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court limited the right to appointed counsel at trial by its decision in *Betts v. Brady*, 316 U.S. 455 (1942). That decision eliminated a consistent guarantee of appointment and substituted an affirmative showing of need for counsel before appointment would be made.

30. 372 U.S. 335 (1963).

31. 372 U.S. 353 (1963).

32. 351 U.S. at 19.

33. Rather than rely on the quoted language from *Griffin*, the *Gideon* Court found that, since the appointment of counsel was "fundamental and essential to a fair trial," the fourteenth amendment made the sixth amendment's guarantee "obligatory upon the States." 372 U.S. at 342.

sary."³⁴ As a result of the decision in *Douglas*, especially when contrasted with *Gideon*, it became clear that the *Griffin* and *Douglas* cases represented the introduction of an equal protection analysis into the realm of state criminal procedure. However, an examination of the two cases indicates that it is not a simple equal protection analysis.³⁵ Rather, the Court seemed deliberately unclear³⁶ on precisely what was happening, beyond the fact that the fourteenth amendment guaranteed indigent defendants certain rights, among which was the right to counsel on the first appeal of right.

As with most landmark Supreme Court decisions, the immediate concern was far less with the instant result of *Douglas* than with its future impact on the law. It was here that the lack of clarity, as to the basis for the right identified in *Douglas*, was most critical. Since the decision was not based on a traditional due process analysis, and since much of the Court's reasoning and wording reflected an equal protection thrust,³⁷ many commentators stressed the equal protection grounds³⁸ while paying little heed to the due process concerns expressed in the opinion.³⁹ One flaw in this interpretation of *Douglas* is that there would be no practical limit to the sweep of the decision. As one commentator expressed it: "[T]he logic of the equal protection argument can hardly recognize any limit imposed by *poverty alone*."⁴⁰ Justice Harlan expressed similar thoughts in his dissent in *Douglas*. His reading of the majority opinion was that the right identified did stem from an equal protection analysis. He also criticized the majority's limitation of the guarantee to the first appeal: "Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review."⁴¹

One commentator who accepted the proposition that the basis for the de-

34. 372 U.S. at 363 (Harlan, J., dissenting).

35. The main support for this contention comes from references in the two opinions to "fairness" and "fair procedure," phrases usually restricted to due process examinations. Cf. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1180 n.78 (1969) ("[t]he equal protection clause . . . normally operated only by comparing how some people are treated with how others are treated without itself setting minimum standards of treatment").

36. See *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 107 (1963) ("[i]n the 1963 cases and those which preceded them, the Court has maintained an ambiguity as to the ground of decision which seems too consistent to have been fortuitous").

37. The *Douglas* opinion's use of such language as "invidious discrimination" supports such a view. See 372 U.S. at 355.

38. See, e.g., Day, *supra* note 6.

39. In addition to the phrases noted above, see note 35 *supra*, the Court seemed to be expressing due process concerns when it characterized the appeal without assistance of counsel as "a meaningless ritual." 372 U.S. at 358.

40. Day, *supra* note 6, at 137.

41. 372 U.S. at 366 (Harlan, J., dissenting).

cision was to be found in both the equal protection clause and the due process clause suggested that this approach represented the Court's balancing "what it foresees as constitutionally desirable, and what it senses to be presently practical."⁴² Further, this use of the due process clause enabled the Court to "posit a principle which is realistic for the time, and yet remains sufficiently flexible to accommodate some future expansion."⁴³

Whether it was this desire for flexibility that led the Court to be less than clear as to the precise nature of the *Douglas* decision, or whether the equal protection analysis was the real basis⁴⁴ and the references to the due process clause were made merely to bolster the holding,⁴⁵ it was clear that the right to counsel on appeals after the first appeal of right remained an open question.

II. THE *Moffitt* INTERPRETATION OF *Griffin-Douglas*

In reaching its decision in *Moffitt* that the guarantee described in *Douglas* did not, in fact, extend past the first appeal, the Court acknowledged that the "precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated . . ."⁴⁶ However, instead of proceeding on an analysis that recognized at least a partial integration of due process and equal protection, a course suggested not only by the *Griffin* and *Douglas* cases but

42. Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 492 (1969).

43. *Id.*

44. Although hardly persuasive, statements by three of the Justices from the *Douglas* Court can be read as support for the proposition that the real basis for the decision was equal protection. See Clark, *Gideon Revisited*, 15 ARIZ. L. REV. 343, 352 (1973) ("equal protection analysis has not played a significant role . . . outside of [*Griffin* and *Douglas*]"); Douglas, *The Right to Counsel—A Foreward*, 45 MINN. L. REV. 693 (1961) ("[t]he refusal to recognize the right of counsel in every criminal case has long seemed to me to be a denial of the equal protection of the law"); Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 218 (1964) ("in *Griffin v. Illinois*, . . . the Court made its first broad pronouncement in the area of economic equality in the criminal process").

45. The precise basis for the guarantee of the assistance of counsel did not present an obstacle to lower courts when the question was within the boundary established by *Douglas*. See, e.g., *Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969), where the court discussed the right to counsel:

At times cast in terms of a defendant's right to counsel under the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, in terms of the due process clause of the Fourteenth Amendment, standing alone, in terms of the equal protection clause of the Fourteenth Amendment, or in terms of a combination of these, the recent trend of decisions makes clear that every defendant has the unqualified right, whether or not indigent, to be represented by counsel at all critical stages of any prosecution against him.

46. 417 U.S. at 608 (footnote omitted).

by other cases and commentary as well,⁴⁷ the Court purported to sever the two concepts so as to make separate due process and equal protection determinations.

In making the due process analysis, the Court first noted that in defining due process the emphasis was on fairness.⁴⁸ Next, a differentiation was made between the function of counsel at trial⁴⁹ and on appeal.⁵⁰ This difference is important, the Court insisted, because "while no one would agree that the State may simply dispense with the trial stage . . . it is clear that the State need not provide any appeal at all."⁵¹ In stating this conclusion, however, the Court made no attempt to distinguish *Douglas*, where counsel was provided on appeal. Also, the Court made no mention of language in other criminal procedure cases that described the state's responsibility once a system of appellate review is established.⁵² Instead, the Court noted that unfairness would result only "if indigents are singled out . . . and denied meaningful access . . . because of their poverty."⁵³ To address this final due process concern the Court turned to an equal protection analysis.

Although it would seem that this transition from a due process analysis to one of equal protection was an affirmation of the overlap of the two concepts as recognized in *Douglas*, the Court discussed equal protection independently. In defining equal protection, the Court stated that the concept emphasized "disparity in treatment."⁵⁴ The Court first noted language in *Douglas* that showed an equal protection treatment⁵⁵ and then quoted from *Burns v. Ohio*⁵⁶ to show other equal protection language in a case involving an indigent defendant:

47. See Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 182 (1955), for a historical treatment of the overlap and merger of the two concepts. See also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1953) ("[b]ut the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive").

48. 407 U.S. at 609.

49. *Id.* at 610-11 ("a shield to protect [the defendant] against being . . . stripped of his presumption of innocence").

50. *Id.* at 611 ("a sword to upset the prior determination of guilt").

51. *Id.*

52. See, e.g., *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1965) ("it is now fundamental that, once [avenues of review are] established, these avenues must be kept free of unreasoned distinctions").

53. 417 U.S. at 611.

54. *Id.* at 609.

55. "[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." *Id.* at 611, quoting 372 U.S. at 357.

56. 360 U.S. 252 (1959). In *Burns*, decided after *Griffin* but before *Douglas*, the Court held that Ohio's practice of according each person whose conviction has been af-

[O]nce 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. . . . 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.⁵⁷

The language from *Burns* would seem to support a similar extension of *Douglas* to second appeals. However, rather than distinguishing *Burns*, or otherwise limiting the meaning of the quoted statements,⁵⁸ the Court proceeded on an independent equal protection analysis to determine if, in fact, the equal protection clause mandated appointment of counsel for second or discretionary appeals.

The Court began the equal protection analysis by citing an earlier case for the proposition that there is a tendency for "all rights 'to declare themselves absolute to their logical extreme.'"⁵⁹ Notwithstanding this tendency, there are "limits beyond which the equal protection analysis may not be pressed."⁶⁰ So fortified, the Court cited a number of cases, beginning with *San Antonio Independent School District v. Rodriguez*.⁶¹ This decision was cited for the proposition that "the Fourteenth Amendment 'does not require absolute equality or precisely equal advantages.'"⁶² Next, the Court listed a number of the *Griffin-Douglas* line of cases⁶³ as a prelude to what appears to be the crux of the majority opinion: "[W]e do not believe that the Equal Protection Clause . . . in the context of these cases, requires North Carolina

firmed by its court of appeals the right to apply to the Ohio Supreme Court for leave to appeal, could not be denied an indigent defendant solely because of inability to pay the required filing fee. The state's contention that *Griffin* was distinguishable, since here the defendant had received one appellate review of his conviction, was rejected by the Court.

57. *Id.* at 257 (citation omitted).

58. One possibility would be to limit the reach of *Griffin* and *Burns* to the issue of access to the appellate court and follow this line of reasoning by showing that assistance of counsel is not required to gain access. Although there was some sentiment for so limiting *Griffin*, see, e.g., 55 MICH. L. REV. 413, 420 (1957), the sweeping language in *Douglas* clearly countered such a reading. See 27 VAND. L. REV. 365, 370 n.26 (1974).

59. 417 U.S. at 611-12. The case cited as the source of this phrase was *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908), which involved state police power as used to regulate water rights within the state. Its applicability to an equal protection analysis was not developed.

60. 417 U.S. at 612.

61. 411 U.S. 1 (1973).

62. 417 U.S. at 612, quoting 411 U.S. at 24.

63. The Court cited *Griffin*, *Rinaldi*, *Douglas*, *Draper v. Washington*, 372 U.S. 487 (1963), and *Lane v. Brown*, 372 U.S. 477 (1963).

to provide free counsel for indigent defendants seeking to take discretionary appeals"⁶⁴ The remainder of the equal protection analysis is a supporting rationale for this opinion as it focuses on the discretionary mandate of the North Carolina Supreme Court.⁶⁵ The Court acknowledged that a defendant represented by counsel, especially "one trained in the somewhat arcane art of preparing petitions for discretionary review,"⁶⁶ would be in a better position relative to an indigent proceeding *pro se* in seeking this discretionary review. However, the majority viewed this situation as leaving the unrepresented indigent only "somewhat handicapped in comparison with a wealthy defendant."⁶⁷ Further, this inequality between the two classes of defendants did not mean that the state had failed in its duty to "assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the state's appellate process."⁶⁸ And, with emphasis on the fairness of the contested procedure, a traditional due process concern,⁶⁹ the Court concluded the equal protection analysis.

The final section of the majority opinion applied the equal protection analysis⁷⁰ to the question of appointing counsel for a defendant seeking review in the Supreme Court of the United States. The main thrust of this section was that the right to review in the Supreme Court was not a product of state action and, therefore, the *Griffin-Douglas* rationale was not applicable. However, no mention was made of the fairness of differentiating between rich and poor defendants, a question which was addressed in the discussion of this right in the context of the state system.

Justice Douglas' brief dissent was limited to an affirmation of Chief Judge Haynsworth's view for the Fourth Circuit.⁷¹ Justice Douglas noted that the

64. 417 U.S. at 612.

65. The statute governing discretionary appeals, N.C. GEN. STAT. § 7A-31 (1967), limits the certification to those cases which: (1) have subject matter of significant public interest or (2) involve legal principles of major significance or (3) are decisions of the court of appeals that are likely to be in conflict with a decision of the state supreme court. The U.S. Supreme Court felt that this discretionary character obviated, to a degree, the need for a lawyer. *But see* note 88 *infra*.

66. 417 U.S. at 616.

67. *Id.*

68. *Id.* at 617.

69. *See, e.g., Developments in the Law, supra* note 35, at 1180 n.78. "Under a due process analysis the Court, in the name of 'fundamental fairness,' sought to establish a set of standards below which a state was not permitted to fall even if in so falling it treated all persons equally."

70. While not applying the equal protection analysis in so many words, the Court refers to the discussion "in the preceding section," the section focusing on equal protection. 417 U.S. at 616.

71. Writing for himself and Justices Brennan and Marshall, Justice Douglas said: "I am in agreement with the opinion of Chief Judge Haynsworth for a unanimous panel in the Court of Appeals." *Id.* at 619.

decision in *Douglas* was limited to the first appeal because that was the only issue before the Court at the time. The dissent asserted that *Douglas* "was grounded on concepts of fairness and equality"⁷² and voiced support for the Fourth Circuit's view that the "same concepts of fairness and equality, which require counsel in the first appeal of right, require counsel in other and subsequent discretionary appeals."⁷³

III. A BRIEF PROBING OF *Moffitt*

Although the Court disavowed the approach of integrating due process and equal protection in *Moffitt*, it is arguable that the actual analysis used recognized such an overlap. Once this similarity of approach is recognized, the question is why the Court arrived at the result it did rather than extending the right identified in *Douglas* to later appeals.

The particular procedural history⁷⁴ of *Moffitt* may have been a key factor that dictated the Court's decision. By virtue of the two separate cases, the issue of appointed counsel on discretionary review was raised in relation both to state courts as well as to the Supreme Court. While the bulk of the majority opinion dealt with the question in the context of proceedings in state courts, considerations of the impact on the Supreme Court may have influenced the decision in two ways. First, the right to review in the Supreme Court is not state-created. During oral argument, Justice White expressed concern that placing the financial burden on the states to provide counsel to assist indigents on appeal to the Supreme Court might not be fair.⁷⁵ Secondly, the inclusion of the Supreme Court made the issue directly relevant to the Court, and an affirmation of the Fourth Circuit's holding would have acted to invalidate present Court practices.⁷⁶ This very issue of Court practice was raised in the two dissenting opinions in *Douglas*,⁷⁷ and also may have been at the heart of at least one of the circuit court opinions that conflicted

72. *Id.* at 621.

73. *Id.*, quoting *Moffitt v. Ross*, 483 F.2d 655 (4th Cir. 1973).

74. See note 11 *supra*.

75. See 42 U.S.L.W. 3606 (April 30, 1974).

76. "The Court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document." R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 378 (4th ed. 1969).

77. "Indeed, if the Court is correct it may be that we should first clean up our own house. We have afforded indigent litigants much less protection than has California." 372 U.S. at 359 (Clark, J., dissenting). "What the Court finds constitutionally offensive in California's procedure bears a striking resemblance to the rules of this Court . . . on petitions for certiorari or for leave to appeal filed by indigent defendants *pro se*." 372 U.S. at 365 (Harlan, J., dissenting).

with the Fourth Circuit's opinion in *Moffitt*.⁷⁸

A desire on the part of the Court to declare an end point to the *Douglas* right may have led to the decision in *Moffitt*. While the *Douglas* Court had limited the right to the question before it, the language and philosophy expressed in reaching the decision offered support for a wider application.⁷⁹ By restricting *Douglas* to the first appeal of right, the Court may have been signaling an unwillingness to extend the right to appointed counsel to collateral attacks, petitions for rehearing, or any other post-conviction proceedings.⁸⁰ Foreclosing consideration of further extensions may be desirable in view of the Court's heavy caseload, as well as the states' interest in having the question of appointed counsel settled. Such a result would then enable the states to codify their procedures for assigning counsel to the level required and also align their state criminal practice with the requirements.⁸¹

The significant change in the membership of the Court between *Douglas* and *Moffitt*⁸² is another factor that explains the decision. The decisions of the Burger Court have shown a different perspective on the rights of criminal defendants from that of the Warren Court.⁸³ Generally, this different view has led to an unwillingness to provide new protections or to extend ones previously announced.⁸⁴ It has also been noted that the Burger Court has a

78. One example is found in *United States ex rel. Pennington v. Pate*, 409 F.2d 757 (7th Cir. 1969), where the Court decided that Illinois' failure to appoint counsel for an appeal to the Illinois Supreme Court did not violate the defendant's constitutional rights. The court noted: "We find support for our decision in the present practice of the United States Supreme Court . . ." *Id.* at 760.

79. See p. 314 *supra*.

80. Chief Justice Burger seemed to express concern about the lack of an end point when he questioned counsel for the respondent about whether this right to counsel would extend to a petition for rehearing. See 42 U.S.L.W. 3606 (April 30, 1974).

81. The Commonwealth of Virginia, as amicus curiae, expressed concern that the decision of the Fourth Circuit would upset the state's criminal justice system. Brief for Commonwealth of Virginia as Amicus Curiae at 2, *Ross v. Moffitt*, 417 U.S. 600 (1974).

82. Making up the *Douglas* majority were Justices Douglas, Brennan, Black, White, Goldberg, and Chief Justice Warren. Justices Clark, Harlan, and Stewart dissented. Making up the *Moffitt* majority were Justices Rehnquist, Powell, Blackmun, Stewart, White, and Chief Justice Burger. Justices Douglas, Brennan, and Marshall dissented. See Kurland, *The New Supreme Court*, 7 JOHN MARSHALL J. OF PRAC. AND PRO. 1 (1973), for a discussion of the present Court as compared with the previous one. But see Clark, *supra* note 44, at 345, where former Justice Clark comments: "[T]he truth about attempts to change the decisions of the Court through appointments to the bench is that the attempts fail."

83. See Kurland, *supra* note 82, at 8: "[W]e have already seen that the Burger Court has drawn back from an extension of the Warren Court's decisions in the area of criminal procedure."

84. See, e.g., *United States v. Ash*, 413 U.S. 300 (1973) (counsel not necessary at

view of the equal protection clause differing from that taken by the Warren Court,⁸⁵ and, since the *Griffin-Douglas* cases are at least in part equal protection cases, this shift in approach could explain the *Moffitt* decision.

In seeking to understand why the Court decided as it did, one should discuss some of the arguments that would have supported an opposite result but that were not compelling enough to persuade a majority of the Court. While an attempt at defining these arguments must be speculative in nature, some guidance is available from the opinions of other courts and from the briefs in this case.

Perhaps the strongest argument against the reasoning used by the majority is the importance of the assistance of counsel on appeal. The general importance of the assistance of counsel has been recognized from the early criminal procedure cases to the present.⁸⁶ The vital role that counsel plays was clearly voiced in *Douglas*,⁸⁷ and, as pointed out by the dissent in *Moffitt*, it was stressed by the Fourth Circuit in reaching its decision.⁸⁸ One commentator has noted that the recognition of this importance of counsel had led to little resistance to the movement to extend the right to indigents.⁸⁹ One court, commenting on the impact of denial of counsel on a second appeal, likened the result to the "temple of criminal justice" having "three stories for the affluent and only two for the indigent."⁹⁰ Recognizing the general practice

post-indictment photo display); *Kirby v. Illinois*, 406 U.S. 682 (1972) (counsel not required at pre-indictment showup).

85. See Kurland, *supra* note 82, at 12.

86. The language of Justice Sutherland in *Powell v. Alabama*, 287 U.S. 75 (1932), illustrates the early belief in the importance of counsel:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him.

Id. at 68-69.

87. "[T]he rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf." 372 U.S. at 358.

88. The dissent cited the Fourth Circuit's independent recognition of the importance of counsel on appeal along with an article quoted by the lower court. 417 U.S. at 621, quoting *Moffitt v. Ross*, 483 F.2d 650, 653 (4th Cir. 1973). The article, Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1967), noted: "Certiorari practice constitutes a highly specialized aspect of appellate work. The factors which [the Supreme Court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant."

89. Beane, *The Right to Counsel: Past, Present and Future*, 49 VA. L. REV. 1150, 1155 (1963).

90. *Mitchell v. Johnson*, 488 F.2d 349, 353 (6th Cir. 1973).

of appointing counsel to assist an indigent once certiorari is granted,⁹¹ the description might be restated to note that all three stories are available to rich and poor alike, it is just that the indigent must somehow find the third level without the aid of a stairway.

The Court's result in *Moffitt* can also be questioned by making a comparison with the practice of providing counsel in the federal court system. Once an indigent establishes the requisite need, counsel is provided through "every stage of the proceedings"⁹² and this has been construed to include seeking a writ of certiorari to the Supreme Court.⁹³ One commentator, describing the sweep of *Douglas* shortly after that case was decided, suggested that it provided the state defendant with rights unavailable to the federal defendant.⁹⁴ After *Moffitt*, the opposite situation exists.⁹⁵

Also standing counter to the majority's result is studied opinion that counsel should be appointed to assist indigents in all appeals. The amicus curiae brief of the National Legal Aid and Defender Association (NLADA) mentioned a number of organizations that support such a result, including an advisory committee of the American Bar Association.⁹⁶ Additionally, as mentioned earlier, various commentators have indicated support for an extension of *Douglas* to cover subsequent appeals.⁹⁷

One issue that was raised by parties on both sides in *Moffitt*, but not mentioned by the Court, was the question of an increased workload for the bar if the Fourth Circuit decision was upheld. The briefs supporting reversal raised the issue⁹⁸ and claimed that an intolerable burden would ensue, but

91. See R. STERN & E. GRESSMAN, *supra* note 76, at 378-80.

92. The description of the duration of appointment is from the Criminal Justice Act, 18 U.S.C. § 3006A (1970).

93. For a description of the statutory grounds and an analysis of the extent of the right, see *Doherty v. United States*, 404 U.S. 28, 29-36 (1971) (Douglas, J., concurring).

94. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 7 (1963).

95. Counsel for *Moffitt* made this point in the brief to the Supreme Court: "The federal practice clearly recognizes the value of appointed counsel for indigents seeking discretionary review by this Court. There is no reason to conclude that state criminal defendants are any more capable of running the gauntlet alone or that their claims are less meritorious than their federal counterparts." Brief for Respondent at 11, *Ross v. Moffitt*, 417 U.S. 600 (1974).

96. The sources cited as supporting appointment of counsel at all stages of appellate review were: (1) recommendation of National Advisory Commission on Criminal Justice Standards and Goals; (2) National Legal Aid and Defender Association, *Handbook of Standards for Legal Aid and Defender Offices* (1965); and (3) American Bar Association, *Project on Minimum Standards of Criminal Justice* (1967). Brief for National Legal Aid and Defender Association as Amicus Curiae at 8-9, *Ross v. Moffitt*, 417 U.S. 600 (1974).

97. See notes 5 & 6 *supra*.

98. The brief for the petitioner, as well as the three amicus curiae briefs from the

the NLADA amicus brief offered the experience of various defender agencies as proof that no such increase would result.⁹⁹ It may be that the opinion of Chief Justice Burger in an earlier right to counsel case, that "the dynamics of the profession have a way of rising to the burdens placed on it"¹⁰⁰ precluded any emphasis on this point in the *Moffitt* decision.

IV. THE END OF THE *Griffin-Douglas* LINE

Whatever the precise reason for the *Moffitt* decision, it is clear that the holding limits a state's requirement to appoint counsel for indigent defendants to the first appeal of right—the *Douglas* guarantee.¹⁰¹ Further, it is clear that this limitation applies to second and/or discretionary appeals both to the highest state court and to the United States Supreme Court. Although all the ramifications of such a holding are not certain, it seems probable that the underlying philosophy that supported this decision will also bar a finding of any state duty to appoint counsel on collateral attacks or other post-conviction remedies.

One commentator has expressed the view that the Burger Court will not use the equal protection clause with the frequency or strength that the Warren Court did, but that the Court will give an increased role to the due process clause.¹⁰² While the accuracy of this prediction must await the test of time, it would seem, in light of *Moffitt*, that the projected response to the equal protection clause can be extended to those times when the two clauses are intertwined and, as a result, "fairness" will not have an equality facet.¹⁰³

states (Illinois, Florida and Virginia), all stressed this point. See, e.g., Brief for State of Florida as Amicus Curiae at 4, *Ross v. Moffitt*, 417 U.S. 600 (1974): "[I]t is in the best interest of Florida to appear as amicus curiae in . . . opposition to Respondent Moffitt's position, inasmuch as this single appeal may result . . . in excessively burdening the administration of justice in Florida's appellate courts as well as the workload of those responsible as counsel in certiorari hearings."

99. Brief for National Legal Aid and Defender Association, *supra* note 96, at 8.

100. *Argersinger v. Hamlin*, 407 U.S. 25, 44 (1972) (Burger, C.J., concurring).

101. The Court did note that there was no intent to discourage "those States which have, as a matter of legislative choice, made counsel available . . . at all stages of judicial review." 417 U.S. at 618. However, in light of the allegations of the untenable workload that such a right would create, see note 98 *supra*, it is unlikely that many states will seek to provide this protection absent a mandate to do so.

102. See Kurland, *supra* note 82, at 12.

103. One thoughtful treatment on including the concept of equality within the notion of fairness can be found in Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search For Constitutional Standards*, 24 HASTINGS L.J. 647 (1973):

Webster defines "fair" as a general term, "[which] implies, negatively, the absence of injustice or fraud; positively, the putting of all things on an equitable footing, without undue advantage to any. . . ." Thus, Webster describes "fair-

So, unless and until some future Court borrows Justice Black's phrase from *Gideon* and describes *Moffitt* as "an abrupt break with its [the Court's] own well-considered precedents,"¹⁰⁴ the *Griffin-Douglas* line stops at the first appeal of right for the appointment of counsel. When one is seeking a second or discretionary review of a criminal conviction, wealth will make a difference.

William E. Brew

The Continued Vitality of the Standing Doctrine in Challenges to Federal Government Action

Recent litigation¹ in the federal courts has resulted in substantial erosion of the barriers which had formerly denied standing to citizens and taxpayers seeking to challenge action by the federal government.² So marked has been this erosion that one court has indicated that, in its circuit, the concept of standing "has now been almost completely abandoned."³ Indeed, one could have predicted that the United States Supreme Court would take advantage

ness" Janus-like, facing both towards the language of due process and to equal protection. Historically, however, the courts became fixated exclusively on the first part of the definition: if the trial is not "unjust," it could not be "unfair." Nonetheless, the second part of the definition is equally vital and constitutes a natural bridge from the historicity of due process to the latter day strictures of equal protection. "Without undue advantage to any" commands a clear, simple, workable test of treatment in lieu of the fuzzy tautology that the "process" meted out to a defendant was "due," because neither "fraudulent" nor "unjust." The very term "justice" thus comes for a redefinition: could that be just which unduly advantages one party over the other?

Id. at 659 (footnotes omitted).

104. This is Justice Black's characterization of *Betts v. Brady*, 316 U.S. 455 (1942), in overruling it in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

1. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968).

2. It should be noted that state courts are generally much more amenable to taxpayer suits than have been federal courts. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 722 (Supp. 1970); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 *YALE L.J.* 895, 918-19 (1960).

3. *Reservists Comm. to Stop the War v. Laird*, 323 F. Supp. 833, 839 (D.D.C. 1971), *rev'd sub nom. Schlesinger v. Reservists Comm. to Stop the War*, 94 S. Ct. 2925 (1974).