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Criminal Procedure -- No Right to Counsel on Discretionary Appeal

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to enact such laws, the Court will allow the states to experiment with different ways to rectify the effects of past discrimination.[56]

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Criminal Procedure—No Right to Counsel on Discretionary Appeal

In *Douglas v. California*[1] the United States Supreme Court held that the failure to appoint counsel to represent an indigent criminal appellant in his "*one and only appeal*" of right[2] violates the fourteenth amendment. The extension of the *Douglas* right to counsel to indigents seeking discretionary state and federal review of their convictions led to conflict in the circuits.[3] Resolution came in *Ross v. Moffitt*.[4]

56. Three cautionary statements are apposite here. First, as Justice Brennan pointed out, the Florida exemption is neither mandatory nor automatic. That is, a widow, in order to receive the exemption, must apply for it. Whether or not a mandatory reverse discrimination statute will be invidious is not decided by *Kahn*. 416 U.S. at 359 n.5. It seems, however, that the distinction would make little difference. It is up to the state legislature to draw the lines, *see* note 41 *supra*, and if it decides to remedy the discrimination against all women who have suffered it rather than merely those who apply for the exemption, then it is not the function of the Court to tell the state it cannot draw its line there.

Secondly, the continuing validity of the statute involved in *Kahn* if and when the effects of past discrimination are erased is a different question which is beyond the scope of this note.

Thirdly, the effect that the passage of the proposed Equal Rights Amendment might have on legislation such as Florida's tax exemption for widows is beyond the scope of this note. There has been speculation on the issue, though. *See, e.g.*, Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 903-05 (1971).

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

2. *Id.* at 357 (emphasis in original). The term "appeal of right" refers to review by an appellate court of the merits of a claim guaranteed by a state statute or constitution. The term "discretionary appeal" or "discretionary review" refers to review where, although there exists a statutory or constitutional right to *seek* review, the appellate court may decline to hear the appeal in its discretion.

3. *Compare* Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974), *with* United States *ex rel.* Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) *and* Peters v. Cox, 341 F.2d 575 (10th Cir.) (per curiam), *cert. denied*, 382 U.S. 863 (1965). *See also* United States *ex rel.* Coleman v. Denno, 313 F.2d 457 (2d Cir. 1963).

4. 417 U.S. 600 (1974).

In reversing a unanimous Fourth Circuit panel,[5] the Supreme Court refused to extend the *Douglas* right to counsel to discretionary appeals in the North Carolina Supreme Court or to writs of certiorari in the United States Supreme Court.

THE CASE

Moffitt, an indigent, was convicted of forgery and uttering a forged instrument in two separate North Carolina prosecutions in Guilford and Mecklenburg Counties. Both convictions were affirmed[6] on separate appeals of right[7] to the North Carolina Court of Appeals. Moffitt's Mecklenburg counsel sought and was denied appointment by the Mecklenburg Superior Court[8] to petition for discretionary review[9] to the North Carolina Supreme Court. The Guilford Superior Court, however, appointed the Public Defender[10] to petition for such review. After this petition was denied by the North Carolina high court,[11] Moffitt requested the trial court and the North Carolina Court of Appeals to assign counsel to prepare a writ of certiorari to the United States Supreme Court. This petition was also denied. Thereafter, Moffitt sought federal habeas corpus relief[12] claiming the State's refusal to appoint counsel both to petition for discretionary review in the North Carolina Supreme Court of his Mecklenburg conviction and to prepare a writ of certiorari to the United States Supreme Court in his Guilford conviction constituted a denial of due process and equal protection.[13]

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5. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *noted in* 4 MEMPHIS ST. L. REV. 616 (1974), 27 VAND. L. REV. 365 (1974) *and* 9 WAKE FOREST L. REV. 579 (1973).

6. State v. Moffitt, 11 N.C. App. 337, 181 S.E.2d 184 (1971), *appeal dismissed*, 279 N.C. 396, 183 S.E.2d 247 (1971) (Guilford); State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970) (Mecklenburg).

7. *See* N.C. GEN. STAT. § 7A-27 (1969).

8. The superior court is a trial court with general criminal jurisdiction. *Id.* § 7A-270.

9. *See id.* § 7A-31.

10. North Carolina provides for representation of indigent criminal defendants by Public Defender Offices in the 12th (Cumberland and Hoke Cos.), 18th (Guilford Co.), and 28th (Buncombe Co.) Judicial Districts. In the 26th Judicial District (Mecklenburg Co.) counsel is appointed from a local Bar roster. *See* 1973 REPORT OF THE ADMINISTRATIVE OFFICE OF THE COURTS, NORTH CAROLINA 96-100.

11. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 247 (1971).

12. Pursuant to 28 U.S.C. § 2254 (1970). The petitions were filed in the United States District Courts for the Western (Mecklenburg) and Middle (Guilford) Districts of North Carolina.

13. Moffitt's additional allegation that he had a statutory right to counsel based on N.C. GEN. STAT. § 7A-451 (1969) was denied in the habeas corpus hearing. Moffitt v. Blackledge, 341 F. Supp. 853, 854 (W.D.N.C. 1972). The Fourth Circuit, however, agreed with Moffitt's interpretation of the statute but lacked jurisdiction to enforce state statutory rights. Moffitt v. Ross, 483 F.2d 650, 652 (4th Cir. 1973).

The habeas corpus petitions were denied,[14] and the cases were consolidated for appeal to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit unanimously held that due process required appointment of counsel to indigents seeking discretionary review in both state and federal systems.[15] Reasoning that as the Bar has grown there has been a correlative growth in the ability of the courts to implement "basic notions of fairness,"[16] the court found in the context of *Douglas* "no basis for differentiation between appeals as of right and permissive appeals or between first appeals and second or third stage review."[17]

The Supreme Court granted the North Carolina Attorney General's petition for certiorari[18] and reversed.[19] Initially, the Court reviewed and analyzed prior cases representative of the "extensive consideration"[20] given to indigents' rights on appeal. This precedent was viewed as falling into two distinct lines of cases. The first line, beginning with *Griffin v. Illinois*,[21] stands for the proposition that a state violates the fourteenth amendment by granting an appeal right but erecting financial barriers that arbitrarily cut off access to that right to

14. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972).

15. The court expressed confusion over the basis of the *Douglas* holding. "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, . . . due process encompasses elements of equality." 483 F.2d at 655. There was no explanation why the court chose to ground its decision in due process. *See id.* at 654.

16. *Id.* at 655. This transition is illustrated by Betts v. Brady, 316 U.S. 455 (1942) (fourteenth amendment does not require appointment of counsel in every noncapital state prosecution); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel is a fundamental right essential to a fair trial and is made obligatory on the states by the fourteenth amendment); Argersinger v. Hamlin, 407 U.S. 25 (1972) (absent a knowing and intelligent waiver, no person may be imprisoned for any offense unless represented by counsel).

17. 483 F.2d at 651. Judge Haynesworth noted that Moffitt had been represented by assigned counsel in his petition for review to the North Carolina Supreme Court in the Guilford charge but not in the Mecklenburg charge and that there were no guidelines for trial judges in exercising their discretion in these appointments. *See* Brief for Appellant at 48a, Moffitt v. Ross, 483 F.2d 600 (4th Cir. 1973). He implied that, had a sufficient basis for consideration been laid, the court would have inquired closely whether the denial of counsel to indigents situated similarly to those for whom counsel was provided would in itself work a denial of equal protection. 483 F.2d at 652.

18. 414 U.S. 1128 (1974).

19. 417 U.S. 600 (1974). Justice Rehnquist wrote for the majority of himself, Chief Justice Burger, Justices Stewart, White, Blackmun, and Powell. Justice Douglas wrote for the dissent, joined by Justices Brennan and Marshall.

20. *Id.* at 605.

21. 351 U.S. 12 (1956).

indigents.[22] The *Douglas* line, however, represents a departure from the "limited doctrine"[23] of *Griffin* by inquiring into the *adequacy* of the indigent's access to the appellate system. Thus, the Court framed the issue for determination in *Ross* as whether *Douglas* should be extended to require appointment of counsel to indigent defendants for discretionary state appeals and writs of certiorari to the Supreme Court.[24]

The Court then set out to clarify the previously unstated and confused constitutional underpinnings of the precedent by explicating the due process and equal protection bases of the *Douglas* and *Griffin* lines.[25] Due process concerns fairness between the state and the individual. Provision of an appeal is completely within a state's legislative discretion,[26] and unfairness does not automatically flow from failure to provide counsel to an indigent for an appeal as it would if counsel were denied during the indispensable trial stage.[27] Therefore, North Carolina would violate due process only by denying the indigent "meaningful access"[28] to the appellate system because of his poverty. The determination of "meaningful access" is to be made under an equal protection analysis.

The Court viewed the equal protection mandate as a matter of degrees rather than absolutes. While a state is not required to eliminate all differences between rich and poor,[29] it may not adopt appellate procedures that "entirely cut off" an indigent's appeal or that merely provide him with a "meaningless ritual" while the rich are af-

22. 417 U.S. at 607. *See, e.g.*, Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

23. 417 U.S. at 607.

24. *Id.* at 602-03. This note will examine only the issue of right to counsel on discretionary state appeals. The Court applied similar reasoning in finding no constitutional right to counsel for preparation of writs of certiorari to the United States Supreme Court, but declared that the *Griffin* and *Douglas* cases were inapplicable since the right to seek access to the United States Supreme Court comes from a federal, not a state, statute. *Id.* at 617. For a discussion of the federal approach to appointed counsel see 9 WAKE FOREST L. REV. 579, 586-88 (1973).

25. *See* 417 U.S. at 609-16.

26. *See* McKane v. Durston, 153 U.S. 684, 687 (1894).

27. *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963). The Court in *Ross* articulated the distinction as follows: "[t]he defendant needs an attorney on appeal not as a shield to protect him against being 'hauled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." 417 U.S. at 610-11.

28. 417 U.S. at 611.

29. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Rinaldi v. Yaeger, 384 U.S. 305 (1966); Baxtrom v. Herald, 383 U.S. 107 (1966); Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring).

forded a "meaningful appeal."[30] The issue thus devolved to an examination of the indigent's status within the tri-level North Carolina appellate system.[31]

The Court in *Ross* found several benefits available to an indigent seeking discretionary review by the North Carolina Supreme Court. His appointed counsel, guaranteed on his first appeal of right by *Douglas*, will have examined the trial record and prepared an appellate brief. The intermediate court will have passed on the merits of the appeal. In addition he approaches the supreme court armed with some form of trial record and often with a court of appeals opinion setting forth claimed errors. Finally, the appellant is given the opportunity to make *pro se* submissions. These benefits were found sufficiently meaningful relative to the wealthy appellant to work no denial of equal protection.[32] Additional support for this conclusion was drawn from the absence in the statutory standards of a requirement that the supreme court determine if "a correct adjudication of guilt"[33] were made below.[34]

BACKGROUND AND ANALYSIS

The equal protection-due process analysis examined in *Ross* has been traditionally applied to determine the constitutionality of post-conviction state procedures that seem to impinge on an indigent due to his poverty.[35] The first case in this area, *Griffin v. Illinois*,[36] invalidated a state procedure that required a criminal appellant to pur-

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

31. North Carolina employs a tri-level court structure including an intermediate court of appeals and a supreme court. An appeal of a criminal conviction lies as of right to the intermediate court except when a death or life imprisonment sentence is imposed, in which case appeal lies directly to the supreme court. N.C. GEN. STAT. § 7A-27 (1969). An appeal of right of a court of appeals' decision to the supreme court exists only in criminal cases involving a substantial constitutional question or in which there is a dissent. *Id.* § 7A-30. In all other cases review of court of appeals' decisions is within the supreme court's discretion as defined by statutory guidelines. *Id.* § 7A-31(c).

32. *See* 417 U.S. at 614-16.

33. *Id.* at 615, *citing* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

34. Justice Douglas, for the three-member dissent, found the reasoning of the court of appeals below, Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), completely persuasive. He saw the *pro se* petitioner at a "substantial" disadvantage due to the complexities of certiorari practice and the failure of the counsel-prepared court of appeals brief to address the North Carolina discretionary review criteria of public policy and jurisprudential significance. *See* 417 U.S. at 619-21; N.C. GEN. STAT. § 7A-31(c) (1969); Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1961).

35. *But see* Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam).

36. 351 U.S. 12 (1956).

chase and make available a transcript of his trial to secure full appellate review. There was, however, no majority agreement on the exact consitutional basis for the decision.[37] This ambiguity remained in a series of cases that relied on *Griffin* to strike down state practices imposing similar contingencies between the indigent and a statutory appellate right.[38]

Douglas v. California[39] first applied *Griffin* and its progeny to the right to counsel.[40] Under scrutiny was the California practice of allowing the intermediate appellate court to determine after *ex parte* examination of the trial record whether appointment of counsel would be beneficial to the indigent or the court. Forcing the indigent "to run this gantlet of a preliminary showing of merit"[41] was held constitutionally impermissible, and the Court imposed a duty on the state to provide counsel. The holding, however, was explicitly limited to the first appeal of right.[42] Predictably, the decision contained language evocative of both equal protection[43] and due process.[44]

Justice Rehnquist, writing for the *Ross* majority, viewed *Griffin* and *Douglas* as analytically separable. To the Court, *Griffin* mandated that states not "cut off appeal rights for indigents" while the affluent

37. Four Justices felt "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded *as adequate appellate review* as defendants who have money enough to buy transcripts." *Id.* at 19 (emphasis added). Justice Frankfurter cast the deciding vote but objected to this language. "Of course a State need not equalize economic conditions." *Id.* at 23.

38. Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (per curiam), invalidated a transcript procedure as a denial of "a constitutional right guaranteed by the Fourteenth Amendment." *Id.* at 216. *See* note 51 *infra*. Burns v. Ohio, 360 U.S. 252 (1959), invalidated the requirement of a twenty-dollar filing fee before the Ohio Supreme Court would entertain motions to invoke its discretionary review of an intermediate appellate court's decision in a felony case in language suggestive of equal protection. *See id.* at 258. Smith v. Bennett, 365 U.S. 708 (1961), invalidated a four-dollar habeas corpus filing fee in similar equivocal language. *See id.* at 710-11, 714. Lane v. Brown, 372 U.S. 477 (1963), struck down an Indiana procedure where a prisoner could obtain a transcript which was a condition precedent to a writ of error *coram nobis* only if the Public Defender requested it as a violation of the "Fourteenth Amendment of the United States Constitution." *Id.* at 478.

39. 372 U.S. 353 (1963).

40. The Court could see no substantive distinction between denial of a transcript and denial of counsel. "In either case the evil is the same: discrimination against the indigent." *Id.* at 355.

41. *Id.* at 357.

42. *Id.* at 356.

43. "[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.*

44. "When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.* at 357.

have "open avenues of appeal." *Douglas*, however, mandated standards of adequacy of the indigent's access to the appellate system.[45] Conflicts develop in utilizing this dichotomy to analyze these cases. The Illinois practice struck down in *Griffin* did not "cut off" the indigent's appeal. Rather, submission of the transcript to the appellate court resulted in full review of the conviction as opposed to limited review on the face of the "mandatory trial record" available as a matter of right without cost.[46] The Court in *Griffin* required the state to furnish the indigent a transcript but left open an opportunity for the states to develop less costly alternatives to the transcript that would still afford "adequate and effective" review to the indigent.[47] Thus the Court was expressing the same concern for the *quality* of the indigent's appellate rights as later echoed in *Douglas*.

There is much additional evidence of the novelty of the *Ross* view of *Douglas* and *Griffin*. Prior to *Douglas*, *Griffin* was used dispositively to determine unconstitutionality of other non-doorclosing state appellate procedures.[48] After *Douglas* the adequacy of alternatives to transcripts was tested by reliance on the principles in *Griffin* without reference to *Douglas*.[49] Indeed, *Griffin* has been used to set standards of conduct for attorneys representing indigents on appeal to insure the adequacy of the *Douglas* right to counsel.[50]

An alternative to the Court's belief that *Griffin* represents a "limited doctrine"[51] is the view that *Griffin*, as the origin of a single line of cases of which *Douglas* is a part, has developed a method for determining the constitutional adequacy of a state's treatment of indigents within its appellate structure. Unconstitutional treatment can consist either of precluding access to the "open avenues of appeal"[52] available to the wealthy[53] or of admitting the indigent without providing

45. 417 U.S. at 607. *See* text accompanying notes 22-27 *supra*.

46. *See* Griffin v. Illinois, 351 U.S. 12, 13-14 n.2 (1956).

47. *Id.* at 20.

48. In Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (per curiam), two years after *Griffin* the Court relied on *Griffin* to strike down a Washington practice of granting a free transcript to an indigent only if the trial judge were satisfied that "justice [would] thereby be promoted." *Id.* at 215. The transcript was not a condition precedent to appeal, but the Court felt that without it the appellant was denied *effective* appeal. *See id.* at 216.

49. *See* Mayer v. City of Chicago, 404 U.S. 189 (1971).

50. *See* Anders v. California, 386 U.S. 738 (1967).

51. 417 U.S. at 607. *See* text accompanying notes 22-27 *supra*.

52. 417 U.S. at 607.

53. *See, e.g.*, Williams v. Oklahoma City, 395 U.S. 458 (1969) (per curiam); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

him a constitutionally adequate appeal.[54]

Ross consciously attempted to eliminate the confusion that has surrounded the due process-equal protection principles applicable to indigents' appellate rights since *Griffin*.[55] Noting that "[n]either clause by itself provides an entirely satisfactory basis for the result reached"[56] in the *Griffin* and *Douglas* lines, the Court viewed due process and equal protection as symbiotic by virtue of "meaningful access." The primary consideration is whether the state denies due process by failing to provide the indigent "meaningful access" to the appellate system, and this determination is made under an equal protection analysis.[57] This statement alone fails to achieve the clarity sought by the Court. "Meaningful access" is treated as neither a substantive standard nor a term of art. The concept reappears in *Ross* as questions of whether the North Carolina Supreme Court has an "adequate basis" on which to make its decision to review[58] and whether the indigent is given an "adequate opportunity" to present his claims.[59]

More significant than the bare statement of the relationship of due process and equal protection is that the Court retained the methodology of the *Griffin* and *Douglas* cases to determine an indigent's right to counsel on discretionary appeal. The Court determined the benefit available to the uncounseled indigent relative to the wealthy and compared this disparity to principles of due process and equal protection.[60] In its statements of these principles, the Court avoided mention of language in *Griffin* that the states must provide equally adequate appellate review for indigents and wealthy. Rather, the Court twice referred[61] to the concurring opinion of Justice Frankfurter in *Griffin* who objected strongly to this implication[62] and reaffirmed the idea ex-

54. *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189 (1971); Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam); Anders v. California, 386 U.S. 738 (1967); Long v. District Ct., 385 U.S. 192 (1966) (per curiam); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1957) (per curiam).

55. "The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment." 417 U.S. at 608-09.

56. *Id.*

57. *See* text accompanying notes 28-31 *supra.*

58. *Cf.* 417 U.S. at 615.

59. *Cf. id.* at 617.

60. *Cf.* cases cited notes 56-57 *supra.*

61. *See* 417 U.S. at 606, 612.

62. *See* note 40 *supra.*

pressed in *Douglas* that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them."[63]

The implication is clear that the Court intended *Ross* to dispose of future claims to a constitutional right to counsel on discretionary appeal. The decision in *Ross* was reached, however, only after analysis of the benefits available to indigents within the North Carolina appellate system.[64] The full impact of the case, therefore, can best be assessed by identifying illustrative examples of the different state appellate systems to which the learning of *Ross* can be applied.

In determining whether counsel must be appointed to represent an indigent under any particular state appellate system, the initial consideration is whether state statutory[65] or case law[66] confers a right to counsel. *Ross* not only affirmed the notion that states may provide benefits beyond constitutional mandates, but also disclaimed that the holding should discourage them from doing so.[67] It is the extent of the constitutional mandate that is in issue here.

The second step in determining the indigent's right to counsel is a consideration of the particular appellate system, the point in that system at which counsel is sought, and whether the appeal is discretionary or a matter of right. First examined are the various situations arising in the twenty-four state systems[68] utilizing an intermediate appellate court.[69]

First appeal of right. Generally, an appeal of right lies to the intermediate court in all serious criminal charges,[70] although it is quite common to find provisions bypassing the intermediate court giving an appeal of right direct to the highest court where serious punishment

63. 417 U.S. at 608, *citing* Douglas v. California, 372 U.S. 353, 357 (1963).

64. *See* notes 32-34 and accompanying text *supra.*

65. *See, e.g.*, COLO. REV. STAT. ANN. § 40-1-503 (Supp. 1971); N.C. GEN. STAT. § 7A-451 (1969). *But see* note 14 *supra.*

66. *See, e.g.*, Hutchins v. State, 227 Tenn. —, 504 S.W.2d 758 (1974); Cabaniss v. Cunningham, 206 Va. 330, 143 S.E.2d 911 (1965).

67. *See* 417 U.S. at 618-19.

68. The states are Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Washington.

69. These systems were instituted primarily to relieve appellate court congestion. *See* AMERICAN JUDICATURE SOCIETY, INTERMEDIATE APPELLATE COURTS (Report No. 20, 1968).

70. *See, e.g.*, CAL. CONST. art. VI, §§ 10, 11; ILL. CONST. art. VI, § 6; WASH. REV. CODE ANN. § 2.06.030 (Supp. 1973).

is imposed.[71] *Douglas*, neither extended nor overruled by *Ross*, dictates appointment of counsel at this level.

Second appeal of right. There exist circumstances in which state high court review of intermediate court decisions is also a matter of right, thus giving two appeals of right. These appeals are triggered by either a dissent in the intermediate court's opinion,[72] the initial construction of a state or federal statute or constitutional provision,[73] or some preliminary showing by the appellant of a significant constitutional issue.[74] This situation is covered explicitly by neither *Douglas* nor *Ross*. Although it is an appeal of right, it is a second appeal, and *Douglas* was limited to the first appeal.[75] *Ross* declined to find a constitutional right to counsel on a second appeal, but the appeal under consideration there was discretionary.

Two factors indicate that the presence of a second appeal of right is an insufficient basis for distinguishing *Ross*. First, *Ross* held that the mere presence of a state right to seek discretionary review did not of itself mandate appointment of counsel;[76] thus, by analogy, the *right* of second appeal should not control. Secondly, the benefits available to the uncounseled indigent on his second appeal of right are substantially the same as those that were available to Moffitt as he sought subsequent discretionary review by the North Carolina Supreme Court. The indigent has had benefit of counsel on his first appeal, and the high court has a trial record, an intermediate court opinion, and the indigent's *pro se* submissions on which to make its decision. Thus the appellant, in *Ross* terms, would have meaningful access to the appellate system.[77]

However, a distinction may be drawn between a right of appeal at any level and a right to seek discretionary review. Once a state grants a right of appeal, it makes a commitment to review the merits of the claim, and the setting becomes clearly adversarial. The role of counsel in an appeal of right is to argue the case before the appellate court. It is unclear whether benefits available to the uncounseled indigent will provide him an adequate opportunity to present his claims or an adequate basis for the court to make its determination on the merits,

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-120.21 (Supp. 1974); N.C. GEN. STAT. § 7A-27(a) (1969).
72. *See, e.g.*, N.C. GEN. STAT. § 7A-30(2) (1969).
73. *See, e.g.*, FLA. CONST. art. 5, § 4.
74. *See, e.g.*, N.C. GEN. STAT. § 7A-30(1) (1969).
75. *See* text accompanying note 42 *supra.*
76. *Cf.* text accompanying notes 26-27 *supra.*
77. *See* text accompanying note 28 *supra.*

as opposed to a decision whether to grant review at all. Current United States Supreme Court practice reflects this distinction by appointing counsel to indigents convicted of state crimes only after certiorari has been granted.[78]

Second appeal discretionary. In most circumstances review of intermediate court decisions is within the high court's discretion. It was within this situation that the *Ross* case arose. In *Ross*, however, the high court's discretion was governed by statute.[79] While many states similarly limit the scope of the high court's discretion by statutory or constitutional[80] standards, in some states the discretion is unfettered[81] or merely defined by non-controlling statutory guidelines.[82]

This divergence in state practice seems to be of little assistance in distinguishing *Ross*. The Court reached its decision that there was no constitutional requirement to appoint counsel for indigents seeking discretionary review prior to a consideration of the North Carolina statutory standards. The Court was only "fortified in this conclusion"[83] by the nature of these standards; it did not reach its conclusion based on them.[84]

In determining the right to counsel in the twenty-six states utilizing the traditional two-level appellate system, the same consideration must be given to the nature of the appeal right.

First appeal of right. In the vast majority of two-level systems, appeal of all criminal convictions lies as of right to the high court.[85] *Douglas* clearly controls here and requires that counsel be appointed.

First appeal discretionary. In a few situations the first and only appeal from a criminal conviction is within the discretion of the high court.[86] This presents another example where neither *Douglas* nor *Ross* are apposite.[87] While *Ross* reaffirms the principle that states need provide no appeal at all,[88] here the benefits available to the un-

78. U.S. SUP. CT. R. 53.
79. N.C. GEN. STAT. § 7A-31(c) (1969).
80. *E.g.*, FLA. CONST. art. 5, § 4.
81. *See, e.g.*, GA. CODE ANN. § 2-3704 (1945).
82. *See, e.g.*, ILL. ANN. STAT. ch. 110A, § 315(a) (Smith-Hurd 1968).
83. 417 U.S. at 615.
84. *See* text accompanying notes 33-34 *supra.*
85. *See, e.g.*, ALASKA STAT. § 22.05.010(a) (1962); MISS. CODE ANN. § 99-35-101 (1972).
86. *See, e.g.*, KY. REV. STAT. ANN. § 21.140(1), (2) (1971) (appeal discretionary if sentence imposed is less than twelve months).
87. *See* text accompanying note 75 *supra.*
88. *See* text accompanying note 26 *supra.*

counseled indigent include only a trial record and *pro se* submissions. Conspicuously absent are the prior assistance of counsel in examination of the trial record and preparation of arguments to the appellate court, and an intermediate appellate court once passing on those claims.[89] The inference is compelling that this treatment falls below the line of adequacy drawn in *Ross*, thus giving rise to a constitutional right to counsel.

CONCLUSION

Over a decade ago the Supreme Court, examining the rights of indigent persons, stated that "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."[90] More recently, in finding a sixth amendment guarantee of counsel at trial whenever there exists a possibility of a prison sentence, the Court felt that "the adversary system functions best and most fairly only when all parties are represented by competent counsel."[91] *Ross v. Moffitt*, in disposing of a constitutional claim of right to counsel on discretionary appeals in all but atypical situations, contrasts strikingly with these principles. A state's highest court, as final arbiter of interpretation of state common law, might provide the most meaningful review of a criminal conviction.[92] This fact is unaffected by whether access to that court is by right or discretion. *Ross* describes certiorari practice as a "somewhat arcane art."[93] If this be true, lawyers, not *pro se* indigent appellants, should unravel its mysteries.

STANLEY D. DAVIS

Labor Law—Preemption of State Damage Remedies for Discharge

Since the Taft-Hartley amendments to the National Labor Rela-

89. *See* text accompanying note 32 *supra*.
90. Coppedge v. United States, 369 U.S. 438, 449 (1962).
91. Argersinger v. Hamlin, 407 U.S. 25, 65 (1972) (Powell, J., concurring).
92. *See, e.g.*, State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973), *rev'g* State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972) (modifying elements of common law kidnapping relied on by lower court).
93. 417 U.S. at 616.