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Subsequent History of Selected Decisions of the Court of Appeals for the Ninth Circuit

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SUBSEQUENT HISTORY OF SELECTED DECISIONS OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

I. RESIDENT ALIENS AND THE CIVIL SERVICE

A. BACKGROUND

Hampton v. Mow Sun Wong[1] involved five Chinese resident aliens who challenged the constitutionality of a Civil Service Commission regulation[2] which excluded all persons except United States citizens and natives of American Samoa from most positions in the federal competitive civil service. The five plaintiffs were denied the opportunity to apply for positions in the federal competitive civil service because of their status as resident aliens. In 1971, the plaintiffs brought an action in federal district court,[3] alleging that the regulation violated Executive Order No. 11,478,[4] conflicted with section 502 of the Public Works Appropriation Act,[5] and contravened the due process clause of the fifth amend-

1. 96 S. Ct. 1895 (1976).

2. The regulation, 5 C.F.R. § 338.101 (1972), provides in pertinent part:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment . . . in the absence of qualified citizens or (2) an appointment in rare cases . . . , unless the appointment is prohibited by statute.

For additional evidence of the Commission's exclusion of aliens see U.S. CIVIL SERV. COMM'N FEDERAL PERSONNEL MANUAL, Installment No. 124, ch. 338, subch. I, § I-I(a)(1969). The only persons other than citizens who owe permanent allegiance to the United States are noncitizen "nationals." This phrase has been construed to cover only natives of American Samoa. Hampton v. Mow Sun Wong, 96 S. Ct. 1895, 1899 n.1 (1976).

3. Mow Sun Wong v. Hampton, 333 F. Supp. 527 (N.D. Cal. 1971).

4. 3 C.F.R. 803 (Comp. 1966-70), *reprinted in* 42 U.S.C. app. § 2000e (1970). The order, which is entitled Equal Employment Opportunity in Federal Government, declares that the "policy of the United States Government [is] to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex or national origin."

5. Public Works Appropriation Act of 1970, Pub. L. No. 91-144, § 502, 83 Stat. 336-37 (1969). Section 502 declares that "no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any . . . employee of the . . .

ment.[6] The plaintiffs sought an injunction to prevent enforcement of the regulation and declaratory relief.

After the district court successfully resisted a challenge to its jurisdiction,[7] it held that even if Executive Order No. 11,478, which expressed a policy of equal opportunity in federal employment, and the Commission's regulation did conflict, the matter would not be judicially reviewable because the Executive Order was merely a declaration of general national policy.[8] The court also concluded that there was no conflict between the regulation and section 502 of the Public Works Appropriation Act, which the plaintiffs alleged had been impermissibly narrowed by the Commission's administrative regulation.[9] Finally, the district court rejected the plaintiffs' third contention that the regulation contravened the due process clause of the fifth amendment. The plaintiffs had argued that the regulation established a classification based on alienage, which should be subject to the strict scrutiny of the "compelling interest" equal protection test.[10] The court reasoned, however, that the federal government's plenary power over aliens and the "partially political, non-justiciable content of that power"[11] mandated that the proper standard of security be the traditional "rational interest" test.

Using this test, the district court found that it could identify two interests which could provide a rational basis for the Commission's regulation: (1) the government's interest in having United States policy being formulated and executed only by United States citizens; and (2) the interest in protecting the economic security of the American people by reserving civil service jobs only to citizens. In light of these rational governmental interests, the district court concluded that the plaintiffs had failed to state a claim upon which relief could be granted and therefore granted the defendants' motion to dismiss.[12]

United States . . . unless such person . . . (2) who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States . . ., [or] (3) is a person who owes allegiance to the United States . . . ."

6. 333 F. Supp. at 529.

7. *Id.* The Court found that subject matter jurisdiction was conferred by 28 U.S.C. § 1331(a) (1970), which provides that

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws or treaties of the United States.

8. 333 F. Supp. at 530.

9. *Id.* at 531.

10. *Id.*

11. *Id.* at 532.

12. *Id.*

In 1974, the Ninth Circuit[13] reversed the district court decision. On appeal, the issue before the court was whether the exclusion of resident aliens from employment in the competitive federal civil service was consistent with the due process guarantees of the fifth amendment.[14] Although the court rejected the plaintiffs' contention that the protections provided by the fifth amendment are co-extensive with those provided by the equal protection clause of the fourteenth amendment, it did find that "discrimination may be so unjustifiable as to be violative of due process."[15]

The court recognized that Congress' plenary power over aliens is subject to constitutional limits[16] and cited the Supreme Court decision in *Graham v. Richardson*[17] for the proposition that classifications based on alienage are inherently suspect and subject to close judicial scrutiny. The court found that the exclusionary rule involved in the Commission's regulation unreasonably discriminated against the plaintiffs. The "broad sweep" of the regulation unjustifiably violated the due process rights of the plaintiffs. Although the Ninth Circuit recognized that the government could demonstrate some compelling interest to justify restricting certain civil service jobs to citizens, no such interest had been shown which could justify the flat prohibition of employment of aliens in every civil service position. Thus, the *Mow Sun Wong* panel held that the regulation denied the plaintiffs their rights to due process.[18]

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13. Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974).

14. *Id.* at 1038.

15. *Id.*, *citing* Bolling v. Sharpe, 347 U.S. 497 (1954); *accord*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schneider v. Rusk, 377 U.S. 163 (1964).

16. 500 F.2d at 1036, *citing* United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972). *See also* Capitol Traction Co. v. Hof, 174 U.S. 1 (1899), where the Supreme Court recognized that Congress' plenary power over the District of Columbia may only be exercised in so far as it does not "contravene any provision of the Constitution of the United States." *Id.* at 5.

17. 403 U.S. 365 (1971).

18. 500 F.2d at 1041. *See generally* Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 HAST. CONST. L.Q. 1029, 1052 (1975); *Immigration, Alienage and Nationality—Aliens and the Federal Government: A Newer Equal Protection*, 8 U.C.D.L. REV. 1 (1975) [hereinafter cited as *Aliens and the Federal Government*]; Comment, *Aliens, Employment and Equal Protection*, 19 VILL. L. REV. 589 (1974). The authors of *Aliens and the Federal Government* criticized the Ninth Circuit's opinion for its application of the strict scrutiny standard and for basing its conclusions on Supreme Court decisions which held that state laws discriminating against aliens created a suspect classification. It was argued that those decisions could be distinguished from the facts of the instant case because the federal government, as opposed to the individual states, was invested with a special responsibility for the regulation of aliens. *Aliens and the Federal Government*, *supra* at 18-22. The latter contention was subsequently adopted by the Supreme Court. *See* Hampton v. Mow Sun Wong, 96 S. Ct. 1895, 1904 (1976).

B. The Supreme Court Opinion

On certiorari, the Supreme Court affirmed the decision of the Ninth Circuit.[19] Justice Stevens, writing for the majority, recognized that the concept of equal justice under the law is served by the due process clause of the fifth amendment as well as by the equal protection clause of the fourteenth amendment. However, the Court agreed with the Ninth Circuit's analysis that the protections of the fifth and fourteenth amendments are not always coextensive. Federal legislation may be justified by an overriding national interest, even when similar state legislation would be unacceptable.[20] Yet, the Court rejected the notion that the federal government's power over aliens is so plenary that resident aliens may be arbitrarily subjected to substantive rules which are different from those applied to citizens. The regulation in question, noted the Court, created an additional disadvantage to persons who are already at a disadvantage in our society:

> The added disadvantage resulting from the enforcement of the rule—ineligibility for employment in a major sector of the economy—is of sufficient significance to be characterized as

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Previous to the Ninth Circuit's decision, the District of Columbia, in Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), *cert. denied*, 409 U.S. 887 (1972), was faced with a challenge to the same regulation. The majority recognized that the plaintiff's contentions raised a substantial issue, but the court was unable to resolve it because the district court's order dismissing the complaint included no findings of fact. Therefore, the case was remanded to the district court. Chief Judge Bazelon dissented, stating that the remand was unnecessary. He felt that under the principles announced by the Supreme Court in Graham v. Richardson, 403 U.S. 365 (1971), the regulation was invalid. For a discussion supporting Chief Judge Bazelon's dissent, which also notes the *Mow Sun Wong* district court opinion, see Comment, *Aliens and the Civil Service: A Closed Door?*, 61 Geo. L.J. 207 (1972) [hereinafter cited as *Closed Door Comment*].

Subsequent decisions by courts in other circuits have been in accord with the conclusions reached in *Mow Sun Wong*. *See, e.g.*, Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361 (D.P.R. 1974), *modified*, 96 S. Ct. 2616 (1976). The *Ramos* court held that the exclusion of aliens from employment in the federal civil service was unconstitutional. The court reasoned that the government's power to decide when to admit or deport aliens did not include the power to indiscriminately deny them federal jobs. For other decisions which recognize that the federal government's plenary power over aliens only relates to immigration and naturalization matters see United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975); Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y. 1975), *prob. juris. noted*, 96 S. Ct. 2622 (1976).

19. Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976).

20. The Court stated: "We agree with the petitioners' position that overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State." *Id.* at 1904. *See* Sugarman v. Dougall, 413 U.S. 634 (1973). *Sugarman* involved the invalidation of citizenship requirements for those applying for state competitive civil service employment.

> a deprivation of an interest in liberty. Indeed, we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis.[21]

Such a deprivation of liberty can only be accompanied by due process.[22] Although the plaintiffs in *Mow Sun Wong* argued that the Commission's regulation was invalid under traditional equal protection analysis,[23] the Court focused on whether the Commission had utilized proper procedures in promulgating its regulation. In *Mow Sun Wong*, the Court stated that when the federal government asserts a national interest for a discriminatory rule that would violate the equal protection clause if a state were involved, due process requires that there be a legitimate basis for presuming the rule was actually intended to serve that interest.

The Court examined the interests asserted by the government as justifications for the regulation and looked to see whether these interests were related to the responsibilities of the agency promulgating the regulation. In this case, the government argued that the broad exclusions of the regulation might (1) facilitate the President's negotiation of treaties with foreign powers by enabling him to offer employment to foreign citizens; (2) provide an incentive for aliens to become naturalized citizens so that they could participate more fully in our society; or (3) avoid the administrative inconvenience and expense of determining on a job-by-job basis which federal civil service positions should have a citizenship requirement.[24]

The Court agreed that the first two interests cited above might justify the rule at issue if Congress or the President had promulgated it. In that case, the rule could be viewed as a legitimate protection of an interest that Congress and/or the President had a direct responsibility to protect. However, since the Court found that neither Congress nor the President had expressly adopted a citizenship requirement for government service,[25] the

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21. 96 S. Ct. at 1905 (footnote omitted).

22. U.S. CONST. amend. V states: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

23. Justice Stevens referred to due process clause analysis as having a substantive as well as procedural aspect. 96 S. Ct. at 1905.

24. *Id.* at 1905-06.

25. *Id.* at 1907-09. Simple acquiescence by Congress and the President in the regulation promulgated by the Civil Service Commission is insufficient to demonstrate affirmative approval of the administrative regulation. *See* Greene v. McElroy, 360 U.S. 474, 507 (1959).

rule had to protect an interest of the Civil Service Commission, whose "only concern . . . is the promotion of an efficient federal service."[26] Consequently, in order for the regulation to be upheld, the third governmental interest noted above would have to provide a rational basis for the general rule of exclusion.

The Court found that administrative convenience could not justify the rule in this situation. The quality of the interests at stake required the rejection of what might be nothing more than a hypothetical justification. The record in the case did not indicate that the Civil Service Commission had actually evaluated the convenience of a simple exclusionary rule as opposed to the desirability of enlarging the pool of eligible employees. Furthermore, the Court noted that the administrative burden of establishing job classifications for which citizenship would be an appropriate requirement did not appear to be a particularly onerous task. Thus, the Court concluded that the decision made by the Civil Service Commission to exclude resident aliens from federal civil service could not be justified by any interest properly within the concern of the Commission. Consequently, it held that the Civil Service regulation deprived the plaintiffs "of liberty without due process of law and [was] therefore invalid."[27]

C. The Dissenting Opinion

Justice Rehnquist, joined by three other Justices, dissented. He argued that the majority had misapplied the due process protections afforded by the fifth amendment and had evolved a doctrine of delegation of legislative authority which had no supporting precedent. He stated that the federal government's broad power to formulate policies toward aliens was sufficient to justify the exclusion of aliens from competitive civil service.[28] He reasoned that such a decision was a political one, and the wisdom of it could not be challenged in the courts. A procedural challenge could be sustained only if it were found that the Commission was improperly delegated the authority to enact such a regulation. The majority of the Court, Justice Rehnquist noted, appeared to hold that the delegation involved in *Mow Sun Wong* was improp-

26. 96 S. Ct. at 1911.

27. *Id.* at 1912. Justice Brennan, joined by Justice Marshall, wrote a short concurring opinion in which he stated that he joined "the Court's opinion with the understanding that there are reserved the equal protection questions that would be raised by congressional or Presidential enactment of a bar on employment of aliens by the Federal Government." *Id.*

28. *Id.* at 1916.

er.[29] However, Justice Rehnquist believed that the delegation of authority from Congress and the President to the Commission was proper. Therefore, he contended that the regulation must be upheld, since once it is

> determined that the agency . . . was properly delegated the power . . . to make decisions regarding citizenship of prospective civil servants, then the reasons for which that power was exercised is as foreclosed from judicial scrutiny as if Congress had made the decision itself.[30]

D. Conclusion

The *Mow Sun Wong* dissent appeared to misread the majority opinion. The majority never indicated that the Civil Service Commission had been improperly delegated the authority to enact regulations regarding citizenship requirements for civil service employees. The Court clearly indicated that the Civil Service Commission had the authority to establish standards with respect to citizenship of civil service employees;[31] only the blanket exclusion of all aliens from civil service employment invalidated the regulation.[32]

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29. *Id.* at 1915.

30. *Id.* Justice Rehnquist asserted that an agency acting within the scope of properly delegated authority may advance the same justifications for its actions as the governmental branch that delegated the authority to the agency. *Id.*, *citing* Ludecke v. Watkins, 335 U.S. 160 (1948). Administrative rulemaking is generally entitled to the same presumption of constitutionality as is the legislative process. *See* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

31. 96 S. Ct. at 1910. In the Civil Service Act of 1883, 22 Stat. 403, Congress delegated to the President the power to prescribe regulations for the admission of individuals into the Civil Service as will "best promote the efficiency of the service" and to ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought. The Act has been amended several times, but its modern version, 5 U.S.C. § 3301 (1970), contains similar language. The Act has never used the word citizenship in its statement of what qualifications the President may prescribe for federal employees. In accordance with this grant of authority, President Eisenhower issued Executive Order No. 10,577, 3 C.F.R. 84 (Comp. 1954-58), *reprinted in* 5 U.S.C. § 3301 app. (1970), authorizing the Civil Service Commission to establish standards with respect to citizenship, age, education and experience for applicants to the civil service. The Court might have concluded that the President exceeded the authority delegated by Congress in authorizing the Civil Service Commission to establish standards with respect to the citizenship of all applicants for federal employment. *See also The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 105, (1976), wherein the author notes that Justice Stevens "could have construed the delegation to the President . . . to be limited to actions 'promot[ing] the efficiency of the service,' and overturned the exclusion of it as an abuse of authority." *Id.* at 109.

32. 96 S. Ct. at 1911.

Although the Court did not reach the equal protection questions involved in *Mow Sun Wong*, in recent years it has not hesitated to overturn state laws discriminating against aliens as a violation of the equal protection guarantees of the fourteenth amendment.[33] In *Sugarman v. Dougall*,[34] the Court invalidated a statute that prohibited aliens from obtaining employment in the competitive class of a state's civil service. Even though the *Mow Sun Wong* court recognized that the holding in *Sugarman* could not simply be extended to the actions of the federal government due to the paramount federal power over immigration,[35] the due process clause of the fifth amendment still should require the federal government to demonstrate a compelling interest for flatly excluding aliens from employment in the civil service.[36] Any governmental action which prohibits resident aliens from qualifying for literally millions of positions available in the federal civil service ought to be upheld only if such a demanding burden of justification were met.

The Court may soon have to face this very issue in light of a recent action by the President. In September, 1976, three months after the *Mow Sun Wong* decision, President Ford issued Executive Order No. 11,935[37] which specifically stated that no person could be appointed to a position in the federal competitive civil service unless he or she were a United States citizen, subject to such exceptions necessary to promote the efficiency of the service. On the same day that the Executive Order was issued, President Ford sent a letter to Congress in which he concluded that the policy of

33. *See* Graham v. Richardson, 403 U.S. 365 (1971); *In re* Griffiths, 413 U.S. 717 (1973). In *Graham*, the Court stated that a classification based on alienage was inherently suspect and would therefore be subject to strict judicial scrutiny. *See generally* Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Laws*, 35 U. PITT. L. REV. 499 (1974).

34. 413 U.S. 634 (1973).

35. 96 S. Ct. at 1904.

36. *See* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970), wherein the Court stated:

> [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.

Id. at 309 n.5, *quoting* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion). *See also Closed Door Comment*, *supra* note 18; Note, *Immigrants, Aliens and the Constitution*, 49 NOTRE DAME LAW. 1075 (1974).

37. 41 Fed. Reg. 37,301 (1976).

excluding aliens from employment in the competitive Civil Service was in the national interest. He acknowledged that Congress has the primary responsibility for the regulation of the conduct of aliens within the United States and therefore urged that Congress "promptly address this issue."[38]

The plaintiffs in *Mow Sun Wong* have returned to federal district court to challenge the constitutionality of the presidential order. If the challenge once again reaches the Court, it would seem that the equal protection questions raised by the exclusion of aliens from the federal competitive civil service will finally be decided.

Joan Richardson

II. INDIGENT'S RIGHT TO A TRANSCRIPT UNDER 28 U.S.C. SECTION 753

A. Background

This past term, the Supreme Court continued to limit the rights of indigent criminal defendants. In *MacCollom v. United States*,[1] the Court, relying primarily on its holding in *Ross v. Moffitt*,[2] held that indigent inmates have no constitutional right to a free transcript for the purpose of collaterally attacking their conviction.[3] In 1970, Colin F. MacCollom, the defendant, was convicted in a district court of passing forged currency.[4] Two years after his conviction, having given up his right to direct appeal, MacCollom filed a motion for transcript in forma pauperis so that

38. *Id.* at 37,303.

1. 96 S. Ct. 2086 (1976), *rev'g* 511 F.2d 1116 (9th Cir. 1974).

2. 417 U.S. 600 (1974). *Ross* was a right to counsel case, while *MacCollom* concerned an indigent's right to free transcripts. However, both decisions dealt with an indigent's access to legal tools. The majority in *Ross* held that there was no due process or equal protection right to counsel for discretionary appeals to state supreme courts. The *Ross* Court stated:

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

Id. at 616.

3. 96 S. Ct. at 2088.

4. 511 F.2d 1116, 1117 (9th Cir. 1974).

he might prepare a 28 U.S.C. section 2255[5] motion. A section 2255 motion grants prisoners the right to collaterally attack their sentences.[6] The clerk of the district court advised MacCollum that a section 2255 motion must be filed before the court could act on his transcript request under 28 U.S.C. section 753(f),[7] which provides that a free transcript will be furnished only if the district court finds that the appeal is not frivolous and that the transcript is necessary to decide the issues in question in the appeal. MacCollom then filed the motion, alleging ineffective assistance of counsel and insufficiency of the evidence. The district court found in favor of the government's motion for dismissal for failure to state a claim upon which relief could be granted.[8] The dismissal on such grounds implied that MacCollum's claim was frivolous; therefore, he was denied the right to a free transcript. The Ninth Circuit reversed the judgment of the district court and held that a federal prisoner permitted to proceed in forma pauperis is entitled to a transcript upon request in order to assist him in the preparation of a post-conviction motion under 28 U.S.C. section 2255.[9]

B. The Supreme Court and an Indigent's Right to a Transcript

Direct Appeals

A series of Supreme Court cases, beginning with *Griffin v.*

5. 28 U.S.C. § 2255 (1970) reads in pertinent part:

> A prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

6. A section 2255 motion is a substitute for a habeas corpus proceeding relied upon to obtain sentencing relief prior to enactment of this section. Robinson v. Swope, 197 F.2d 633 (9th Cir. 1952). This section provides a prisoner with a post-conviction remedy to test the legality of his detention by filing a motion to vacate both the judgment and sentence in the trial court in which he was convicted and sentenced. Wiley v. United States Bd. of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974).

7. 28 U.S.C. § 753(f) (1970) provides in pertinent part:

> Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

This section also authorizes free transcripts without restrictions for habeas corpus relief and for other proceedings upon a finding by the court that the appeal presents a "substantial question."

8. 511 F.2d at 1117.

9. *Id.* at 1124.

Illinois,[10] has delineated an indigent defendant's right to a transcript. In *Griffin*, two indigent defendants attacked the statutory scheme of Illinois as violative of the due process and equal protection clauses of the Constitution. Illinois law gave every person convicted in a criminal trial the right of review, but conditioned direct appellate review on the requirement that the defendant furnish the appellate court with a bill of exceptions or report of the trial proceedings, a document which usually could not be prepared without a transcript of the trial proceedings. The defendants contended that the state's failure to provide a transcript to indigents without charge denied adequate review to the poor. The Court sustained their argument and held that indigent defendants must be afforded "as adequate appellate review as defendants who have money enough to buy transcripts."[11]

Two years after the *Griffin* decision, the Supreme Court held, in *Eskridge v. Washington*,[12] that a state could not require an indigent seeking a transcript for direct appeal to demonstrate, at a hearing before the original trial judge, that justice would be promoted by the provision of the transcript. Similarly, five years after *Eskridge*, the Court, in *Draper v. Washington*,[13] invalidated a

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10. 351 U.S. 12 (1956).

11. *Id.* at 19. The Court emphasized that the central aim of our entire judicial system is that all must "stand on an equality before the bar of justice . . . ," *id.* at 17, and stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. In addition, the Court found that although there is no constitutional right to any criminal proceeding beyond a trial, once a state creates such a right by statute, the due process and equal protection guarantees of the Constitution apply to those proceedings. *Id.* at 18.

The *Griffin* holding established the basic due process and equal protection principles applicable to indigent criminal appeal procedures, but left the states latitude to fashion their own particular procedural design within these principles. *Id.* at 20. *See generally* Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595 (1973); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 999 (1975).

12. 357 U.S. 214 (1958) (per curiam). *Eskridge* reached the Supreme Court on a writ of habeas corpus which attacked the state's denial of a transcript to the petitioner almost 20 years earlier. The state had not denied either the utility of the transcript or its continued availability. Justices Harlan and Whittaker dissented from the Court's decision, arguing that *Griffin* should not be retroactively applied. *Id.* at 216. For a discussion of the nonretroactivity issue see Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1559 (1975).

13. 372 U.S. 487 (1963). Draper challenged the Washington state procedure for obtaining free transcripts which had been revised in light of *Eskridge*. The Washington Supreme Court review of the denial of Draper's request for a free transcript at the transcript hearing was found to be inadequate because it was based solely on the stenographic record of the transcript hearing. The Court found such a record to be of insufficient completeness to ensure adequate appellate review. *Id.* at 497-500. Justice Goldberg, writing for the majority, stated an indigent petitioner's dilemma succinctly:

scheme whereby an indigent seeking a transcript for purposes of a direct appeal was required to demonstrate to the trial judge that the appeal was not frivolous. The following year, in *Hardy v. United States*,[14] the Court held that an indigent's newly appointed appellate counsel was entitled to receive a full trial transcript.[15] In recent years, the Court has extended direct appeal transcript rights to defendants charged with relatively minor offenses[16] and has imposed upon the states the burden of justifying the provision of anything less than a full trial transcript.[17]

Collateral Appeal Rights

The *Griffin* precepts have not been limited to direct appeals as a matter of right. In *Lane v. Brown*,[18] the Supreme Court held unconstitutional a state law requiring the public defender's ap-

> An indigent defendant wishing to appeal and needing a transcript to do so may only obtain it if the judge who has presided at his trial and has already overruled his motion for a new trial as well as his objections to evidence and to conduct of the trial finds that these contentions, upon which he has already ruled, are not frivolous. The predictable finding of frivolity is subject to review without any direct scrutiny of the relevant aspects of what actually occurred at the trial, but rather with examination only of what the parties argued at the hearing on the transcript motion and what the judge recalled and thereafter summarily found as to what went on at the trial.

Id. at 498. This is the type of quandary in which all indigent defendants are placed when they are required to demonstrate some type of preliminary showing justifying their need for a transcript.

14. 375 U.S. 277 (1964).

15. *Hardy*, which was based on statutory as opposed to constitutional grounds, dealt with federal procedures regarding appeals as of right. The *Hardy* majority stated that the right of a federal prisoner to adequate counsel on appeal would be undermined if counsel, newly appointed for the appeal, was denied access to the full trial transcript. *Id.* at 281-82.

16. *See* Williams v. Oklahoma City, 395 U.S. 458 (1969) (per curiam).

17. *See* Mayer v. City of Chicago, 404 U.S. 189 (1971). The *Mayer* Court held that although *Griffin* and *Draper* did leave the states with discretion to provide a substitute for a full trial transcript, where the grounds for appeal established a colorable need for the full transcript, the state has the burden of showing that something less than a full transcript would be sufficient. *Id.* at 195.

18. 372 U.S. 477 (1963). Other decisions issued the same day which reflected the Court's sensitivity and concern for the rights of indigent criminal defendants were Gideon v. Wainwright, 372 U.S. 335 (1963) (giving indigent defendants an absolute right to trial counsel); Douglas v. California, 372 U.S. 353 (1963) (giving indigents the right to counsel for first appeal as a matter of right); Fay v. Noia, 372 U.S. 391 (1963) (expanding the power of federal courts to intervene on behalf of state prisoners by dispensing with the exhaustion of state remedies doctrine); and Townsend v. Sain, 372 U.S. 293 (1963) (expanding the power of federal courts to examine the evidenced introduced at a state trial, pursuant to a state prisoner's application for a writ of habeas corpus).

proval of a free transcript for an indigent who was attacking a denial of a writ of error coram nobis.[19] The Court subsequently found that where indigent prisoners are appealing the denial of a writ of habeas corpus, they are entitled to a transcript of the hearing wherein the writ was denied.[20] Finally, the Court has held that where state law provides for a new application for a writ of habeas corpus at the appellate level in place of an appeal of the denial of the writ by the lower court, an indigent has the right to a transcript of the first habeas corpus hearing.[21]

C. The Ninth Circuit Decision

The Ninth Circuit, relying on *Griffin* and its progeny, disregarded contrary authority from five other circuits[22] and upheld MacCollom's request for a transcript. Judge Goodwin, writing for the court, stated that the restrictions imposed on granting a free transcript under 28 U.S.C. section 753(f) were only an embodiment of various federal court holdings[23] at the time of the statute's enactment. Therefore, the Ninth Circuit concluded that although the statute's requirements for transcripts were explicit, they set only a bare minimum standard which was subject to further extension should the Constitution be found to require it.

The *MacCollom* panel responded to two arguments in opposition to granting free transcripts. First, they disagreed with the Fourth Circuit dictum that "rarely, if ever, would the defendant, himself, need a transcript"[24] for the purposes of collateral attack. The *MacCollom* court found that there were no empirical studies supporting this assumption. Second, it rejected the argument that increased cost to the government would result from providing

19. 372 U.S. at 478. *Lane*, which expressly found that an indigent's rights to a transcript extended to post-conviction procedures other than direct appeal, was based on the interweaving of the right to a transcript cases with the filing fee cases. In Burns v. Ohio, 360 U.S. 252 (1959), the Court held that indigents could not be required to pay filing fees on a motion for appeal from a felony conviction. Smith v. Bennett, 365 U.S. 708 (1961), extended *Burns*, on equal protection grounds, to include habeas corpus proceedings. The implication of *Smith* and *Lane* that pre- and post-conviction remedies should be given the same equal protection guarantees cannot be ignored. However, this was not the view taken by the majority opinion in *MacCollom*. *See* text accompanying notes 30-37 *infra*.

20. *See* Long v. District Court, 385 U.S. 192 (1966).

21. *See* Gardner v. California, 393 U.S. 367 (1969).

22. United States v. Herrara, 474 F.2d 1049 (5th Cir. 1973); Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971); Hines v. Baker, 422 F.2d 1002 (10th Cir. 1970); Hoover v. United States, 416 F.2d 431 (6th Cir. 1969); United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964).

23. 511 F.2d at 1119, *citing* United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964).

24. 511 F.2d at 1121, *citing* United States v. Shoaf, 341 F.2d 832, 835 (4th Cir. 1964).

free transcripts to all imprisoned indigents for use in preparing section 2255 motions because, in most cases, indigents would already have obtained a transcript pursuant to their direct appeal. The court noted that if a free transcript were readily available, it might reveal that there was no serious ground for collateral attack, thereby saving the court time which would otherwise be used in a section 753(f) hearing.[25]

Convinced that allowing an indigent prisoner to obtain a free transcript upon request would not increase the overall costs of administering the federal judicial system, the Ninth Circuit held that such transcripts must be provided to indigents in order to assist in the preparation of section 2255 motions. Any other rule, the *MacCollom* court stated, would violate the principle established by *Griffin* and its progeny that indigent and wealthy defendants must be given "equivalent and fundamentally fair treatment."[26]

D. The Supreme Court Decision

The Plurality Opinion

On certiorari, Justice Rehnquist, writing for a plurality of the Court, initially responded to MacCollom's argument that section 2255 constituted an unconstitutional suspension of the writ of habeas corpus. Although Justice Rehnquist recognized that the remedy provided in section 2255 is essentially equivalent to habeas corpus relief, he stated that the restrictions placed on obtaining a transcript pursuant to that section did not suspend the writ of habeas corpus because the right to a transcript was authorized by statute and not the Constitution.[27] The Court also rejected MacCollom's due process objections, stating that the due process clause of the fifth amendment did not establish any right to collaterally attack a final judgment of conviction. Since MacCollom never pursued his section 753(f) right to a free transcript for an immediate appeal, Justice Rehnquist found that having "foregone this right, which existed by force of statute only, [MacCollom] may not several years later assert a due process right to review of his conviction and thereby obtain a free transcript . . . ."[28] The Court concluded that the conditions imposed on obtaining such a post-conviction transcript comported with "fair procedure" and hence did not violate the due process clause.[29]

25. 511 F.2d at 1123.
26. *Id.* at 1122.
27. 96 S. Ct. at 2090.
28. *Id.* at 2091.
29. *Id.*

Justice Rehnquist devoted the remainder of the plurality opinion to explaining why the equal protection clause did not require that indigents have the same access to transcripts as nonindigents. Noting that equal protection does not guarantee absolute equality or precisely equal advantages,[30] but simply "an adequate opportunity to present [one's] claim fairly,"[31] the Court stated that there was a distinction between the constitutional rights concomitant to a direct appeal and to a collateral attack on a judgment of conviction. The Court, relying on *Ross v. Moffitt*,[32] found the basic equal protection question to be the adequacy of MacCollom's access to procedures designed to review his conviction, in light of those procedures which MacCollom chose to ignore as well as those which he chose to follow. Although Justice Rehnquist recognized that it was more difficult for an indigent to obtain a transcript for a section 2255 collateral attack of a conviction, he stated that such a transcript would have been made available to MacCollom, had he directly appealed, affected MacCollom's equal protection claim. Equal protection did not require that the government furnish to indigents a delayed duplicate of a right of appeal with a free transcript which it had offered in the first instance. Thus, the Court found that the government's simple failure to automatically furnish an indigent a free transcript for a section 2255 motion did not offend the equal protection guarantees inherent in the fifth amendment.[33]

Justice Rehnquist concluded with the observation that courts of appeals in a majority of the circuits,[34] including previous panels of the Ninth Circuit,[35] were in accord with the position taken by the plurality opinion. He noted that a defendant's rights

30. *Id.*, *quoting* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 24 (1973).

31. 96 S. Ct. at 2091, *quoting* Ross v. Moffitt, 417 U.S. 600, 616 (1974).

32. 417 U.S. 600 (1974).

33. The fourteenth amendment is applicable only to the states. Any due process and equal protection rights of persons affected by federal action are contained within the fifth amendment. "There is no equal protection clause in the Fifth Amendment, but under the due process clause the minimal standards of justice ought not to be appreciably lower in the federal courts than the Federal Constitution requires in state courts." United States v. Shoaf, 341 F.2d 832, 835-36 (4th Cir. 1964). *See* Schneider v. Rusk, 377 U.S. 163 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

34. *See, e.g.*, Buford v. Henderson, 524 F.2d 147 (2d Cir. 1975); United States v. Herrara, 474 F.2d 1049 (5th Cir. 1973); Jones v. Superintendent, 460 F.2d 150 (4th Cir. 1972); Ellis v. Maine, 448 F.2d 1325 (1st Cir. 1971); Hines v. Baker, 422 F.2d 1002 (10th Cir. 1970); Hoover v. United States, 416 F.2d 431 (6th Cir. 1969); United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964).

35. *See, e.g.*, Nunes v. Nelson, 467 F.2d 1380 (9th Cir. 1972) (seeking discovery for a habeas corpus motion); Taylor v. United States, 238 F.2d 409 (9th Cir. 1956) (relief under a section 2255 motion).

were not seriously jeopardized since a transcript was unnecessary to alert a defendant to those events or occurrences which give rise to the usual grounds for successful collateral attacks on convictions.[36] Finally, Justice Rehnquist observed that affirmance of the Ninth Circuit holding would place the nonindigent middle class prisoner, too wealthy to qualify as an indigent but too poor to afford a transcript, at a disadvantage in section 2255 proceedings.[37]

E. The Concurring and Dissenting Opinions

Justice Blackmun concurred with the plurality opinion on the narrow ground that the Constitution did not require that indigents be provided with a transcript without any showing of need in order to collaterally attack a conviction. Justice Blackmun indicated that the Constitution did not require that indigents be provided with all possible "legal tools" merely because persons of unlimited means might be able to utilize such resources.[38]

Four Justices dissented from the plurality opinion. Justice Brennan, joined by Justice Marshall, declared that the *Griffin* principle of equality was a broad mandate to eliminate differences in access to legal instruments.[39] Justice Brennan stated that the Constitution demanded that MacCollom be afforded the same opportunity for collateral review of his conviction as the nonindigent. He rejected Justice Rehnquist's assertion that the adequacy of MacCollom's opportunity to present claims at trial and on direct appeal made discrimination between indigent and nonindigent in post-conviction proceedings constitutionally permissible.[40] Justice Brennan also noted that the "adequate opportunity" language, taken from *Ross v. Moffitt* and relied on by the plurality opinion, spoke not only to equality of opportunity in the overall criminal process, but also to equality of opportunity at any stage

36. 96 S. Ct. at 2092.

37. The middle class prisoner problem is susceptible of two solutions: (1) either extend the rights of indigents to all those persons who need them; or (2) maintain the rights of indigents at a minimum level so that the middle class prisoner is not placed in a disadvantaged position.

38. 96 S. Ct. at 2094. Justice Blackmun did not utilize Justice Rehnquist's cumulative approach and stated that the two section 753(f) prerequisites for obtaining a transcript did not constitute a significant barrier to MacCollom's opportunity to fairly present his claim. For a discussion by Justice Blackmun of sections 753(f) and 2255 see Blackmun, *Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1967). Justice Blackmun implied therein that the government has the burden of proving frivolity. *Id.* at 347.

39. 96 S. Ct. at 2094.

40. *Id.* at 2096.

of the process where the validity of a defendant's conviction is at stake.

Justice Stevens' dissent, joined by Justices Brennan, White and Marshall, argued that the government should be required to provide indigent defendants with a transcript for two reasons. Justice Stevens first indicated that the administration of justice in the federal system would be carried out in a more evenhanded manner since an indigent's right to a transcript in section 2255 would not depend on the "happenstance of what district judge has been assigned [in a section 753(f) frivolity hearing]."[41] Second, Justice Stevens believed that the administration of justice would be carried out with less delay since if transcripts were routinely made available in section 2255 proceedings, federal prosecutors would routinely order the transcript at the conclusion of every criminal trial, a practice which would eliminate delay in processing the criminal appeal at the circuit court level.[42]

F. The Supreme Court Analysis in *MacCollom*

The plurality opinion of the Court placed great emphasis on the *Ross* statement that the equal protection principles embodied in the fifth amendment only require that a defendant be presented "with an adequate opportunity to present his claim fairly in the context of the State's appellate process."[43] This opportunity, the Court stated, must be evaluated in light of all the various methods of appellate review which are available to a defendant, and should not be limited solely to the means of review utilized.[44] Emphasis on the overall review procedures available to an indigent defendant, in order to determine the viability of his equal protection claims, has no precedent in *Ross* or any other past decision of the Court.

In *Ross*, the Court held that an indigent defendant had no right to be provided with counsel in order to prepare a discretionary appeal to the North Carolina Supreme Court.[45] To reach this conclusion, the *Ross* Court applied a two-step procedure which

41. *Id.* at 2097.

42. *Id.* at 2098. Justice Stevens also noted that these two reasons would also justify accepting the truthfulness of MacCollom's allegations of ineffective assistance of counsel and insufficient evidence to support his conviction. Justice Stevens would have found, as a matter of law, that these allegations were sufficient to plead a nonfrivolous claim that could not be resolved without a transcript. *Id.*

43. 96 S. Ct. 2091, *quoting* Ross v. Moffitt, 417 U.S. 600, 616 (1974).

44. 96 S. Ct. at 2092.

45. 417 U.S. at 614-15.

first focused on the defendant's overall access to North Carolina's appellate processes.[46] However, the Court next looked to the right afforded the defendant at the particular stage of the appellate process in question and determined that the legal resources possessed by the indigent defendant at the time would not unconstitutionally deprive him of an adequate opportunity to present his claims.[47] Other Supreme Court decisions dealing with the rights of indigent defendants have taken an approach similar to that utilized in *Ross* and have always inquired to what extent an indigent would be disadvantaged by a judicial failure to invalidate a financially based barrier to some portion of the appellate process.[48]

The *MacCollom* Court failed to follow the analysis utilized by past Supreme Court decisions dealing with the rights of indigent prisoners. The Court should have looked to the merits of MacCollom's equal protection claim, with guidance from the *Griffin* mandate that indigent defendants must be afforded the same type of adequate appellate review as defendants "who have money

46. *See* text accompanying note 41 *supra*.

47. 417 U.S. at 615. The Court stated that at the time defendant Ross was attempting to appeal to the North Carolina Supreme Court

> 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 . . . would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

Id. Note the Court's emphasis on the adequacy of the defendant's legal resources at the particular point in the appellate process. The *MacCollom* Court failed to undertake any such analysis, but simply looked to the entire scope of the federal appellate process in order to find that the defendant was not denied access to a meaningful review of his claims.

48. *See* Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971); Long v. District Court, 385 U.S. 192, 194-95 (1966); Lane v. Brown, 372 U.S. 477, 484-85 (1963); Burns v. Ohio, 360 U.S. 252, 257 (1959). For example, the *Burns* Court stated that

> *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to *any phase* of that procedure because of their poverty. 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.

Id. (citation omitted) (emphasis added). *Burns* invalidated an Ohio requirement that an indigent defendant in a criminal case must pay a filing fee before he or she could file a motion for leave to appeal a conviction to the Ohio Supreme Court. The *Burns* Court clearly focused on whether the Ohio requirement disadvantaged an indigent defendant at this stage of the Ohio appellate process. Nowhere did the Court discuss the adequacy of the Ohio appellate process in toto.

enough to buy transcripts."[49] If an indigent is to be provided with equal protection of the laws, he must be afforded access to a transcript which a more affluent prisoner could have purchased. The failure to provide indigents with transcripts in section 2255 appeals compels them to state their grounds for appeal before they have the opportunity to examine the very record which would enable them to correctly articulate the basis of their challenge. Affluent prisoners, who can purchase transcripts long before they are required to set forth such grounds, are placed at a distinct advantage in this situation—an advantage which permits them to present a meaningful appeal. Indigent defendants are left with nothing more than a "meaningless ritual."[50] Such a result is constitutionally proscribed by the *Griffin* equality principle.

G. Conclusion

The *MacCollom* decision gave great weight to the expressions of other circuit courts of appeals in holding that indigent defendants are not entitled to a transcript as a matter of right in collaterally attacking their convictions under section 2255.[51] Justice Rehnquist noted that

> [t]he usual grounds for successful collateral attacks upon convictions arise out of occurrences outside the courtroom or events in the courtroom of which the defendant was aware . . . without the need of having his memory refreshed by reading a transcript.[52]

The transcript's minimal impact on the ultimate disposition of a section 2255 motion, viewed with the collective protections afforded indigents in the appellate process, led the Court to hold that no transcript need be provided indigent defendants in MacCollom's position. This holding ignores the fact that in any given case, the question must be whether a particular transcript contains any basis for relief—regardless of whether the Court's assumption about the utility of transcripts in section 2255 is correct. To

49. 351 U.S. at 19.

50. *See* Douglas v. California, 372 U.S. 353 (1963), where Justice Douglas, writing for the Court, stated that when a state denies an indigent counsel on an appeal which may be taken as a matter of right,

> [t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 358.

51. *See* notes 34 & 35 *supra* and accompanying text.

52. 96 S. Ct. at 2093, *quoting* United States v. Shoaf, 341 F.2d 832, 835 (4th Cir. 1964) (Haynsworth, J.).

ensure an indigent's adequate access to the appellate process, transcripts should be provided automatically in all section 2255 appeals. Mistakes made at trial are not necessarily procedural errors about which defendants will be aware, especially where they allege a denial of the effective assistance of counsel. The Court's failure to provide indigents with transcripts so that they may prosecute section 2255 collateral attacks on their conviction effectively requires indigents to have better memories than more affluent defendants. In addition, it prohibitively restricts an indigent's access to one of the last possible means by which their convictions may be reviewed. The demands of the equal protection clause and society's interest in the protection of an individual's liberty should have led the Court to require that indigents automatically be provided with a transcript meeting the prerequisites set forth by section 753(f).[53]

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53. Justice Brennan has stated the point succinctly:

> [C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

Stone v. Powell, 96 S. Ct. 3037, 3063 (1976) (Brennan, J., dissenting), *quoting* Fay v. Noia, 372 U.S. 391, 424 (1963).