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Absolute Right to Counsel on Appeal Rule and Retroactivity in Missouri, An

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Comments

AN ABSOLUTE RIGHT TO COUNSEL ON APPEAL RULE AND RETROACTIVITY IN MISSOURI

Bosler v. Swenson[1]
Donnell v. Swenson[2]

On July 14, 1966, the Eighth Circuit Court of Appeals held Missouri's criminal appellate procedure for the appointment of counsel on appeal for indigent criminal defendants unconstitutional.[3] On August 23, 1966, the United States District Court for the Western District of Missouri held that the initial decision was to be applied with absolute retroactivity in this state.[4] It is the intent of this article to discuss these decisions, their background, and purpose.

I. The Cases

In 1961, Bosler was tried and convicted in the City of St. Louis of robbery in the first degree by means of a dangerous and deadly weapon. He was properly treated as an indigent criminal defendant. Trial counsel, appointed by the court, prepared and filed defendant's motion for a new trial, and, when denied, prepared the notice of appeal.[5] Prior to the preparation and certification of the transcript for appeal, Bosler, *pro se,* filed a rule 27.26[6] motion to vacate sentence, and this motion was also denied. In the rule 27.26 motion, Bosler alleged that his constitutional rights had been violated in that the trial court had not appointed counsel to aid him in the preparation and presentation of his appeal.[7] In April of 1963, the Missouri Supreme Court affirmed Bosler's conviction.[8] In rejecting the challenge based on a lack of counsel on appeal, the court chose to disregard

1. 363 F.2d 154 (8th Cir. 1966). Since the text of this article was prepared, the United States Supreme Court affirmed. 35 U.S.L. Week 3320 (U.S. March 14, 1967). The *per curiam* opinion follows that of the Court of Appeals. In addition, the Court noted that the "right to be furnished counsel does not depend upon a request," citing Carnley v. Cochran, 369 U.S. 506, 513 (1962). This issue was apparently first raised in the state's petition for certiorari.
2. 258 F. Supp. 317 (W.D. Mo. 1966).
3. Bosler v. Swenson, *supra* note 1.
4. Donnell v. Swenson, *supra* note 2.
5. State v. Bosler, 366 S.W.2d 369, 371 (Mo. 1963).
6. Sup. Ct. Rule 27.26 provides in effect that a prisoner in custody under sentence may file a motion to vacate, set aside, or correct his sentence on a variety of grounds, including violation of constitutional rights, with the trial court. The rule authorizes the trial court to take appropriate action.
7. State v, Bosler, *supra* note 5, at 373.
8. State v. Bosler, *supra* note 5.

Douglas v. California,[9] decided March 18, 1963. The court noted only that under Supreme Court Rules 28.02 and 27.20, it considers all allegations of error preserved by the motion for new trial where the appellant does not file a brief. "Such procedure adequately protects the defendant's rights."[10] Bosler sought habeas corpus in the United States District Court for the Western District of Missouri. That court initially denied the application.[11] The court of appeals reversed and ordered the defendant released if the state failed to act to grant the defendant a new appeal within ninety days.[12] The Eighth Circuit's opinion complimented Missouri for its forward treatment of indigent criminals, and then stated its legal conclusion that the Missouri procedure fell short of the constitutional standard adopted in *Douglas*.[13] The court further found that under familiar principles of constitutional law, *Douglas* was to be applied to cases not yet final and that Bosler fell within the purview of that rule as the affirmation of his conviction came three weeks after the announcement of *Douglas*.[14]

In 1960, Donnell was convicted in the City of St. Louis of robbery in the first degree by means of a dangerous and deadly weapon. He too was treated as an indigent criminal defendant and trial court appointed counsel. Counsel prepared defendant's motion for a new trial and his notice of appeal.[15] In affirming, the Missouri Supreme Court noted that because of the obvious inadequacy of the defendant's *pro se* brief, it had considered all of the assignments of error preserved in the motion for a new trial as if the defendant had filed no brief, while making the best use of that brief it could.[16] Donnell resorted next to the rule 27.26 motion to vacate sentence, and for the first time raised the issue of the denial of his constitutional rights in that the trial court had failed to appoint counsel on his first appeal knowing that he was an indigent. The trial court denied this motion and the Missouri Supreme Court affirmed.[17] The supreme court noted that in July, 1963, it had amended rule 29.01 to conform to the standard of *Douglas* and then stated:

> It is probable that as large a percentage of criminal judgments have been reversed in this Court without counsel, as have been reversed with counsel. Under these circumstances, we decline to hold, ex post facto, that this defendant was deprived of any constitutional right because his trial counsel did not brief and argue the case on appeal or because other counsel was not appointed to do so.[18]

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9. 372 U.S. 353 (1963), holding that an indigent criminal defendant has a right to counsel on the first appeal a state grants.
10. State v. Bosler, *supra* note 5, at 373.
11. Bosler v. Swenson, *supra* note 1, at 155.
12. *Id.* at 158.
13. *Id.* at 157.
14. *Id.* at 158.
15. State v. Donnell, 351 S.W.2d 775, 777 (Mo. 1961).
16. State v. Donnell, *supra* note 1, at 780. This is consistent with prior decisions of the court. State v. Mace, 295 S.W.2d 99 (Mo. 1956); State v. Russell, 324 S.W.2d 727 (Mo. 1959).
17. State v. Donnell, 387 S.W.2d 508, 513 (Mo. 1965).
18. *Id.* at 514.

No plenary consideration was given to this constitutional issue, nor did the court recognize another such issue.[19] The court reaffirmed the position that it had competence to act as both advocate and impartial tribunal. Donnell sought habeas corpus, which was granted in an opinion both supporting *Bosler* and supplying retroactivity to the rule.[20]

II. The Background

Until the 1930's, the American attitude toward poverty was at best one of indifference. Our judicial system also had little inclination to protect the rights of the poor. With the depression and a large increase in the number of poverty stricken individuals, this indifferent attitude was altered. Murmurs were early felt in legal circles. *Powell v. Alabama*[21] began the change in 1932, and shortly thereafter indigent criminal defendants were to be given trial counsel in capital cases.[22] The foundation was thus laid for all that was to later develop in this area. In 1938, the Supreme Court recognized that the sixth amendment gave the indigent criminal defendant, in the federal courts, an *absolute* right to counsel[23] at trial and on appeal. Then in 1941, a major breakthrough in attitude was expressed in *Edwards v. California*:

> Indigence in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact constitutionally an irrelevance. . . .[24]

The Court had begun to carefully distinguish an individual's constitutional rights from his guilt and his status as it related to that guilt.

Prior to 1959, however, lower federal courts held unanimously that the failure of a state to give the indigent aid on appeal and in post-conviction remedies was not a denial of constitutional rights.[25] These decisions relied on *McKane v. Purston*,[26] where the Supreme Court decided that appeal from a criminal conviction as a matter of right was not required by due process, but was a matter of discretion which lay with the state legislature. To hold otherwise would be to recognize explicitly that the system of trial justice which has developed in this

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19. The Missouri court refused to grant petitioner an evidentiary hearing as required by Townsend v. Sain, 372 U.S. 293, 312 (1964). Donnell v. Swenson, *supra* note 2, at 333.

20. Donnell v. Swenson, *supra* note 2.

21. 287 U.S. 45 (1932).

22. Betts v. Brady, 316 U.S. 455 (1942).

23. Johnson v. Zerbst, 304 U.S. 458 (1938); Johnson v. United States, 352 U.S. 565 (1957); Ellis v. United States, 356 U.S. 674 (1958). However, not all post-conviction remedies and motions are encompassed by the broad rule. Gershon v. United States, 243 F.2d 527 (8th Cir. 1957); Smith v. United States, 216 F. Supp. 809 (S.D. Cal. 1961).

24. 314 U.S. 160, 179 (1941).

25. See Carr v. Lanagan, 50 F. Supp. 41 (D. Mass. 1943); United States v. Martin, 205 F.2d 514 (2d Cir. 1953); Mason v. Cranor, 227 F.2d 557 (9th Cir. 1955).

26. 153 U.S. 684 (1895); see also McDonald v. Hudspeth, 129 F.2d 196 (10th Cir. 1942).

country is inherently weak and in need of additional checks and balances. It should be noted that the Supreme Court has recently affirmed this position tacitly in *Thompson v. Louisville*.[27] Due process did not yet require state aid to indigent criminal defendants at the appellate level.[28] The equal protection clause of the fourteenth amendment was still basically restricted to situations of racial discrimination, as defined in the *Slaughter House Cases*.[29] In 1951, the Supreme Court moved forward in *Dowd v. United States*.[30] In a habeas corpus proceeding, the Court held that the suppression of appeal papers by a warden during the six month period allowed for appeal constituted a denial of equal protection. The Court further held that if the state provides appeal to all criminal defendants, appeal provided to the indigent must meet the standards of due process and equal protection.[31] In 1956, the ultimate step was taken in *Griffin v. Illinois*.[32] The Court held that the administration of the statutory criminal appellate procedure in such a way as to deny "adequate appellate review to the poor" was a violation of the equal protection and the due process clauses of the United States Constitution.[33] The defendant, an indigent, had requested a free transcript for the purposes of his appeal. The State refused and required that he pay for the transcript in advance. On appeal, Illinois conceded that the transcript was a necessity for an adequate review of the trial, but argued that since it had the power to withhold the review altogether, it had the power to set the terms upon which the review could and would be granted.[34] To a certain extent, the Court agreed:

> But neither the fact that a state may deny the right of appeal altogether nor the right of a State to make appropriate classifications. . . , nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by the State that have no relation to a rational policy of criminal appeal nor authorizes the imposition of conditions that offend the deepest presuppositions of our society.[35]

The majority equated discrimination on account of poverty and discrimination on the basis of race. The equal protection clause was extended to all indigent criminal defendants, as the Court recognized that it had a responsibility to provide equal justice to the poor. The holding of the court is best summarized in these words:

> The state is not free to produce such squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.[36]

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27. 362 U.S. 199 (1960). The Supreme Court granted certiorari to review a police court judgment which could not be reviewed under Kentucky law.
28. Cases cited note 25 *supra*.
29. 83 U.S. (16 Wall.) 36 (1873).
30. 340 U.S. 206 (1951).
31. *Id.* at 208.
32. 351 U.S. 12 (1956).
33. *Id.* at 18.
34. *Id.* at 14.
35. *Id.* at 21.
36. *Id.* at 22.

Though limited factually to the right of an indigent defendant to a free transcript, the thrust of the decision was clear. The state cannot discriminate in its judicial structure on the basis of poverty. It can not establish a system of criminal justice which, though non-discriminatory on its face, in fact works to deny the indigent effective access to any of its phases. *Burns v. Ohio*[37] made this abundantly clear, holding that it was a violation of the equal protection and due process clauses for the court to refuse to file appeal notices without the requisite filing fee. In that decision the Court made clear that its major concern was equal access and equal opportunity in every phase of criminal justice.

In 1963, *Gideon v. Wainwright*[38] held that due process required the state provide counsel to all indigent criminal defendants. On the same day, *Douglas v. California*[39] was decided.

In the *Douglas* decision the Supreme Court held that it was a denial of due process and of equal protection for the state to fail to appoint counsel on the first appeal it grants as a matter of right.[40] Under the California procedure, the indigent requests the appointment of counsel. The appellate court then reviews the case and determines whether the interests of justice would be served by the appointment of an attorney, *i.e.*, if in its judgment such appointment would be of aid to the defendant or the court.[41] The Supreme Court was concerned less with the exact procedure than with the *type* of appeal the defendant received. If he has sufficient funds, his attorney may examine the record and present the defendant's case with brief and argument. If he lacks sufficient funds, the appellate court must prejudge the merits of the defendant's cause to determine if the appeal was worthy of a champion. In effect, the Court condemned other courts for placing themselves in a position where their pre-determination of guilt could influence their decision as to the defendant's constitutional rights.

> There is lacking the equality demanded by the Fourteenth Amendment where the 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, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The 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.[42]

The essential elements of the decisions are that one person enjoys the benefit of counsel and his knowledge and ability while another does not; and where the record is not clear and inferentially where the area in issue is a developing one, the poor man is severely disabled to the extent that he is denied both due process

37. 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961).
38. 372 U.S. 335 (1963).
39. Douglas v. California, *supra* note 9.
40. *Id.* at 356.
41. *Id.* at 354.
42. *Id.* at 357.

and equal protection by the state's judicial process.[43] *Douglas* is therefore only a factual variation of the *Griffin* decision of seven years before.

III. The Rule as Applied in Missouri

In Missouri the indigent criminal defendant has two avenues of appeal.[44] He may appeal from the denial of his motion for a new trial merely by filing a notice of appeal.[45] When this method is utilized, the Missouri Supreme Court has stated that it will consider all allegations of error preserved in the motion for new trial which are sufficiently specific to comply with rule 27.20.[46] Secondly, the defendant may file only a brief in support of his appeal. Where the defendant has counsel, or the court considers his *pro se* brief adequate, assignments of error made in the motion for new trial not preserved in the brief are waived.[47] Where the defendant files a *pro se* brief, which the court considers to be "obviously inadequate" or which pays little heed to the assignment of errors in his motion for a new trial, the court will review all valid assignments of errors preserved under rule 27.20 and will in addition utilize the brief to the fullest possible extent.[48] The Eighth Circuit Court of Appeals considered that the Missouri system provided for the appointment of counsel on appeal when in the exercise of its discretion the trial court felt that it would aid the defendant.[49] Research has failed to disclose any reported cases in which the trial court acted to appoint counsel for the defendant on his first appeal as a matter of right. At the onset, then, the Mis-

43. See generally, Boskey, *The Right to Counsel in Appellate Proceedings,* 45 Minn. L. Rev. 783 (1961); Clark, *The Sixth Amendment and the Law of the Land,* 8 St. L. L.J. 1 (1963); Simeone and Richardson, *The Indigent and his Right to Legal Assistance in Criminal Cases,* 8 St. L. L.J. 15 (1963); Mator, *The Right to be Provided Counsel: Variations On A Familiar Theme,* 9 Utah L. Rev. 50 (1964).

44. For an excellent discussion of the Douglas rule and Missouri, see, Gerard, *The Right to Counsel on Appeal in Missouri: A Limited Inquiry into the Factual and Theoretical Underpinnings of Douglas v. California,* 1965 Wash. U.L.Q. 463.

45. Sup. Ct. Rule 28. Since the preparation of this article, the Missouri Supreme Court has moved to amend its court rules 27.26, 28.02, 28.05, and 29.01. The text of these amendments are found in Advance Sheet No. 4, 409 S.W.2d, Feb. 7, 1967. The impact of the change will be dealt with fully in a forthcoming issue of the Missouri Law Review.

It is sufficient to note here that the changes in Rule 28 will eliminate the practice of appeal without briefs as the court indicates it will no longer consider errors raised but not briefed. Further the change in Rule 27.26 provides that indigents be given counsel thus eliminating the problem of the "first appeal as of right" language in *Douglas*. The change in Rule 29.01 requires briefs by appointed counsel and should move Missouri significantly forward in this area. The reader should consider these new rules, noting that with them the result of the *Donnell* and *Bosler* cases will be guaranteed to all indigents in this state and that with them neither case would have been necessary.

46. Cases cited note 16, *supra;* State v. Bosler, *supra* note 5.

47. Sup. Ct. Rule 28.02; State v. Donnell, *supra* note 15; State v. Russell, *supra* note 16; State v. Mace, *supra* note 16; State v. Smith, 365 S.W.2d 505 (Mo. 1963).

48. State v. Donnell, *supra* note 15; State v. Turner, 272 S.W.2d 266 (Mo. 1954).

49. Bosler v. Swenson, *supra* note 1 at 157.

souri system is significantly different from that struck down in California. It is also significantly different from the systems struck down in *Lane v. Brown*[50] and in *Draper v. Washington*.[51] In Missouri, the indigent defendant is not burdened with a predetermination that his appeal is without sufficient merit to warrant counsel.

In the second appeal in the *Donnell* case on his denial of the rule 27.26 motion, the Missouri Supreme Court stated:

> It is probable that as large a percentage of criminal judgments have been reversed in this court without counsel, as have been reversed with counsel. Under these circumstances, we decline to hold, ex post facto, that this defendant was deprived of any constitutional right because his trial counsel did not brief and argue the case on appeal or because other counsel was not appointed to do so.[52]

Professor Gerard of Washington University agrees with the factual conclusion stated by the court.[53] The Eighth Circuit Court of Appeals also concurred,[54] but held the Missouri procedure unconstitutional without even a requirement that the defendant show actual prejudice. What then is it that makes this procedure unconstitutional?

The indigent defendant normally has had trial counsel, who has prepared defendant's motion for a new trial. The defendant has then filed a *pro se* brief or in effect throws himself upon the mercy of the court. There has been no contention that the Missouri Supreme Court has been less than conscientious in attempting to protect the defendant, yet the *Douglas* standard has been violated. The emphasis in *Douglas* must be placed on the Supreme Court's requirement that every defendant have the advantage of an attorney's legal skills to search the record, research the law and brief and argue the appeal. Under the Missouri system, the indigent has had the aid of the attorney on appeal only in the preparation of his motion for a new trial. Yet this aid is without much significance since the attorney is, at that time, unable to make an actual search of the record and must rely on his own memory. He is not able to discover the "hidden errors" which may pervade the record, nor is he able to sufficiently research the law. Thus, it is insignificant that in many criminal cases where the defendant has counsel the defendant and his counsel have not filed a brief, but have allowed the defendant to win or lose on the record and the brief of the attorney general.[55]

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50. 372 U.S. 477 (1963). Under the Indiana system, the Public Defender was vested with the duty to protect the indigent's rights. He had authority to order a transcript and without such order, the defendant could not obtain a transcript. Court rules permitted appeal from a denial of a writ of error, *coram nobis*, but require a transcript to vest jurisdiction. This system was held to violate the equal protection clause.

51. 372 U.S. 487 (1963). Under this system, the indigent must convince the trial court that the appeal was not frivolous. Logically, if he could do so, he would get a new trial. This was held to violate both due process and equal protection.

52. State v. Donnell, *supra* note 18.

53. Gerard, *supra* note 44.

54. Bosler v. Swenson, 363 F.2d 154, 157 (8th Cir. 1966).

55. Gerard, *supra* note 44.

The insignificance is derived from the fact that the equal protection clause of the fourteenth amendment, as interpreted, only prohibits invidious discrimination as between the rich and the poor.[56] The discrimination in the Missouri system exists because the indigent is not given the same opportunity as is the man of means, regardless of the ultimate result. The rich man's counsel has had the opportunity to search the record and has been able to make a value judgment based on all relevant factors when he chooses not to brief or argue the case on appeal. The indigent lacks this basic opportunity: to do otherwise. This creates the degree of discrimination which violates the due process and equal protection clauses. Logically, discrimination cannot be entirely eliminated from the appellate process, for the man of means will have the ability to hire the more skilled attorney and provide himself with investigators. Yet the Supreme Court has recognized that these differences are beyond the power of that Court to repair.[57] This fact does not cause it to restrain itself in protecting the individual by giving to the indigent defendant substantially the same opportunity on appeal. The indigent may not receive the best lawyer available, but he will have a man whose skill and training make him better able than the defendant to ascertain upon what basis the defendant should proceed.

> For there can be no equal justice where the kind of appeal a man enjoys depends "on the amount of money he has."[58]

There are additional reasons why Missouri's procedure must fail. First, the appeal from a motion for a new trial provides no guarantee that there will be a full use of the attorney's skills and is subject to abuse.[59] Second, the American judicial system is based upon an adversary system. Historically the judicial function has been that of the impartial judge, not the advocate.[60] As noted in *Powell v. Alabama*:

> But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused?[61]

The court lacks the ability to sufficiently research the entire record and the responsibility necessary to insure the defendant his rights. The functions of the court and of the advocate are wholly distinct. Making the court an advocate deprives it of its objectivity.[62] This was the recognized situation in England where the accused was not, until 1836, allowed counsel.

> The flimsy pretence, that the courts are to be counsel for the prisoner will only heighten our indignation at the practice; for it is apparent to

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56. Griffn v. Illinois, *supra* note 32.
57. *Id.* at 21; Douglas v. California, *supra* note 9.
58. Douglas v. California, *supra* note 9, at 355; Griffin v. Illinois, *supra* note 32, at 19.
59. Gerard, *supra* note 45.
60. Clark, *supra* note 43; Powell v. Alabama, *supra* note 21.
61. Powell v. Alabama, *supra* note 21 at 61.
62. Articles cited note 43 and 44 *supra;* Donnell v. Swenson, 258 F. Supp. 317, 324 (W.D. Mo. 1966).

> the least consideration, that a court can never furnish a person accused of a crime with the advice and assistance necessary to make his defense.[63]

Third, the Missouri procedure is complicated because the attorney general briefs each criminal appeal, generally on all issues raised in the motion for a new trial where the defendant has not filed a brief, or when the attorney general feels that the appellate court may consider all of the allegations in the motion for a new trial. In addition, the attorney general cannot confess error and, therefore, argues for affirmance in every instance.[64] This raises the likelihood that too much reliance will be placed on the work of the attorney general's office, which is required by judicial policy to be prejudicial. Thus, the court has deprived itself of the objectivity necessary to protect an individual's constitutional rights without becoming entangled in what may be his obvious guilt. The usual Missouri procedure would be but a one-half adversary system on the appellate level.

> Our American system of jurisprudence is based upon the fundamental assumption that the rights of the innocent must be constitutionally protected and safeguarded by an adversary system of criminal law administration and that such a system is a viable one only if the contesting parties are represented by competent counsel. Anything less would convert our adversary system of criminal justice into an inquisitorial system unknown to American jurisprudence.[65]

IV. Retroactivity

Bosler held only that the *Douglas* decision was to be applied to cases not yet final and to those pending on review.[66] The Supreme Court has consistently held that finality means that there has been a judgment, that all available appeals have been exhausted, and that time for a petition for certiorari has elapsed.[67] This principle, that the decisions of the Court are to be applied to all cases not yet final, is not new, and has been consistently applied except in cases in which the court has denominated the decision to be purely prospective so that it does not even apply to the parties before the court, or to be purely retrospective.[68] The Eighth Circuit Court of Appeals was on familiar constitutional grounds when it held that the *Douglas* standard was to be applied to the *Bosler* conviction since the *Douglas* decision was handed down three weeks prior to the affirmation of *Bosler*'s conviction. The problem in *Donnell* is different. Was the principle in the *Douglas* decision to be given absolute retroactive effect so that it would encompass the 1960 conviction of the defendant Donnell? The United States District

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63. Powell v. Alabama, 287 U.S. 45, 63 (1932); Mr. Justice Sutherland quoting Zephaniah Swift.

64. See Gerard, *supra* note 44. This is a policy of the Supreme Court of Missouri, the propriety of which is subject to extreme doubt.

65. Donnell v. Swenson, *supra* note 62, at 326.

66. Bosler v. Swenson, 363 F.2d 154, 158 (8th Cir. 1966).

67. Linkletter v. Walker, 381 U.S. 618 (1965); Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932).

68. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

Court for the Western District of Missouri held that the answer must be yes. On eight different occasions, the Supreme Court of the United States has so indicated[69] and nine lower federal courts have agreed.[70] The best indication of the Supreme Court's attitude is *Smith v. Crouse*,[71] a 1964 decision. The defendant had been convicted in 1960. In 1963, he applied to the Kansas Supreme Court for a writ of habeas corpus alleging violation of his constitutional rights because the court originally failed to appoint counsel for him on appeal. The Kansas Supreme Court rejected the defendant's contentions, noting that only the United States Supreme Court could give an authoritative decision as to retroactivity.[72] In 1964, in a *per curiam* decision, the United States Supreme Court reversed the judgment of the Kansas court, citing only *Douglas*.[73] Mr. Justice Harlan dissented on the ground that he felt that the question of the retroactive application of the *Douglas* case should be given plenary consideration.[74] It was made abundantly clear that the majority opinion was applying the principle retroactively.

> In the light of *Douglas*'s recognition of an indigent's "absolute" right to counsel on appeal and considering the dissenting justices' position that the apposite constitutional clause is the Due Process Clause, we hold that *Douglas* must be applied retrospectively.[75]

Because of the response of the United States Supreme Court to the position of the Kansas court in 1964, there seems to have been little doubt as to the outcome on this question. However, the *Smith* case and the seven other *per curiam* decisions agreeing with it were decided before three cases involving retroactivity in criminal cases: *Linkletter v. Walker*,[76] *Tehan v. United States ex rel Shott*,[77] and

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69. Smith v. Crouse, 378 U.S. 584 (1964); Ruark v. Colorado, 378 U.S. 585 (1964); Cox v. State, 376 U.S. 191 (1964); Shockey v. Illinois, 375 U.S. 22 (1963); Ausbie v. California, 375 U.S. 24 (1963); Herrera v. Heinze, 375 U.S. 26 (1963); Tabb v. California, 375 U.S. 27 (1963); Daegeie v. Kansas, 375 U.S. 1 (1963). On March 14, 1967, the Supreme Court remanded two cases for consideration in the light of *Bosler, Tehan, infra* note 77, and *Eskridge, infra* note 79. Tettamble v. Missouri, 33 U.S.L. WEEK 3320 (U.S. March 14, 1967); Deckard v. Warden, 33 U.S.L. WEEK 3321 (U.S. March 14, 1967). As in the *Smith* case, it would appear that the court is giving Missouri another chance to reach the result of retroactive application independently.

70. Puckett v. North Carolina, 343 F.2d 452 (4th Cir. 1965); Magee v. Peyton, 343 F.2d 433 (4th Cir. 1965); Pate v. Holman, 341 F.2d 764 (5th Cir. 1965); Chase v. Page, 343 F.2d 167 (10th Cir. 1965); United States *ex rel*, Mitchell v. Fay, 241 F. Supp. 165 (S.D.N.Y. 1965); Miller v. Okla., 240 F. Supp. 263 (E.D. Okla. 1965); Kessinger v. Okla., 239 F. Supp. 639 (E.D. Okla. 1965); Wright v. Bailey, 228 F. Supp. 560 (E.D.N.C. 1964); Spaulding v. Taylor, 234 F. Supp. 147 (D. Kan. 1964).

71. 378 U.S. 584 (1964). For a representative state court decision holding *Douglas* retroactive, see, *e.g.*, Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 12, 213 Atl. 2d 613, 624 (1965).

72. Smith v. Crouse, 192 Kan. 171, 386 P.2d 295 (1963).

73. Smith v. Crouse, *supra* note 72.

74. *Id.* at 585.

75. Pate v. Holman, 341 F.2d 764, 776 (5th Cir. 1965).

76. 381 U.S. 618 (1965).

77. 382 U.S. 406 (1966).

Johnson v. New Jersey.[78] Further, the case of *Eskridge v. Washington State Board of Prison Terms and Paroles*[79] is particularly relevant to this discussion.

The 1958 *Eskridge* decision held that the *Griffin* case was to be applied retroactively to a 1935 murder conviction.[80] Logically, this case is of particular importance since it is contended that the *Douglas* decision was merely a factual variation on the theme set in *Griffin*. In *Eskridge*, the Court did not bother to discuss retroactivity since the invidious discrimination condemned there was held to substantially affect the defendant's rights on appeal, and therefore the defendant was denied a fair and equal appeal, a denial of equal justice which can be corrected only by a new appeal.

Linkletter[81] solidified a rule previously announced by Mr. Justice Cardozo, that the Constitution neither requires nor prohibits retroactive application of any decision.[82] In that decision, the Court noted that it had in the past made decisions both absolutely retroactive and absolutely prospective without extended discussion, and then set out relevant considerations which were decisive of its decision. The courts of the nation were instructed to look to the merits of each case, "by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard it operation."[83] Since *Mapp v. Ohio*[84] was to be an effective deterrent to police action, its purpose would not be advanced, nor would reparation be furthered by its retroactive application. In addition, the Court felt that its past decisions had been so heavily relied on that the administration of justice would be impeded if it were retroactive.[85]

Tehan v. United States ex rel. Shott[86] concerned the rule of *Griffin v. California*,[87] which held that commenting on the failure of the defendant to testify in criminal cases was a violation of his fifth amendment privilege against self incrimination. This decision accepted *Linkletter* as its starting point and utilized the same considerations to test whether or not the rule should be applied retroactively.[88] In *Tehan* particular emphasis was placed upon the administration of justice in relation to the prior decision of *Twining v. New Jersey*.[89] The court concluded that the purpose of the rule was to protect a complex of values and that no purpose would be served by retroactive application in relation to the burden imposed upon the judicial system of the states.[90]

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78. 384 U.S. 719 (1966).
79. 357 U.S. 214 (1958).
80. *Ibid.* The court stated at 216, "The conclusion of the trial judge that there was no reversable error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expenses of a transcript." The word "counsel" fits equally well.
81. Linkletter v. Walker, *supra* note 76.
82. *Ibid.*; Great Northern Ry. Co. v. Sunburst Oil & Refining Co., *supra* note 67, at 364.
83. Linkletter v. Walker, *supra* note 76, at 628; also at 627.
84. 367 U.S. 643 (1961); See Annot., 84 A.L.R.2d 933 (1961).
85. Linkletter v. Walker, *supra* note 76 at 630.
86. Tehan v. United States *ex rel.* Shott, *supra* note 77.
87. 380 U.S. 609 (1965).
88. Tehan v. U.S. *ex rel.* Shott, *supra* note 77, at 407.
89. 211 U.S. 78 (1908).
90. Tehan v. United States *ex rel.* Shott, *supra* note 77, at 415, 416.

Johnson v. New Jersey[91] involved the retroactive application of *Escobedo*[92] and *Miranda*.[93] It was decided that those cases were to have only limited retroactive application as of the date of the decision in *Escobedo*. *Johnson* does not employ any new or different tests for the determination of the question, but is concerned with questions of degree as between the problems involved.[94]

The first consideration to which the Court requires attention is the purpose of the rule. As previously discussed, the purpose of *Douglas* is direct: to prevent invidious discrimination based on a man's financial status and to thus accord to all the same opportunity on appeal.

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'[95]

The rule of *Douglas* is designed to destroy the discrimination and unconstitutional line drawn between the rich and the poor.

> The purpose of the constitutional rule that guarantees counsel in both the trial and the appellate court in criminal proceedings is to make certain that one who "lacks both the skill and knowledge adequately to prepare his defense" be afforded "the guiding hand of counsel at every step of the proceedings against him". . . .[96]

The second consideration is whether the retroactive application of the rule will further or retard its operations. The distinction here seems to be whether the rule or standards with which the decision is involved protect the integrity of the fact finding or guilt certification process, or whether the rule is designed as an effective deterrent to police action. *Linkletter* clearly indicated that the exclusionary rule was designed as a deterrent. In *Tehan,* the Court indicated that the complex of values which lay behind the privilege of the fifth amendment do not relate to the protection of the innocent. *Johnson,* while in fact concerning itself mainly with the problems of administration, indicated that the *Escobedo* and *Miranda* rules likewise are not so much concerned with the integrity of the evidence collected as with the police practices involved. On the other hand, *Griffin* and *Gideon,* both dealing with the problems of justice and indigency, have been applied retroactively. Unlike the *Mapp* situation, it is not too late for reparation in *Douglas* situation. Retroactive application of this rule will further the purpose of the rule and will allow all those imprisoned without the benefit of counsel on appeal to stand before the bar of justice in equality. The retroactive application of the rule will cleanse the judicial system of vestiges of invidious discrimination.

Perhaps the major consideration is the effect of the rule on the administration

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91. Johnson v. New Jersey, *supra* note 78.
92. Escobedo v. Illinois, 378 U.S. 478 (1964).
93. Miranda v. Arizona, 384 U.S. ; 86 Sup. Ct. 1602 (1966).
94. For a more detailed discussion of this area, see Donnell v. Swenson, *supra* note 62, at 328.
95. Griffin v. Illinois, 351 U.S. 12, 17 (1956); see generally, Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Wieman v. Updegraff, 344 U.S. 183 (1952); Cole v. Arkansas, 333 U.S. 196 (1945).
96. Donnell v. Swenson, *supra* note 62, at 326.

of justice within the state. *Donnell* limits its inquiry to the effects in Missouri. Logically a hardship will result, but that hardship weighs only slightly in the balance of justice. In Missouri, with the provisions of article V, section 6 of the Missouri Constitution, which allows the transfer of judicial personnel by the supreme court, and because of the general forward looking treatment of criminals by the state, the effect on the administration of justice should be sufficiently mitigated to erase this as a major consideration. It should be noted that in Kansas and Illinois the opinions of the courts on the new appeal with counsel have not noted any particular hardships.[97]

In 1963, as of the date of *Douglas,* only eleven states had statutory provisions specifically providing for counsel on appeal by indigents.[98] This compares with the fact that only six states did not refuse the right to comment on the failure to testify, as noted in the *Tehan* decision.[99] In *Tehan,* there was no retroactivity. In *Douglas,* there should be. The prime difference is that the history of the *Douglas* standard indicates that with slight exception, the thirty-nine states which did not so provide did so at their own risk, for there was lacking United States Supreme Court authority on which they could base the contrary practice. In 1956, the Supreme Court, in *Griffin,* spoke for the first time in this area and gave to the states a concrete indication as to the future course of their decisions, as they had done in the decision of *Wolf v. Colorado.*[100] The states did not take the hint in *Wolf* in general, nor did they take it in *Griffin.* Where the rights of the individual are concerned, the interests of the states, their pride, and their procedure, must take a second seat, else we fall again into the trap which fails to distingush the individual's rights from his guilt.

Therefore, under the considerations outlined by the court in *Linkletter* and supported in *Tehan* and in *Johnson,* there is no reason why *Douglas* should not be applied retroactively in all instances. The theory and the principles involved correspond to those which have been held to warrant similar application, and they apply well to the tests laid down in the above recent decisions. There is nothing present in those three decisions which would lead the Supreme Court to reverse their original pronouncement of *Smith v. Crouse.*[101]

Donnell reasons along the identical lines and reaches the same result, for in spite of the Missouri Supreme Court's opinion, to do less would be to ratify an invidious discriminaton and leave those potentially affected without relief, a situation intolerable under the adversary system of American justice.

JOHN L. OLIVER, JR.*

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97. State v. Cox, 193 Kan. 571, 396 P.2d 326 (1964); People v. Shockey, 30 Ill.2d 147, 195 N.E.2d 703 (1964); see authorities collected, Donnell v. Swenson, *supra* note 62, at 332.

98. ALA. CODE. Title 15, § 382(1) and (5) and (58); ALASKA CRIM. R. 39 a and b; CONN. GEN. STAT. § 54-81; GA. CODE ANNOT. § 27-3001(a); HAWAII REV. LAWS § 253-5 (Supp. 1960); KAN. GEN. STAT. § 62-1304(b) (Supp. 1961); MD. R. CRIM. P. 719(b); NEB. REV. STAT. § 29-1803; ORE. REV. STAT. § 138, 820; WIS. STAT. ANNOT. § 957.26(3); WYO. COMP. STAT. ANNOT. § 7-8.

99. Tehan v. United States *ex rel.* Shott, *supra* note 77, at 417.

100. 338 U.S. 25 (1949).

101. Donnell v. Swenson, 258 F. Supp. 317, 331 (W.D. Mo. 1966).

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