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use of the privilege *without actual possession*.²⁸ To require that a claimant to a prescriptive easement establish exclusive adverse possession, rather than non-exclusive adverse use of the property in which the easement is claimed is a new and startling development.

In considering the impact of *Daytona v. Tona-Rama*, two distinctions between prescription and custom must be examined. Of primary importance is the nature of the use required for each. Consent of the owner to the use, which would destroy the adverseness necessary to establish prescription, is not similarly effective to defeat a right based on custom. With the application of custom to claims of a public easement in private ocean-front property, beach owners have lost as a defense the fact that they had granted permission for past public use.

A second significant difference between prescription and custom is the required duration of the use involved. The requirement for prescription is use for exactly twenty years.²⁹ For custom, the test is imprecise—ancient use continuing from time immemorial.³⁰ The issues of what duration of public use will be considered ancient and what range of uses will be considered consistent with a public easement must still be resolved. The answers may be given soon as pressures from a growing population with competing demands on the beaches increase the frequency of these cases.

PATRICIA IRELAND

NO REQUIREMENT TO PROVIDE COUNSEL FOR INDIGENTS ON DISCRETIONARY APPEALS

Respondent Moffitt, an indigent represented by court-appointed counsel, was convicted twice of forgery in two North Carolina counties. Both convictions were affirmed on first appeals of right to the North Carolina Court of Appeals.¹ In one case the State refused to provide counsel for the discretionary appeal to the state supreme court; in the other, respondent was represented by a public defender and the Supreme Court of North Carolina denied certiorari.² Respondent

28. *Downing v. Bird*, 100 So. 2d 57, 65 (Fla. 1958) (emphasis added).

29. *J.C. Vereen & Sons, Inc. v. Houser*, 123 Fla. 641, 167 So. 45 (1936).

30. 1 W. BLACKSTONE COMMENTARIES 75-78. In *State ex rel. Thornton v. Hay*, 254 Ore. 584, 462 P.2d 671 (1969), the public use of the beach was admitted to have continued for more than sixty years. The court's opinion traced the use of the dry sand areas from the aboriginal inhabitants through the first European settlers to the present day residents. Testimony cited in the Attorney General's brief established public use of the beach for at least fifty-two years.

1. *State v. Moffitt*, 9 N.C. App. 694, 177 S.E.2d 324 (1970) (this was the conviction in Mecklenburg County); *State v. Moffitt*, 11 N.C. App. 337, 181 S.E.2d 184 (1971) (this was the conviction from Guilford County).

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

sought relief in the federal courts through habeas corpus petitions, both of which were denied. The United States Court of Appeals reversed in both cases.³ The United States Supreme Court on conflict certiorari⁴ review of the consolidated cases *held*, reversed: The fourteenth amendment does not require states to provide counsel for indigents for discretionary appeals in state or federal courts. *Ross v. Moffitt*, 94 S. Ct. 2437 (1974).

The United States Supreme Court first considered the rights of an indigent on appeal in *Griffin v. Illinois*.⁵ An Illinois rule provided that convicted persons could secure an appeal only if they procured a transcript of testimony at trial. Only indigents sentenced to death were provided with a free transcript. The Court in *Griffin* stated:

There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial and one which effectively denies the poor an adequate appellate review accorded to all who have enough to pay the cost in advance.⁶

The Court therefore found that the Illinois procedure was a financial discrimination in violation of the fourteenth amendment, and thus, granted an indigent the right to obtain a free transcript for appeal purposes.

The Supreme Court continued to follow the philosophy of *Griffin* in later cases⁷ and in *Douglas v. California*,⁸ it dealt directly with the question of an indigent's right to counsel on appeal. Petitioners, convicted of thirteen felonies, requested counsel for their first appeal of right to a California district court of appeal. The district court denied their request for counsel, stating that it had examined the record and had come to the conclusion that "no good whatever could be served by

3. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).

4. *United States ex rel. Pennington v. Pate*, 409 F.2d 757 (7th Cir. 1969); *Peters v. Cox*, 341 F.2d 575 (10th Cir. 1965).

5. 351 U.S. 12 (1956) [hereinafter referred to as *Griffin*].

6. *Id.* at 18.

7. The Court invalidated similar financial impediments created by the states, such as a court rule requiring a \$20 docketing fee in order to move to appeal, *Burns v. Ohio*, 360 U.S. 252 (1959); and a requirement of a filing fee prior to processing a habeas corpus petition, *Smith v. Bennet*, 365 U.S. 708 (1961). In each case "these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment." 94 S. Ct. at 2442.

During the 1963 session, the Supreme Court decided two cases which continued the development of fourteenth amendment principles begun in *Griffin*. These cases, *Draper v. Washington*, 372 U.S. 487 (1963), and *Lane v. Brown*, 372 U.S. 477 (1963), concerned an indigent's right to a transcript. In *Draper* the Court invalidated the state procedure whereby an indigent could receive a free transcript only if the trial judge determined that the appeal would not be frivolous. Similarly, in *Lane* the Court struck down an Indiana provision giving the indigent's appointed counsel the sole right to request a free transcript for an appeal. In both cases the Court determined that the indigent had a right to obtain the transcript without these procedural impediments.

8. 372 U.S. 353 (1963) [hereinafter referred to as *Douglas*].

appointment of counsel."⁹ Thus, an indigent's appellate merit would be prejudged without the assistance of counsel, while a person who could pay would receive the full benefit of counsel before the appellate court would decide on the merits.

The United States Supreme Court found that this procedure, which was in accord with a state rule of criminal procedure, was "an unconstitutional line . . . drawn between rich and poor"¹⁰ in violation of the fourteenth amendment and held that an indigent has an absolute right to appointed counsel on an appeal of right in a state criminal conviction.¹¹ The absolute right to counsel mandated by *Douglas* was expressly limited to first appeals as of right.

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review We are dealing only with the first appeal, granted as a matter of right to rich and poor alike from a criminal conviction.¹²

It was to this purposely unanswered question that the respondent Moffitt directed his case "to determine whether *Douglas v. California* . . . which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications for review [to the Supreme Court]."¹³ The Court refused to so extend *Douglas*, and reversed the decision of the court of appeals.¹⁴ The court of appeals had concluded that there is "no logical basis for differentiation between appeals as of right and permissive review procedures in the context of the Constitution and the right to counsel."¹⁵ The court of appeals further reasoned that when states establish an intermediate appellate court, such as the North Carolina Court of Appeals, the states intend that court to have final determinative power. Although this system limits review by the highest court, it does not by any means preclude such review. Therefore, the right to appeal to the highest court is still an important right of a convicted person, especially with regard to criminal constitutional questions where "permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive."¹⁶ The fact that the highest court has the discretion to choose whether to review does not

9. *People v. Douglas*, 187 Cal. App. 2d 802, 812, 10 Cal. Rptr. 188, 195 (2d Dist. 1960).

10. 372 U.S. at 357.

11. The decision is based on general principles of fairness of the fourteenth amendment as discussed by Justice Harlan in his dissent. "The Court appears to rely both on the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause of the Fourteenth Amendment, with obvious emphasis on 'equal protection'." *Id.* at 360.

12. *Id.* at 356.

13. 94 S. Ct. at 2440.

14. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973).

15. *Id.* at 653.

16. *Id.*

decrease the importance of the right to ask such court to review. This argument, however, was apparently unpersuasive to the majority of the Supreme Court Justices.

The Supreme Court recognized that the *Griffin* line of decisions had been based on general fourteenth amendment principles rather than on an express clause. Discussing first the due process rationale, the Supreme Court emphasized the significant distinctions between the trial and appellate stages of a criminal proceeding. Recognizing the fundamental right to counsel at trial propounded in *Gideon v. Wainwright*¹⁷ that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,"¹⁸ the Court went on to contrast this with appellate review. Using an analogy, Justice Rehnquist likened a lawyer at trial to a shield, and a lawyer on appeal to a sword to upset a prior conviction. Reiterating the constitutional principle stated in *Griffin* and *Douglas* that a state need not provide any appellate process at all,¹⁹ the Court found the distinction between the trial and appellate levels to be compelling. "The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way."²⁰

The Court indicated that the more appropriate analysis would be a consideration of equal protection principles. Once again the Court distinguished between the stages of a criminal proceeding. When an indigent has been represented at trial and on a first appeal of right there is a substantial record from which a higher court might discern error. While an indigent would not enjoy the benefits of a highly skilled attorney, the indigent would suffer only a relative handicap. "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages'."²¹

Discussing the procedures of North Carolina and other states, the Court reached the conclusion that

[t]he duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to revise his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.²²

In the court of appeals decision distinctions of procedure on discretionary review were also discussed, and that court concluded that representation of indigents by counsel is equally important on discretionary review as on appeal by right. By way of discretionary

17. 372 U.S. 335 (1963).

18. *Id.* at 344.

19. *McKane v. Durston*, 153 U.S. 684 (1894).

20. 94 S. Ct. at 2444 (emphasis in original).

21. *Id.* at 2444, *citing* *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

22. 94 S. Ct. at 2447.

review procedures, the highest courts of states have adopted strict rules for petitioning for certiorari. "Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are not within the normal knowledge of an indigent appellant."²³ The court further noted that there are valid and important distinctions among the various levels of appellate review. But the distinctions do not derogate the importance of counsel on such review; conversely, the complexity of appellate procedure calls for even more technical assistance, the absence of which would put the indigent at a severe disadvantage.

In a dissenting opinion²⁴ Justice Douglas, joined by Justices Brennan and Marshall, urged affirmance of the court of appeals' decision. Douglas cited with approval Judge Haynsworth's conclusion that there was "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel."²⁵ The dissent concluded that the distinction between appeals of right and discretionary appeals relied on so heavily by the majority is an artificial distinction having no real relationship to standards of fairness.

Under either a due process or an equal protection analysis, the reasoning of the court of appeals seems much more firmly based on fourteenth amendment principles than does the Supreme Court decision. It is an established Constitutional principle that the courts do not require states to "equalize economic conditions,"²⁶ in such areas as education and living conditions; however, the basic ideal of the Constitution is that in a court room, all persons will have an equal opportunity to present their claims. "There can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has'."²⁷

The Supreme Court cited cases holding that a state cannot adopt procedures which leave an indigent "entirely cut off from any appeal at all,"²⁸ or procedures which extend to indigents merely a "meaningless ritual."²⁹ However, the practical application of the holding would seem to do just that. The procedures for discretionary review are freely available to all as long as the person appealing has the legal knowledge and skill available to surmount the technical requirements of discretionary appeals. Since relatively few people have such knowledge and

23. 483 F.2d at 653, citing *Boskey, The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1961).

24. 94 S. Ct. at 2448.

25. 483 F.2d at 653.

26. *Griffin v. Illinois*, 351 U.S. 12, 23 (1956).

27. *Douglas v. California*, 372 U.S. 353, 355 (1963), quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

28. *Lane v. Brown*, 372 U.S. 477, 481 (1963).

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

skill, the indigent will be effectively stopped from further meaningful review after a first appeal of right.

The gradual extension of fourteenth amendment rights for indigents on appeal led one commentator to assume that a logical progression would be affirmance by the United States Supreme Court.³⁰ Such would have seemed the purely logical result but there are no doubt certain background factors which must be considered—the rising volume of cases³¹ and the increasing costs of appeals by public defenders on behalf of indigents.³²

However, as the court of appeals pointed out, appointed counsel for discretionary review is not a huge financial burden for the states. The attorney who represented the indigent at trial and on the first appeal is familiar with the case and can quite easily prepare an efficient petition for discretionary review. Such a theory was also expressed by Justice Douglas in his dissenting opinion.³³

The Supreme Court did not rely heavily on practical aspects such as cost and overburdened courts. The Court's argument is apparently based on both principles of due process and equal protection. However, under analysis, the decision is not adequately supported by either principle. It is submitted that while due process under the fourteenth amendment may not require any appellate review at all, when a state does provide such review, as North Carolina does, the equal protection clause requires equal accessibility to appellate courts. From the viewpoint of a convicted defendant the right to have counsel for a permissive review is of substantial importance and denial of counsel is much more than a "relative handicap."

In the final section of the majority opinion the Court stated that this decision was not intended to discourage states from providing counsel for all stages of appellate review. However, the Court further explained that some states do not have adequate funds to do so. Thus it seems in the final analysis that the Supreme Court compromised the principles of the fourteenth amendment by striking a balance between right to counsel under the Constitution and the economic and case-load realities facing the judicial system.

CHRISTINE P. TATUM

30. Note, *The Right to Counsel on Permissive Appellate Review*, 9 WAKE FOREST L. REV. 588 (1973).

31. G. HAZARD, *AFTER THE TRIAL COURT—THE REALITIES OF APPELLATE REVIEW, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* (1965).

32. See *Mobley v. State*, 215 So. 2d 90, 94 (Fla. 4th Dist. 1968).

33. 94 S. Ct. at 2449.