DRAKE LAW REVIEW

VOLUME 17 MAY 1968 NUMBER 2

Published two times a year by law students of
Drake University.

Member, National Conference of Law Reviews

Notes

THE OBLIGATION OF APPOINTED LEGAL COUNSEL TO REPRESENT AN INDIGENT ON APPEAL

Introduction

What is the nature and extent of the obligation required of an attorney once he has been appointed by the court to represent an indigent defendant appealing a criminal conviction, such as to satisfy the guarantees of due process and equal protection of the law as enumerated in the United States Constitution, and thus to accord such defendant a meaningful appeal of his conviction? Assuming that an indigent defendant is entitled at least to the assistance of counsel, the crucial problem concerns itself not with the right of appointment of counsel itself, but instead with the role that such legal counsel is expected to perform in regard to his duty to the court that appointed him and his professional obligations to his client. The narrow issue to be drawn out of this legal dilemma is whether counsel for an indigent defendant is duty-bound to prosecute frivolous appeals on behalf of his client in order to satisfy due process and equal protection of the laws, or whether he may withdraw from the case after giving some explanation as to why he feels that the appeal is without merit. Assuming that counsel is permitted to withdraw from the case after stating that he can find no non-frivolous issue to be pursued, is the indigent defendant entitled to appointment of further counsel to examine the merits of his case, or is he relegated to prosecute his appeal *pro se*?[1]

The question which has crucial bearing throughout the remainder of this discussion is whether the right of an indigent defendant to have the full and complete assistance of counsel in perfecting his appeal is absolute, or whether it may be abridged in cases where such an appeal would not be able to present anything other than frivolous issues.

I. Historical Developments of the Indigent's Right to be Afforded Counsel on Appeal

Any discussion of an accused person's right to counsel during any phase of a criminal proceeding must commence with the sixth amendment of the

1 Appointment of second counsel to represent the indigent defendant presents additional corollary problems. How great would the prejudice factor be against the defendant's interests, in light of the fact that subsequent counsel may be aware that his predecessor felt that the case had no merit? Furthermore, if the second counsel should perfect the appeal, is it possible to measure the degree of prejudice that may have remained with the reviewing court after having heard the first appointed counsel argue the reasons why he felt the defendant's case was totally lacking any merit for purposes of perfecting an appeal? On the other hand, to require that a court-appointed attorney prosecute an appeal which he feels to be without merit, encourages lackadaisical effort on his part and economic burden upon the community as a whole, not to mention the fact that the indigent defendant may have been deprived of other able legal assistance.

United States Constitution which provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[2] The sixth amendment entitles all defendants in all criminal cases in federal courts to the assistance of counsel unless this right has been knowingly and intelligently waived.[3] Consequently, whenever a defendant in federal court desires counsel but cannot afford to hire counsel, defense counsel must be appointed by the trial court.

In state courts the sixth amendment is incorporated *per se* by the due process clause of the fourteenth amendment.[4] Due process requires that a defendant in any case, capital or non-capital, and even without a showing of prejudicial unfairness or of the necessity of having counsel, be given a reasonable opportunity to employ and consult with private counsel, and that private counsel be given an opportunity to be heard and to present his client's testimony by means of direct examination of his client at the trial.[5] Thus, indigents in state criminal proceedings are entitled to the appointment of counsel under the same circumstances and conditions as in the federal courts.[6]

The Supreme Court has yet to finalize the exact stage in criminal proceedings at which the right to counsel arises. In *Hamilton v. Alabama*[7] the Court held that the failure to appoint counsel at the time of arraignment was a denial of fundamental constitutional rights. Years later in *Massiah v. United States*[8] the Court held that an accused has an absolute right to counsel at all stages of the criminal proceeding following the indictment. This principle was extended in *Escobedo v. Illinois*[9] in which the Court held that the right to counsel arises from the time the prosecution begins to focus on the particular defendant, that is, from the time the proceedings change from "investigatory" to "accusatory."[10]

The exact scope and limitations of an indigent defendant's right to counsel on appeal of his conviction is not clearly defined. The basic right of the indigent defendant to have the assistance of counsel for purposes of taking an appeal is recognized,[11] but the precise delineation of what this embodies is not entirely clear. The United States Supreme Court, in a line of cases commencing with *Griffin v. Illinois*,[12] has been engaged in defining the

---

2 U.S. CONST. amend. VI.

3 Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938).

4 Gideon v. Wainwright, 372 U.S. 335 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942).

5 Ferguson v. Georgia, 365 U.S. 570 (1961).

6 Gideon v. Wainwright, 372 U.S. 335 (1963).

7 368 U.S. 52 (1961).

8 377 U.S. 201 (1964).

9 Escobedo v. Illinois, 378 U.S. 478 (1964).

10 *Id.* The right to the assistance of counsel in criminal proceedings may be waived, but any claimed waiver must be shown to be intelligent and knowing. Mere failure to ask for the appointment of counsel cannot, in and of itself, be deemed a knowing and intelligent waiver of the right. Carnley v. Cochran, 369 U.S. 506 (1962). For a discussion of an indigent's right to counsel *see* Note, *Adequate Appellate Review for Indigents: A Judicial Blend of Adequate Transcript and Effective Counsel*, 52 IOWA L. REV. 902 (1967); on accused's right to counsel under the Constitution *see* Annot., 9 L. Ed. 2d 1260 (1963); Annot., 2 L. Ed. 2d 1644 (1958); Annot., 95 L. Ed. 137 (1950); Annot., 55 A.L.R.2d 1072 (1957).

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

12 351 U.S. 12 (1956).

requirements of substantial equality of treatment of indigents with nonindigents in the administration of criminal appeals by the states. It has determined that filing fees cannot be demanded so as to bar an indigent's appeal,[13] that trial records or their equivalents must be provided without charge so as to enable an "effective" appeal,[14] and finally, that an appointed attorney must be made available on request to represent an indigent before the appellate court on his first appeal as of right.[15]

Where a state provides for appellate review of alleged errors in the trial,[16] it cannot do so in a way that discriminates against some convicted defendants because of their poverty, as such discrimination violates the due process and equal protection clauses of the fourteenth amendment. The state must, therefore, provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions.[17] In *Douglas*, the state appellate court's procedure of going through the appellate record in order to ascertain if any good whatsoever could be served by the appointment of counsel and the failure to appoint counsel was held to be insufficient protection, and in violation of the fourteenth amendment.[18]

The Supreme Court has imposed essentially the same requirements on the federal courts of appeal through construction of Title 28, *United States Code*, section 1915. *Coppedge v. United States*[19] and *Hardy v. United States*[20] make it clear that an indigent on request must be provided with a trial transcript.

---

13 Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

14 Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, 351 U.S. 12 (1956).

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

16 Where the state provides no right of appeal from said convictions, the Supreme Court has the inherent power to review by certiorari any state court conviction to determine whether the defendant's constitutional rights have been abridged. Thompson v. City of Louisville, 362 U.S. 199 (1960).

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

18 *Id.* On the very same day of Gideon v. Wainwright, 372 U.S. 335 (1963), which recognized the right of an indigent defendant to be provided with counsel at the trial level, a divided Court in *Douglas* made a substantial departure from the earlier decisions which had established the right to counsel under the traditional sixth amendment argument. The Court in *Douglas* held that to deny an indigent defendant the assistance of counsel on appeal was to deny him equal protection of the laws under the fourteenth amendment and thereby deprive him of due process of law under the fifth and fourteenth amendments. Thus in every situation where the court is confronted with a defendant proceeding in forma pauperis, it becomes necessary not only to obey the mandate of the sixth amendment by providing such a defendant with the "assistance of counsel," but to adhere to the mandates of the fifth and fourteenth amendments in determining the manner in which the accused can be afforded the equal protection of the laws and due process through apointment of his attorney. The issue ultimately bears upon the role and capacity in which the court-appointed attorney is cast, and what his obligations are held to be in respect to his client, in order to determine whether such client is being effectively represented. Thus the duality of the constitutional theories may be summarized to this extent: Once the right to the assistance of counsel is determined under the sixth amendment, the full and effective assistance of such counsel is necessary to satisfy the requirements of due process and equal protection as espoused in the fifth and fourteenth amendments.

19 369 U.S. 438 (1962).

20 375 U.S. 277 (1964).

Johnson v. United States,[21] *Ellis v. United States*[22] and the *Coppedge* case require appointment of counsel.

Two primary reasons underlie the requirement that counsel must be made available to an indigent criminal on his first appeal as of right.[23] First, our criminal procedure is founded upon the adversary system. The essence of that system is challenge and its effectiveness depends upon continuous searching and creative questioning of official decisions and assertions of authority at all stages of the progress. The appellate process is a vital part of the system. That process depends on the marshalling of facts and authorities and skilled presentation by persons trained in the rules and procedures of the system. The process cannot be effective if one of the adversaries in the contest is without training. He normally will not be able to discover and present hidden issues in the record, determine applicable law, and argue for changes in existing law. Moreover, he will rarely have the ability to present his arguments articulately and cogently so as to focus the attention of busy appellate judges on the substance of his claims. The second, and more stressed, reason for requiring appointment of counsel lies in the principle of substantial equality of treatment of indigents and non-indigents. As the Court stated in *Douglas v. California*:[24]

> The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefits 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.[25]

The *Douglas* case stands in the tradition of the transcript cases:

> In *Griffin v. Illinois*, 351 U.S. 12, we held that a State may not grant appellate review in such a way as to discriminate against some convicted defendants on account of their poverty. There, as in *Draper v. Washington*, *post*, p. 487, the right to a free transcript on appeal was in issue. Here the issue is whether or not an indigent shall be denied the assistance of counsel on appeal. In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has.[26]

Clearly, the fourteenth amendment permits differences in treatment between rich and poor. "But where the merits of the *one and only appeal* an

---

[21] 352 U.S. 565 (1957).
[22] 356 U.S. 674 (1958).
[23] Douglas v. California, 372 U.S. 353 (1963).
[24] *Id.*
[25] *Id.* at 357-58.
[26] *Id.* at 355.

indigent has as of right are decided without benefit of counsel . . . an unconstitutional line has been drawn between rich and poor."[27]

II. What Rights Does the Indigent Defendant Have In Order to Retain Court Appointed Legal Counsel to Prosecute His Appeal?

A. *What Procedures Have Been Used to Abridge This Right?*

1. *Screening by the Appellate Court to Determine Whether the Appeal Warranted the Appointment of Counsel*

Douglas v. California[28] rejected a procedure under which the appellate court, unaided by counsel, screened the trial record of an indigent appellant's conviction to determine whether the case had sufficient merit to warrant appointment of counsel. The Supreme Court was fearful that the California procedure would lead to unjustified affirmances of convictions because no law-trained advocate for the indigent studied the record to uncover the "hidden merit," or researched the law, or marshalled arguments in written briefs on the indigent's behalf.[29] The Supreme Court was unwilling to rely on the state appellate court acting as an investigator without adversary processes in screening meritorious cases from unmeritorious ones to determine when to appoint counsel.[30]

2. *Conclusory "No-Merit Letters"*

The infirmaties in the California procedure rejected in *Douglas* are not cured by the later adopted procedure of *In re Nash*,[31] under which there is a preliminary screening done by the appointed attorney to determine whether an indigent will be represented on appeal by counsel's briefs and arguments. Thus, if the appointed attorney files a conclusory "no-merit letter," the appellate court refuses to appoint another attorney and proceeds to evaluate the appeal on the record or, in addition, on the indigent's *pro se* briefs, if he files them.

The *Nash* procedure creates two striking threats to fair process and substantial equality of treatment. First, once the appointed attorney has filed a "no-merit letter" the appellate court proceeds to evaluate the merits of the

---

27 *Id.* at 357.

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

29 *Id.*

30 Many indigents could fare badly under such a procedure because an appellate court in making such a screening would often determine the merits at that preliminary point. Counsel would only be appointed if the appellate court believed that the indigent would probably prevail on appeal. Hence, an indigent would rarely have counsel on appeal in those situations in which representation is most important—where the initial weight of the argument is contrary to his contentions and trained help is necessary to uncover and pursue complicated issues.

31 61 Cal. 2d 492, 393 P.2d 405 (1964).

indigent's appeal without anyone arguing for him while the state is represented by counsel who files a brief urging affirmance.[32] This is an adversary proceeding with only one side represented. Second, the determination of whether or not the indigent will be represented is shifted from an appellate court which may be disinterested to an attorney who often views the appointment as a nuisance. Many attorneys, of course, will carefully comb the record and set forth in brief and oral arguments every contention which can be made in good faith. However, many others will understandably see themselves as a "friend of court" and will weigh, on the one hand, the time burden imposed on the attorney and the court if full argument is presented. This will lead to the filing of a large number of "no-merit letters" and the consequent denial of legal representation on appeal. The experience in the District Court of Appeals in California indicates the validity of this assertion.[33]

The post *Douglas* California procedure under which the court denies additional counsel upon the unreviewed decision of the appointed attorney is analogous to the procedure found invalid in *Lane v. Brown*.[34] There, under the Indiana procedure, only the public defender could procure a free transcript of a *coram nobis* hearing for an indigent to enable him to appeal denial of the writ. The Supreme Court found a denial of equal protection: "The upshot is that a person with sufficient funds can appeal as of right to the Supreme Court of Indiana from the denial of a writ of error *coram nobis*, but an indigent can, at the will of the Public Defender, be entirely cut off from any appeal at all."[35] Under the California procedure, the indigent's right to appeal was not cut off entirely, but his right to be represented on that appeal by counsel, a right guaranteed him under the mandate of *Douglas v. California*,[36] was cut off at the will of the appointed attorney.

The California Supreme Court in *Nash* stated that the "new" procedure affords indigents "substantially the same representation by counsel on appeal as is afforded indigent federal prisoners seeking to appeal in forma pauperis."[37] The opinion further stated:

> Admittedly, it does not insure exact equality between indigent defendants and those who have ample funds to retain counsel, for undoubtedly a defendant with sufficient funds could ultimately find counsel to brief and argue even the most frivolous appeal. Exact equality, however, is impossible to attain . . . and the United States Supreme Court recognized in the Douglas case that it is not required; that only "invidious discrimination" denies equal protection.[38]

---

32 *Id.*
33 Anders v. California, 386 U.S. 738 (1967).
34 372 U.S. 477 (1963).
35 *Id.* at 481.
36 372 U.S. 353 (1963).
37 61 Cal. 2d 492, 496-97, 393 P.2d 405, 408 (1964).
38 *Id.* at 496-97, 393 P.2d at 408.

3. *Documented Memorandum*

Significantly, however, after the decision in the *Nash* case, the United States Court of Appeals for the District of Columbia[39] faced the equal protection problems raised by the federal appellate procedure,[40] and concluded that a procedure under which appointed counsel could withdraw from a case on the basis of his conclusory statement that the case had no merit was defective. Thus, we have a new step in the judicial process of escalating the treatment of indigent defendants, seeking appeal of their conviction, to a new plateau approaching closer the mandate of the fourteenth amendment guaranteeing equal protection of the law to indigent and non-indigents alike.

In *Tate v. United States*,[41] three circuit judges found improper the granting by the District of Columbia Court of Appeals of appointed counsel's motion to withdraw on the basis of a two paragraph conclusory report by counsel indicating that the appellant's contentions were unmeritorious. The circuit court stated:

> [W]e think it improper for the court to have allowed counsel to withdraw and to have revoked leave to appeal *in forma pauperis* on the basis of the conclusory statements in counsel's "report" to the effect that no non-frivolous issue existed. The appellant did not receive adequate representation by counsel acting as his advocate under the standards of *Ellis v. United States*.[42]

Earlier in the opinion the court had stated:

> Indigent appellants in the Court of Appeals are entitled to representation by counsel acting, pursuant to the standards of *Ellis v. United States*, . . . not as a passive friend of the court, but as a diligent, conscientious advocate in an adversary process. The Court of Appeals is required to enforce these standards by taking greater care than is evidenced in the two cases before us to assure that no appointed counsel is permitted to withdraw from an appeal *unless* he has satisfied the court that after thorough investigation of the facts of the case and research of all legal issues involved he has discovered no non-frivolous issue on which an appeal might be argued. The fact that the chances of prevailing are slim is not a reason for withdrawal, but is rather a summons to conscientious counsel to devote his professional skill and pertinency to the most effective presentation of which he is capable.[43]

Soon thereafter, in *Johnson v. United States*,[44] three other circuit judges denied appointed counsel's motion to withdraw. The court reviewed the District of Columbia practice which requires an appointed attorney to act in the role of an advocate. The opinion reiterated the circuit court policy

---

39 359 F.2d 245 (D.C. Cir. 1966).
40 *In re* Nash, 61 Cal. 2d 492, 393 P.2d 405 (1964) (found analogous to California's appellate procedure).
41 359 F.2d 245 (D.C. Cir. 1966).
42 *Id.* at 256.
43 *Id.* at 255 (emphasis added).
44 360 F.2d 844 (D.C. Cir. 1966).

urging appointed counsel, especially in a direct appeal from a criminal conviction, to remain in the case, but recognized that counsel might "feel a case to be so lacking in merit that he desires to withdraw on that ground."[45] In such a situation, however, the circuit court's rules require the attorney to file a confidential memorandum "analyzing the case legally, citing record references to the transcript . . . and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion."[46] The court then stated: "To fulfill our responsibility under the *Ellis* decision, we must conclude not only that counsel has made a conscientious investigation of the case, but also that we agree with his evaluation of it. We cannot reach such a conclusion in the absence of a fully documented memorandum."[47]

Judge Burger, concurring, indicated that prior to the *Johnson* case the circuit court had been confronted with numerous requests for withdrawal by appointed counsel who concluded that appeal was pointless and that in most instances the requests were granted, new attorneys were not appointed, and indigent appellants were advised that they could go on *pro se*. He concluded that this practice resulted from a misconception of the role on the part of appointed counsel who viewed themselves either as amicus curiae or as only being obliged to proceed if they felt sure that their clients would prevail.[48]

However, it is important to note that even after the *Tate* and *Johnson* decisions, an indigent is not guaranteed the absolute right to be represented by counsel in prosecuting his appeal if it is deemed by the court after examining appointed counsel's documented memorandum, that the indigent's only issues are frivolous. Thus, the line is drawn on what the sixth amendment incorporated into the fourteenth amendment means in its application to indigent defendants seeking legal counsel on appeal. The rationale of this position is that no greater or lesser obligation should be placed on the states under the fourteenth amendment, and that any appeal deemed to be so frivolous would be dismissed in the case of a non-indigent litigant. However, to arrive at this position, it is necessary that the appellate tribunal pre-judge the appellant's case based upon a carefully documented memorandum drawn up by the appellant's own attorney who is forcefully arguing that the indigent's case has no merit—a position surely to be echoed by the prosecuting attorney. Perhaps then, this is even a more dangerous and prejudicial impact brought upon an indigent defendant than the mere "conclusory statement" made by the appointed attorney under the old system that the case has no merit in that, under the *Tate* and *Johnson* procedural approach, the object of the appointed attorney is to convince the court of the absurdity of the appellant's claims. Thus, the court has forced upon itself the role of listening to persuasive legal argument espousing only one side of a given issue. Is it not possible that what may appear to be a frivolous appeal with only one side of

---

[45] *Id.* at 844.
[46] *Id.* at 844-45.
[47] *Id.* at 845 (footnotes omitted).
[48] *Id.*

the issue argued, may take on an entirely, or significantly different light when arguments are marshalled from another point of view? Is it reflective of our adversary system to require an indigent defendant to adopt dissimilar procedures in prosecuting his appeal distinguished from the course which a non-indigent would follow? Can this perhaps be a form of the "invidious discrimination" which the court in *Douglas* recognized to be repugnant to the mandate that all men are to have the equal protection of the laws in seeking appeals?

Most certainly "equal protection of the laws" is a most elusive and ultimately utopian expression of rights that man is to enjoy under our legal system. Can equal protection of the law ever mean that an indigent defendant must be afforded the same quality of legal counsel that perhaps a very rich man or large corporation could afford? Unless the courts are ready to assume this position on all matters, equal protection must implicitly mean something less. Therefore, it is the duty of the courts to try to define or arrive at a defined set of standards that, when applied to the problem discussed here, dictate when and to what extent legal counsel is to be afforded to an indigent defendant prosecuting an appeal.

Tate and *Johnson* have drawn the line and established that the sole classification in discriminating between the "rich" and "poor" shall be between those cases that are believed to have merit and those regarded as frivolous. Thus, from the *Tate* and *Johnson* viewpoint, the crucial factor is that the issue of frivolity must be determined by a means which amply protects the indigent defendant from being denied representation where non-frivolous issues are involved. This is accomplished by a documented memorandum which analyzes the facts and applicable law. There may be little time advantage in preparing such a memorandum over filing a brief on the merits, and hence the temptation to withdraw where the chances of success are slim is minimized. Importantly, however, such procedure does provide a procedural route for appointed counsel to withdraw in the rare case where he believes that he can make no argument on behalf of his client in good faith. This is a crucial point and should be kept in mind during subsequent discussion of whether an appointed attorney should be allowed to withdraw from his case, where he feels that no non-frivolous issue can be presented.

B. *Should The Right of an Indigent To Be Afforded Legal Counsel on Appeal Be Absolute and Irrevocable?*

1. *The Cruz Position*

The district court in *Cruz v. Patterson*[49] has gone a step further than either *Tate* or *Johnson* by stating that the right of an indigent defendant to have legal counsel at all stages of a criminal proceeding is absolute, and will admit to no exceptions. However, close examination of the facts in *Cruz*[50]

[49] 253 F. Supp. 805 (D. Colo. 1966), *aff'd per curiam*, 363 F.2d 879 (1966).

[50] In August, 1959, petitioner Cruz, an indigent, was convicted of robbery and conspiracy to commit robbery and in that trial was duly represented by court-appointed counsel.

reveals that the decision only goes so far as to say that an indigent defendant must upon request have legal counsel appointed to argue his case and that such appointed counsel is to act in an adversary role. Nevertheless, dictum of this decision appears to be a substantial departure from the *Tate* and *Johnson* positions in that it makes the right of the indigent to be represented by counsel absolute, irrespective of the merit or frivolity of his claims. *Cruz* explicitly rejects as a bar to further legal counsel a conclusory statement from the appointed attorney that the appeal is without merit, but only implicitly rejects the "documented memorandum" pseudo-screening device permitted by *Tate* and *Johnson* to relieve legal counsel from perfecting frivolous claims. Nonetheless, the language of the court in *Cruz* may indicate a trend in judicial thinking in regard to this problem, and may well be an advance indication on the direction in which the United States Supreme Court will go when confronted with this precise problem.

Cruz dictum indicates that the federal judiciary, in interpreting the sixth and fourteenth amendments, will no longer admit of any exceptions that would permit the discriminatory enforcement of the criminal law as to the indigent defendant, or otherwise more specifically, that the *mere* appointment of counsel by the court for an indigent defendant seeking criminal appeal, will not suffice to satisfy the constitutional requirements of due process and equal protection of the law under the fifth and fourteenth amendments.

The court in *Cruz* accentuates the necessity that appointed counsel for an indigent defendant seeking appeal of his conviction, must provide such defendant with a full and effective appeal, and that appointed counsel must be an *advocate* of his client's cause. No longer will a court-appointed attorney for an indigent defendant be permitted to exhaust that defendant's right to

---

Petitioner, desiring to appeal his conviction, twice requested the Colorado Supreme Court to appoint counsel to assist him in perfecting his appeal and both requests were denied. Petitioner's request to the trial court for the appointment of such counsel was also denied. He then appealed, *pro se*, to the Colorado Supreme Court, and the conviction was affirmed on the merits. Cruz v. People, 149 Colo. 187, 368 P.2d 774 (1962). Subsequently, petitioner Cruz sought a writ of habeas corpus in the state trial court contending that the court's refusal to afford him the aid of counsel to perfect his appeal, denied him the constitutional guarantees of due process and equal protection of the law. Such relief was denied, but not before an attorney appointed to study the petitioner's case reported to the Colorado Supreme Court that "[a] review of the entire record fails to disclose any error not presented in the motion for new trial or not covered by the opinion of this Court." 253 F. Supp. 805, 806 (1966). The appointed attorney further stated to the Colorado Supreme Court: "It is my opinion that no grounds for writ of error other than those presented and considered by this Court are in the entire record that require . . . further consideration." *Id.* Thereafter, the Colorado Supreme Court, relying upon this report, declined to appoint further counsel in this case and reaffirmed the previous judgment in the matter. Cruz v. People, 401 P.2d 830 (Colo. 1965), *cert. denied*, Cruz v. Colorado, 382 U.S. 869 (1965). The petitioner, having exhausted his state remedies, brought this matter before the United States District Court of Colorado on a petition for a writ of habeas corpus. The district court ordered that petitioner be granted an appellate review of his conviction with the aid of counsel. 253 F. Supp. 805 (D. Colo. 1966). An appeal of this order was taken from the U.S. District Court for the District of Colorado to the United States Court of Appeals, 10th Circuit, where the court held per curiam that "[a]ll the questions raised on this appeal were considered and decided by the trial court in an exhaustive and well reasoned opinion. . . . Being in full accord therewith, we adopt it as the judgment of this court and affirm the judgment." 363 F.2d 879, 880 (1966).

aid of counsel by arbitrary withdrawal from the case, and in the event that such withdrawal should occur,[51] appellant's right to have further counsel appointed to effectively present his appeal will not be adversely affected.

Thus, *Cruz* may therefore, be differentiated from prior decisions relating to the rights of an indigent defendant seeking appeal of a criminal conviction, in that it admits of no limitations or restrictions, and makes such defendant's rights to be *effectively* represented in an *adversary* proceeding *absolute*. It has implicitly rejected the "documented memorandum" test set up by the court in *Tate* and *Johnson*. *Cruz* treats this condition subsequent as an abridgment of the appellant's absolute right to have legal counsel at *all* stages of a criminal proceeding.

The court in *Cruz* defined what it meant by full and effective assistance of counsel and continued to say:

> Guided by the principle of *Douglas*, that the indigent defendant is to be afforded the assistance of appellate counsel who shall represent him as an advocate rather than as an *amici curiae* to insure that the appeal will be an adequate and meaningful proceeding, it is our conclusion that, rather than providing counsel to represent the petitioner in a fashion that accords with the principle alluded to above, the system utilized by the state tribunal, in an effort to comply with the mandate of *Douglas*, is, in reality, a "screening device" which resulted in counsel in this case assuming primarily the role of an advisor, rather than an advocate, to the court as to whether the case warranted further consideration. Indeed by the very terms of the order, counsel was to determine whether any *reversible error* occurred in the defendant's trial, a burden much greater than that imposed upon counsel in *Ellis, supra*, which was to determine whether the case *warranted review*. Only if he concluded that such error did occur, then was he to assume the role of the advocate and argue his client's cause. *Who but the appellate court can make the ultimate determination as to whether reversible error occurred at the trial?* The teaching of *Douglas* precludes such duality of roles; both the letter as well as the spirit of that decision demand that counsel appointed to represent the indigent on appeal devote his professional skill and full energies to the one overriding duty—representation of his client in the role of an advocate.[52]

On its face, the court in *Cruz* did little to change the theoretical effect of the *Douglas* decision.[53] However, in a pragmatic sense, *Cruz* has done a great deal to narrow and define the sweeping generalities brought forth by the Court in *Douglas*.[54] *Cruz* makes it clear that any procedure whereby a court-

---

51 The personal right of an attorney to withdraw from a case cannot be doubted under certain defined circumstances. *See* ABA. CANONS OF PROFESSIONAL ETHICS No. 44

52 Cruz v. Patterson, 253 F. Supp. 805, 808 (D. Colo. 1966) (emphasis added).

53 "Guided by the principle of *Douglas*, that the indigent defendant is to be afforded the assistance of appellate counsel. . . ." Cruz v. Patterson, 253 F. Supp. 805, 808 (D. Colo. 1966).

54 The *Douglas* decision merely held that it is a denial of an indigent defendant's constitutional rights to have a state court prejudge an appeal without the benefit of counsel. Dictum in the *Douglas* reasoning indicates that the indigent defendant must be afforded

appointed attorney can take it upon himself to decide that the criminal appeal of an indigent defendant is without merit and should not be argued in an adversary proceeding, is a denial of equal protection. The Court in *Cruz* unequivocally states that when such an appointed attorney takes the position before the appellate court that the indigent defendant's cause is without merit, he is not giving effective representation to his client, but is instead acting as an adversary to his client and is assuming the role of an amicus curiae to the prejudice of his client's case.[55]

Thus, *Cruz* defines and narrows the *Douglas* concept of "effective representation" by counsel, in that under *Cruz*, effective representation by counsel and equal protection under the law can only be had when the indigent defendant has had a full, unabridged, and exhaustive review of his case in an adversary proceeding, as broad and as far-reaching interpretation ever given to *Douglas* (in subsequent case law) though many courts have claimed to adhere to the mandate of *Douglas*.[56]

Even though *Cruz* has apparently progressed a step beyond *Tate* and *Johnson* in adopting a position which provides that legal counsel can never be withdrawn from assisting an indigent defendant in prosecuting his appeal, the issue is by no means settled nor is it likely to be resolved until that precise issue is brought before the United States Supreme Court.

2. *Infirmities in the Cruz Position*

As ideally persuasive as the *Cruz* position is, hard realities force one to take a closer look at the *Tate* and *Johnson* position. Justice Harlan, in his

---

full, adequate and effective review of his conviction if he so desires. However, taken in light of the facts upon which the *Douglas* decision was ultimately based (The decision in *Douglas* went to the mere appointment of counsel for presenting defendant's case on appeal. Nothing, aside from general dicta, is said about the duties of such counsel once they have been duly appointed.) it is not at all clear what the Court had in mind when it referred to the "assistance" of counsel and to "effective" review. It may well have been in context with the facts of that case that the indigent defendant would have been afforded an "effective" review merely by having the assistance of counsel in preparing his case with such counsel for all practical purposes acting as an amicus curiae to the appellate court should such counsel decide that defendant's cause is without merit for perfecting the appeal. Such an interpretation is entirely plausible when considered in the light of the Supreme Court of California's subsequent interpretation of *Douglas* where it said:

> We believe that the requirement of the Douglas case is met, however, when, as is in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious grounds of appeal. If thereafter the appellate court is satisfied from its own review of the record in the light of any points raised by the defendant personally, that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument.

In re Nash, 61 Cal. 2d 492, 495, 393 P.2d 405, 408 (1964).

[55] The court in *Cruz* would probably find the "documented memorandum" elicited in Tate v. United States, 359 F.2d 245 (D.C. Cir. 1966) and Johnson v. United States, 360 F.2d 844 (D.C. Cir. 1966), even more distasteful than the conclusory "no-merit letter" of withdrawal of such prior cases subsequently condemned by the court of appeals in *Tate* and *Johnson*, in that its potential harm to the defendant either in prosecuting his appeal *pro se* or securing further legal assistance, would be immeasurable and would preserve an adversary record to undermine the appellant's positions.

[56] *E.g.*, *In re* Nash, 61 Cal. 2d 492, 393 P.2d 405 (1964).

dissenting opinion in *Douglas v. California*[57] candidly stated: "I cannot agree that the Constitution prohibits a state, in seeking to redress economic imbalances at its bar of justice and to provide indigents with full review, from taking reasonable steps to guard against needless expense."[58] On the equal protection issue, Justice Harlan elaborated on his dissent in *Griffin*[59] as follows:

> The States, of course, are prohibited by the Equal Protection Clause from discriminating between "rich" and "poor" *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the state from adopting a law of general applicability that may effect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely. . . . The sole classification established by this rule is between those cases that are believed to have merit and those regarded as frivolous. And, of course, no matter how far the state rule might go in providing counsel for indigents, it could never be expected to satisfy an affirmative duty—if one existed—to place the poor on the same level as those who can afford the best legal talent available.
>
> Parenthetically, it should be noted that if the present problem may be viewed as one of equal protection . . . [the] short way to dispose of *Gideon v. Wainwright* . . . would be simply to say that the State deprives the indigent of equal protection whenever it fails to furnish him with legal services, and perhaps with other services as well, equivalent to those that the affluent defendant can obtain.[60]

C. *To What Extent has the United States Supreme Court Defined the Duties and Obligations of Court-Appointed Legal Counsel Representing an Indigent on Appeal Since Douglas?*

Once appointment of counsel for an indigent appellant is *fait accompli*, several alternate courses of conduct on behalf of such counsel remain in effect in both the federal and state systems. The post *Douglas* California procedure permits appointed counsel to withdraw after the filing of a "no-merit letter" in which such counsel states in conclusory terms that such appeal contains no non-frivolous issues. These conclusory no-merit letters were held to be a denial of the indigent defendant's right to be represented on appeal by legal counsel acting as an advocate of such client's cause in both the *Tate* and *Johnson* decisions. Thus, in the District of Columbia Court of Appeals, in accordance with *Tate* and *Johnson*, an appointed attorney, in order to withdraw from the case, is required to file a documented memorandum in which he analyzes the facts of the case and the applicable law to substantiate his conclusions that

---

57 372 U.S. 353 (1963).
58 *Id.* at 367.
59 Griffin v. Illinois, 351 U.S. 12, 34 (1956) (dissent).
60 Douglas v. California, 372 U.S. 353, 361-63 (1963) (Harlan, J., dissenting).

such appeal would be entirely frivolous. If the appellate court is convinced that counsel's evaluations are correct, and that no non-frivolous issue can be found after a search of the facts and applicable law, then such counsel will be granted leave to withdraw.

The court in *Cruz v. Patterson*[61] overtly stated that an indigent defendant's right to plenary appeal is absolute and cannot be abridged and reiterated the position taken in *Ellis* that such attorney for the indigent must be an advocate for his client and not view his role as an amicus curiae. The court, perhaps having in mind the *Tate* and *Johnson* cases, stated that counsel cannot make the decision that an appeal is frivolous or not meritorious. This is for the judgment of the court.[62]

Thus when *Anders v. California*[63] came before the Supreme Court to test the constitutionality of the California procedure as expressed *In re Nash*,[64] the Court was unavoidably confronted with the issue regarding the extent of the duty of court-appointed counsel to prosecute an indigent defendant's first appeal of a criminal conviction after that attorney has conscientiously determined there is no merit to such indigent's appeal. The *Anders* court, in giving full approval to *Ellis*, stated that in order for the constitutional requirements of substantial equality and fair process to be met, counsel must act in the capacity of an "active advocate" for his client as opposed to that of amicus curiae. The Court made it clear that any procedure which employs the use of conclusive "no-merit letters" as a means of permitting legal counsel to withdraw from the case is repugnant to the sense of duty which is owed by both the court and appointed counsel to an indigent defendant seeking appeal of his conviction.

After the Court said that it would not indicate approval of the requirements and procedures outlined in *Tate* and *Johnson*, it went on to say that:

> [I]f counsel finds his case to be wholly frivolous after a conscientious examination . . . he should so advise the court and re-

---

61 253 F. Supp. 805 (D. Colo. 1966).

62 *See* Cruz v. Patterson, 253 F. Supp. 805, 808 (D. Colo. 1966).

63 386 U.S. 738 (1967). Petitioner, Anders, was convicted in August, 1957, of the felony of possessing marijuana. On petitioner's request the appellate court appointed an attorney to act for him. The attorney subsequently informed the court that he would not file a brief because in his opinion there was no merit to the appeal. Petitioner requested the appointment of another attorney, and was refused by the court in a letter from the clerk of the court which stated that the petitioner's court appointed attorney after careful examination of the record had stated that he had found no merit to his appeal. The petitioner then prepared his own brief, but neglected any mention of the comments made by the trial judge and the prosecutor to the jury regarding petitioner's failure to testify. The conviction was then affirmed. People v. Anders, 167 Cal. App. 2d 65, 333 P.2d 854 (1959). Petitioner thereafter was paroled and rearrested and convicted of another felony in January, 1964. This conviction was affirmed on appeal. In January, 1965, petitioner filed for habeas corpus in the district court of appeals to reinstate his appeal on the prior conviction. He urged that he had been improperly denied assistance of counsel on the original appeal. The district court of appeals denied the petition the very same day. The petition for writ of habeas corpus to reinstate applicant's appeal was denied since "the procedure prescribed by In re Nash, 61 A.C. 538, was followed in this case . . . ." Anders v. California, 386 U.S. 738, 740 (1967). The court again reviewed the record and determined the appeal was without merit. The Supreme Court of California later denied petitioner's petition for habeas corpus. *Id.* at 741.

64 61 Cal. 2d 492, 393 P.2d 405 (1964).

> quest permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and to dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.[65]

Thus after the Court expressly refused to endorse the requirements and procedures regarding the appointed counsel's withdrawal from prosecuting an indigent defendant's appeal as set forth in *Tate* and *Johnson*, the Court adopted a position so strikingly close to that of *Tate* and *Johnson*, that any differences must necessarily reflect important changes in the Court's attitude and positions involving important constitutional questions as opposed to those taken by the court of appeals.

Although the Supreme Court has "decided" the requisite role and duty of court-appointed counsel towards an indigent appellant to satisfy the constitutional requirements of due process and equality of treatment, several basic infirmities remain in such a procedure which may subsequently provide the basis for relitigation of this and similarly related issues.

By virtue of *Anders*, the test to determine whether an indigent appellant is to be afforded continued legal representation to argue his appeal, is not based principally on the doctrine of substantial equality between the rich man and the poor man but instead the necessary prerequisite for continuation of legal assistance is based on the determination of the *merit* of the indigent's appeal. A necessary prerequisite to satisfy the above requirement is therefore a predetermination of the merits of the appeal prior to any adversary proceeding. Thus the poor man unable to afford his own counsel is in effect forced to show cause for the continuation of his own legal counsel, while at the same time his own appointed counsel is diligently trying to convince the court that his own "client's" case is frivolous and should not be heard on appeal.

Under the "documented memorandum" procedure, the court invites the

---

[65] Anders v. California, 386 U.S. 738, 744 (1967). It is interesting to note that the Supreme Court further stated:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. . . . This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.

Id. at 745.

attorney who wishes to withdraw from the case to make a strong, legally persuasive argument in support of such action citing "facts and applicable law" to support his contentions. It is gratifying to note that similarly the indigent is also invited to present his side of the case before the appellate court in order to refute his own counsel's assertions. However, in such an unfamiliar setting, it does not appear to be realistic to expect that an indigent defendant would ever be able to present his case as ably or persuasively as trained legal counsel. Thus it may well be that the only true adversary proceeding in such a hearing, to determine the merits of a client's appeal, is that between the client himself and his court-appointed attorney. Thus whether the "documented memorandum" approach satisfies the constitutional requirement of fair process in establishing substantial parity between the rich appellant and the poor appellant in criminal procedure is by no means resolved by *Anders*.

A further consideration to this same problem would be in those instances where court-appointed counsel is denied leave to withdraw, to-wit: where the court has found at least one "arguable" issue. Under this circumstance, legal counsel must either compromise or reformulate his previous contentions into a new position in support of his client's claims. Such reconciliation of views does not readily lend itself to enthusiastic support for the attorney's "newly appointed" position, nor does it enhance the confidence that a client should have in his legal representative in order to achieve maximum cooperation in attaining a common goal. Furthermore, how is it possible to measure the extent to which the court might be prejudiced or at least influenced from hearing the prior arguments of appointed counsel seeking to withdraw from the case?[66]

As the United States Supreme Court pointed out in the *Anders* case, after the appointed counsel was granted leave to withdraw by the state appellate court based on that counsel's no-merit letter, the defendant was unable to recognize the existence of certain arguable issues in his own appeal which could have been uncovered, had the appellant been effectively represented by legal counsel.[67] The problem, therefore, becomes whether this admitted in-

[66] Does a procedure, which requires an exhaustive predetermination of an appeal only in the case of an indigent trying to retain legal representation, defy the concept of due process and equal protection, when the relative merit of the appeal is no condition precedent for a non-indigent in having a full-dress appeal, argued on his behalf by legal counsel? Does the indigent defendant have any less right to be represented by legal counsel on appeal than he did during the pre-trial and trial procedures? The Constitution guarantees a person legal representation at "all stages" of a criminal proceeding (U.S. CONST. amend. VI) and does not attempt to differentiate between the relative importance of one stage as against another stage. Since the indigent is guaranteed legal counsel at the "accusatory stage" (Escobedo v. Illinois, 378 U.S. 478 (1964)) irrespective of the merit of the accusation, is it reasonable to expect that the same indigent must have his appeal prejudged as being meritorious in order to retain counsel in perfecting the appeal? Is it so necessary to save society from "needless expense" (Justice Harlan's dissent in Douglas v. California, 372 U.S. 353, 361 (1963)) that the appeal has been isolated from the many "stages" of criminal procedure to which legal counsel has been guaranteed, and to establish conditions precedent for the retention of such counsel at that stage—a restrictive procedure which is only operative to inhibit one class of persons from having legal representation on appeal—those persons who are unable to afford their own counsel?

[67] Anders v. California, 386 U.S. 738 (1967).

firmity in the procedure, allowing conclusory no-merit letters to be filed, is remedied under the *Anders* approach which requires the filing of a documented memorandum supporting counsel's contentions that no non-frivolous issues are involved in the appeal. Undoubtedly, many such hidden issues that were undetected under the former California procedure would be brought to light under the procedure adopted in *Tate, Johnson* and *Anders*. However, there continues to exist a procedural environment which encourages attorneys, seeking to withdraw from a case, to overlook or to dismiss the importance of many such issues which they may personally feel to be frivolous, or unlikely to yield positive results. Similarly, they are unlikely themselves to uncover or pursue many important hidden issues in their zeal to present a legally persuasive argument which consistently supports their position. It is therefore reasonable to expect that many of these issues will never come to the attention of the reviewing court.[68] It cannot be expected that the indigent will recognize many or any of these issues in proceeding to argue the appeal *pro se*, as the court in *Anders* candidly admitted. Hence by virtue of his impoverished condition, the indigent is forced to shift for himself and is consequently denied equal protection of the law.

The extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal, is not conclusively established by virtue of the *Anders* decision due to several variables discussed previously, but also due in a large part to the factual circumstances on which the case was decided and to the manner in which it was presented to the Supreme Court.

The decision of *Anders v. California*[69] is simply that the post *Douglas* California procedure,[70] in regard to the aforementioned problem, denied the indigent appellant substantial equality of law and fair process required by the Federal Constitution. The Court stated that the "no-merit letter and the procedure it triggers" was not sufficient to meet required standards. Hence it is clear that the Court's decision went only to invalidate the "no-merit letter" procedure, and by way of dictum stressed the importance of establishing a procedure whereby "counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae."[71] Although the Court has adopted a position very similar to that taken by the court of appeals in *Tate* and *Johnson*, it is of no less importance to note that the court refused to indicate approval of the requirement set out in *Tate* and *Johnson*.

---

68 The dissent in Anders v. California, 386 U.S. 738, 745 (1967), discounts this as presenting any significant problem and insists that one must rely on the attorney's good faith in the disposition of this matter. However, such an approach ignores the impact that certain previously acquired prejudices could have upon the attorney's objective appraisal and analysis of certain factual and legal situations and his likelihood to recognize hidden merit in such issues.

69 386 U.S. 738 (1967).

70 *E.g., In re* Nash, 61 Cal. 2d 492, 393 P.2d 405 (1964).

71 Anders v. California, 386 U.S. 738, 744 (1967).

Furthermore, counsel for the petitioner[72] urged that the Court strike California's present procedure in favor of the procedure now employed in the District of Columbia under the mandates of *Tate* and *Johnson*.[73] The Court has not yet had the opportunity to listen to any arguments attacking the constitutionality of the *Tate* and *Johnson* positions, in favor of going all the way, and guaranteeing each appellant legal representation throughout the course of his appeal—a position urged by the court in *Cruz*. Thus, until that precise issue—the constitutionality of the "documented memorandum" method of granting appellate counsel leave to withdraw from his indigent client—becomes ripe, the issue must necessarily remain unresolved. Since the Supreme Court in *Anders* was not asked by counsel for the petitioner to go all the way as the Court in *Cruz* has suggested, the decision was confined to the precise situation then being litigated. It is not unlikely that under a different set of circumstances the Court may elect to revise its present position on this matter as expressed in *Anders*, and lean toward the *Cruz* approach. The "liberal trend" reflected in recent Supreme Court decisions, and the widening of constitutional protection to indigents at all phases of criminal proceedings may well be an indication of things to come, and there is no indication at this time that the Court will limit the protection afforded to any person under the Constitution, if it can be shown that substantial rights may be violated under present procedures. Until the Court is faced with litigating the constitutionality of the "documented memorandum" procedure endorsed by *Tate* and *Johnson*, and at least prima facie endorsed by *Anders*, the extent of appellate counsel's duty remains unresolved.

III. The Iowa Position: What Procedures Must the State Adopt To Satisfy the Constitutional Mandates of Due Process and Equal Protection?

The constitutional requirements which are binding on a state in the administration of its appellate criminal procedures with respect to convicted indigents seeking initial review of their convictions, came under the scrutiny of the Supreme Court in *Entsminger v. Iowa*.[74]

---

[72] Counsel for the petitioner: Ira Michael Heyman, by appointment of the court, 384 U.S. 925 (1966).

[73] Obviously, counsel for the state argued for a procedure even less stringent than that espoused in Tate v. United States, 359 F.2d 245 (D.C. Cir. 1966) and Johnson v. United States, 360 F.2d 844 (D.C. Cir. 1966).

[74] 386 U.S. 748 (1967). Iowa law prior to the *Entsminger* decision provided alternate methods of appealing criminal convictions; the first method being an appeal on a "clerk's transcript" which followed the notice of appeal as a matter of course. Iowa Code § 793.6 (1966). Under this procedure the clerk of the trial court prepared and filed a modified transcript of the proceedings below. Such transcript contained the information or indictment, the grand jury minutes, the bailiff's oath, statement and instruction, and various orders and judgment entries of the court, but did not contain the transcript of evidence nor the briefs and argument of counsel. This practice was used in the absence of a request on the part of counsel for a plenary review of the case. If such a request was made, the appellant was provided an appeal on a complete record of the trial, including not only those items included in the clerk's transcript, but in addition thereto, the briefs and arguments of counsel.

The Court in *Entsminger* held that the Iowa procedure, whereby an indigent's right to appeal could be exhausted solely by virtue of the submission of the clerk's transcript to the Iowa Supreme Court for examination, without the benefit of briefs and arguments of counsel, was a denial of the constitutional guarantees of due process and equal protection under the law.

The Supreme Court adopted the position of the Iowa Supreme Court in *Weaver v. Herrick*[75] which held that "[t]o afford an indigent defendant an adequate appeal from his conviction; the furnishing of a transcript, printed record and necessary briefs is required"[76] in *all* cases, unless the indigent appellant intelligently and knowingly waives such rights.

It must be noted that *Entsminger* only went so far as to say that the former Iowa procedure was unconstitutional and, aside from recognizing that the defendant has a right to have counsel appointed to assist him in perfecting his appeal, did not pass upon the precise duty of that counsel subsequent to his appointment. Hence the primary issue as to the role of appointed counsel once he has decided that the case is without merit and consequently seeks to withdraw on that account, remains unresolved by *Entsminger*. However, in this regard, the Court did footnote its discussion to comment: "Indeed the

---

Thus the right of an indigent defendant in Iowa to a plenary appeal of his conviction could have been abridged by the availibility of a "clerk's transcript" appeal. *See* IOWA SUP. CT. R. 15. Nowhere does there appear any provision requiring that an indigent defendant be entitled as a matter of right to a full-dress appeal. In fact, the judicial remedies for an indigent defendant could have been entirely exhausted by a clerk's transcript appeal, with or without benefit of counsel, and without a review of the merits of the case. *See* State v. Larkins, 113 N.W.2d 268 (Iowa 1962).

The *Entsminger* case provides an excellent example of the shortcomings of this system. Convicted and sentenced in Polk County to ten years on a forgery charge, Entsminger had clearly expressed his desire to take his appeal to the Iowa Supreme Court. An attorney was then appointed by the trial court to represent him on the appeal. However, the attorney did not present the merits of Entsminger's case to the Iowa Supreme Court, but instead received a review on the "clerk's transcript." The Iowa Supreme Court ruled there was no error and upheld the conviction. State v. Entsminger, 137 N.W.2d 381 (Iowa 1965). A brief filed by the Iowa Civil Liberties Union in Entsminger's behalf pointed out that since 1960 more than 140 criminal appeals have been decided by the Iowa court by method of the "transcript appeal."

Attorneys sometimes fail to perfect appeals and permit review on the clerk's transcript in order to delay start of the sentence. An attorney also may regard the request for appeal frivolous and use the clerk's transcript route to avoid prosecuting non-meritorious appeals. But it also is true that court-appointed attorneys on occasion have appealed their client's cases only on the basis of the clerk's transcript although the requests for appeal involved claims with merit. The Iowa system made it possible for attorneys to do this and for the clients to be under the mistaken impression that they received full-scale review.

An appellant with funds is able to receive full review merely by paying an attorney to prosecute the appeal. The indigent may, however, get a review only on the clerk's transcript if his court-appointed attorney declines to give him the benefit of a meaningful appeal. In the *Entsminger* case, he made repeated requests of his court-appointed attorney for a full appeal and apparently was promised he would obtain one. But the appeal provided by his attorney was only on the clerk's transcript.

The existence of a procedure which permits an indigent's appeal to be processed in such a manner as the clerk's "transcript appeal," and to have their appeal stand in equal cognizance of the law as an appeal which is a truly adversary proceeding, in that it is based on the submission of the abstracted record, briefs and arguments of legal counsel, is to give literal definition to appeals constructed from "meaningless ritual," which is repugnant to due process of law. *See* Griffin v. Illinois, 351 U.S. 12 (1956).

[75] 258 Iowa 796, 140 N.W.2d 178 (1966).

[76] *Id.* at 801-02, 140 N.W.2d at 181.

Attorney General (of Iowa) has moved the Supreme Court to change its rule with respect to the clerk's transcript system and his suggested changes, and the responsibility of appointed counsel thereunder are now under advisement. We do not pass on the validity of the suggested procedure."[77]

The procedure as recommended by the Iowa Attorney General's office is quite similar to that procedure adopted by the federal courts in *Tate* and *Johnson* in that appointed counsel is not obligated to prosecute frivolous appeals, conditioned upon the requirement that such appointed counsel has sufficiently demonstrated to the court the reason he believes the appeal to be without merit.

In connection with the Court's refusal to discuss the role and duties of the court-appointed counsel in perfecting appeals of indigents, the Supreme Court called attention to the fact that it had discussed this same issue in *Anders v. California*,[78] which was argued and decided the same day as *Entsminger*.[79] The court in *Entsminger* has given implicit approval of the procedures adopted in *Anders*, but such procedures are by no means made mandatory upon Iowa's criminal appellate system.[80] However, since the Iowa Supreme Court has no alternative but to revise its procedure in this regard, such corresponding procedures in *Anders* should be given close scrutiny. Of course, the outright adoption of the *Anders* procedure carries with it no guarantee that Iowa's appellate procedure will pass the future scrutiny of the United States Supreme Court should that procedure come up for review. However, by virtue of *Entsminger*, the present clerk's transcript appeal has been declared unconstitutional, thus Iowa will have to adopt some alternate procedure to handle appeals of indigents which will give such appeals valid standing under the requirements of due process and substantial equality. Consequently, any procedure thus adopted must conform to the test of *Griffin v. Illinois*[81] which requires that the appeal must be "meaningful" rather than "meaningless ritual," and not a mere screening device designed to frustrate indigents from having appeals perfected, where the chance of success is not probable.

In Iowa's subsequent efforts to redesign its appellate criminal procedures, and in particular its application to appeals arising from indigent defendants, it may be advisable for the drafters to give careful consideration to presently foreseeable trends in legal scholarship relating to the concept of equal protection and due process of law. Courts and legal scholars are constantly expanding and reapplying the mandates of the sixth and fourteenth amendments. Thus what may presently be compatible with the language and ideas expressed in *Anders, Tate* and *Johnson* may be invalid under subsequent reapplication of the position taken by the court in *Cruz*, or other courts extending and re-

77 Entsminger v. Iowa, 386 U.S. 748, 751 n.4 (1967).
78 386 U.S. 738 (1967).
79 The majority opinion in both *Anders* and *Entsminger* was written by Justice Clark.
80 This results from the fact that the Supreme Court in neither of these cases made a determination as to the validity of any other existing or proposed procedures.
81 351 U.S. 12 (1956).

defining the ramifications of what is meant by due process and equal protection. Hence the constitutional guarantee expressed via the sixth and fourteenth amendments—that each person is entitled to the assistance of counsel—may subsequently encompass the concept that the right to counsel is absolute, and cannot be abridged in any manner.[82]

While it is implicitly necessary that any changes in Iowa's appellate procedure be compatible with the mandates of *Anders*, expressed through *Entsminger*, the drafters of such proposals should not be unmindful of the more liberal positions that are currently being taken by lower courts, and notable legal scholars. The right of each appellant to be accorded a truly adversary proceeding in the disposition of his appeal must not be compromised.

It is the duty of the Iowa Supreme Court to abrogate its double standard of justice in the disposition of appeals, and to guarantee that each appellant will be afforded the same opportunity to have the merits of his case examined in a truly adversary proceeding by the appellate court.

THOMAS D. MCMILLEN, JR.

82 Hence the relative merit of the appeal would no longer be a prerequisite to the continuance of legal counsel in prosecuting an indigent's criminal appeal.