

NOTE

HALBERT V. MICHIGAN: THE APPLICATION OF THE DOUGLAS-ROSS DICHOTOMY IN CONSTITUTIONALIZING INDIGENCY IN STATES' APPELLATE COURT PROCESSES.

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I. THE BALANCE BETWEEN APPELLATE ACCESS AND JUDICIAL EFFICIENCY

A. A Change in the Michigan Court System

Before 1994, every person convicted of a felony in the State of Michigan had the right to an automatic appeal with full briefing and oral argument to the Michigan Court of Appeals.¹ As a result, appeals from plea-based convictions in Michigan comprised a substantial portion of the total cases filed before the Court of Appeals.² In 1992, as many as one-third of the appeals filed in the Michigan courts derived from challenges to guilty-pleas, comprising two-thirds of all criminal appellate cases.³ Because of the potential to overburden the appellate courts with arguably frivolous appeals from plea-based convictions, the Michigan Legislature sought to

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¹ See Brief for the Petitioner at 4, *Halbert v. Michigan*, No. 03-10198 (U.S. Jan. 21, 2005).

² Brief for the Respondent at 2, *Halbert v. Michigan*, No. 03-10198 (U.S. Mar. 24, 2005).

³ *Id.*

reduce the number of such cases on appeal.⁴ The solution adopted by the Legislature was the proposed amendment to Article I, section 20 of the Michigan Constitution.

In 1994, the citizens of Michigan approved the amendment to Article I, section 20 to provide that, “In every criminal prosecution, the accused shall have the right...to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court.”⁵ After the amendment, criminal defendants who pleaded guilty or nolo contendere to felonies in Michigan and who maintained that an error occurred at sentencing or at some other point in the proceedings were only permitted to file applications for leave to appeal to the Michigan Court of Appeals.⁶ If such an application is granted, the appeal proceeds to full briefing and argument.⁷ If, on the other hand, the Court of Appeals denies the application, a standard order will be issued denying leave “for lack of merit in the grounds presented.”⁸

B. *The Impact of Michigan’s Appellate Court Laws on Indigent Defendants*

Prior to the year 2000, a defendant pleading guilty, guilty but mentally ill, or nolo contendere generally received appointment of appellate counsel by Michigan trial judges for

⁴ Chief Judge William Murphy of the Michigan Court of Appeals reported that less than one percent of guilty-plea cases tracked in 1992 were reversed (12 out of 1,629) and that 9.5 percent were remanded for further sentencing actions. MICH. LAW. WKLY., Feb. 1993 at 20.

⁵ Brief for the Petitioner, *supra* note 1, at 4.

⁶ *Id.* at 5.

⁷ *Id.*; see also Mich. Ct. R. 7.205(D) (3).

⁸ Brief for the Petitioner, *supra* note 1, at 5-6; *People v. Bulger*, 614 N.W.2d 103, 124 (Mich. 2000).

review of the defendant’s conviction or sentence.⁹ This would change with the development of section 770.3a of the Michigan Compilation Laws and the Michigan Supreme Court’s decision in *People v. Bulger*¹⁰. In *Bulger*, the court considered whether the U.S. Constitution secures a right to appointed counsel for plea-convicted defendants seeking review in the Court of Appeals.¹¹ It concluded that appointment of counsel is not required for several reasons: 1) Court of Appeals review following plea-based convictions is by leave and is thus “discretionary”¹²; 2) plea proceedings are shorter, simpler, and more routine than trials¹³; and 3) by entering a plea, a defendant “accede[s] to the state’s fundamental interest in finality.”¹⁴

While the *Bulger* case was still pending in the Michigan Supreme Court, the Michigan Legislature enacted section 770.3a.¹⁵ This statute provided that a “defendant who pleads guilty, guilty but mentally ill or nolo contendere shall not have appellate counsel appointed for review of the defendant’s conviction or sentence” unless certain requirements were met that would

⁹ *Id.* at 8.

¹⁰ *People v. Bulger*, 614 N.W.2d 103 (Mich. 2000).

¹¹ *Id.* at 110.

¹² *Id.* at 108-13.

¹³ *Id.* at 112.

¹⁴ *Id.*

¹⁵ In *Kowalski v. Tesmer*, 125 S.Ct. 564 (2004), the U.S. Supreme Court refused to grant a declaratory judgment that Mich. Comp. Laws §770.3a was unconstitutional on grounds that the plaintiffs lacked standing and that the lower courts properly abstained from deciding the claims of the indigent criminal defendants.

provide otherwise.¹⁶ The rule granted access to appellate courts for indigent defendants if 1) the prosecuting attorney seeks leave to appeal; 2) the defendant's sentence exceeds the upper limit; 3) the defendant seeks leave to appeal a conditional plea; or 4) if the defendant's application for leave is granted by either the court of appeals or the supreme court.¹⁷ However, if an indigent raises an issue that does not present an outcome-determinative challenge to the decision by the trial judge, the statute then forbids trial courts from appointing counsel to assist or handle their appeal.¹⁸ Four years later, the Michigan Supreme Court, in *People v. Harris*¹⁹, determined that the statute was constitutional as applied under the *Bulger* standard.²⁰ Following that decision, the court directed Michigan trial judges to deny counsel to indigent plea defendants notwithstanding any contrary federal court opinions.²¹

C. Halbert's Case for Appellate Counsel

Petitioner Antonio Dwayne Halbert pleaded nolo contendere to two counts of second-degree criminal sexual conduct.²² During Halbert's plea colloquy, the trial court inquired, "You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right."

¹⁶ Mich. Comp. Laws § 770.3a (1)-(3).

¹⁷ Mich. Comp. Laws § 770.3a (2)-(3).

¹⁸ Brief for the Petitioner, *supra* note 1, at 7.

¹⁹ *People v. Harris*, 681 N.W.2d 653 (Mich. 2004) (denying request for appointment of counsel to assist in preparing an application for leave to appeal).

²⁰ *Id.*

²¹ Brief for the Petitioner, *supra* note 1, at 8.

²² *Halbert v. Michigan*, 125 S. Ct. 2582, 2589 (2005).

Halbert answered, “Yes, sir.”²³ The court further advised Halbert of the circumstances under which, though the appeal would not be as of right, the court nevertheless “must” or “may” appoint appellate counsel.²⁴ The court did not, however, inform Halbert that it could not appoint counsel under other circumstances, including Halbert’s own case.²⁵

One day after receiving consecutive sentences for the two counts of criminal sexual conduct, Halbert submitted a handwritten motion to withdraw his plea.²⁶ The trial court denied the motion stating that Halbert’s “proper remedy is to appeal to the Michigan Court of Appeals.”²⁷ Twice thereafter and to no avail, Halbert requested the trial court to appoint counsel to assist him in the preparation of an application for leave to appeal to the intermediate appellate court.²⁸ Halbert argued that his sentence was misscored and that he needed the aid of counsel to preserve the issue before undertaking an appeal.²⁹ He further claimed that he “required special education due to learning disabilities,” and was “mentally impaired.”³⁰ Citing the *Bulger*

²³ *Id.*; Brief for the Respondent, supra note 2, at 9-11.

²⁴ *Halbert*, 125 S. Ct. at 2589.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2589-90.

³⁰ *Id.* at 2590. Halbert noted that to prepare his pro se filings, he was obliged to rely on the assistance of fellow inmates.

decision concluding that there is no a constitutional right to appointment of appellate counsel to pursue a discretionary appeal, the trial court denied Halbert’s motion.³¹

Halbert, acting as a pro se defendant, filed an application for leave to appeal with the Michigan Court of Appeals using a form supplied by the State.³² He asserted claims of sentencing error and ineffective assistance of counsel and sought remand for appointment of appellate counsel and resentencing.³³ In a standard form order, the Court of Appeals denied Halbert’s application “for lack of merit in the grounds presented.”³⁴ Divided five to two, the Michigan Supreme Court refused to grant Halbert’s application for leave to appeal to that court.³⁵ This decision prompted Halbert to appeal his case to the United States Supreme Court for further consideration.

The U.S. Supreme Court granted certiorari to consider whether the denial of appointed counsel to Halbert violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment³⁶. In deciding the outcome of this case, the Court needed to determine whether Halbert’s case was covered by the precedent established in either *Douglas v. California*³⁷ or *Ross*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The dissenting justices would have provided for the appointment of counsel, and allowed counsel to file a supplemental leave application prior to the Court of Appeals’ reconsideration of Halbert’s pleas.

³⁶ U.S. CONST. amend. XIV, § 1.

³⁷ *Douglas v. California*, 372 U.S. 353 (1963).

*v. Moffitt*³⁸. In *Douglas*, the Court held that appointed counsel is required for first-tier, as-of-right appellate review.³⁹ The *Ross* Court held that the appointment of counsel is not required for discretionary appellate review.⁴⁰ In essence, the *Douglas-Ross* framework entitles indigent defendants to court-appointed counsel on initial appeals of right, but not on subsequent discretionary appeals.⁴¹ Justice Ginsburg, writing for the majority, found the *Douglas* decision to be the controlling precedent applicable to the *Halbert*.⁴²

First, the Court refused to allow the “discretionary” nature of Michigan Court of Appeals jurisdiction to shift control from *Douglas* to *Ross*.⁴³ Justice Ginsburg later reasoned that the limited legal skills of indigent defendants, together with the complexity of the appellate process, rendered indigent defendants ill-equipped to proceed pro se in pursuing first-tier appellate review.⁴⁴ The Court also concluded that the preparation of review petitions by appellate counsel rather than pro se defendants would reduce the workload of the Court of Appeals by yielding more comprehensible applications.⁴⁵ Finally, it rejected Michigan’s argument that Halbert waived his right to court-appointed appellate counsel by pleading nolo contendere because,

³⁸ *Ross v. Moffitt*, 417 U.S. 600 (1974).

³⁹ *Douglas*, 372 U.S. at 355-58.

⁴⁰ *Ross*, 417 U.S. at 618-19.

⁴¹ Recent Case, 119 HARV. L. REV. 199, 201 & n.15 (2005).

⁴² See *Halbert*, 125 S. Ct. at 2590.

⁴³ *Id.* at 2591.

⁴⁴ *Id.* at 2592-94; Recent Case, *supra* note 41 at 202.

⁴⁵ *Id.* at 2594.

according to the Court, he did not recognize the existence of such a right at the time of the apparent waiver.⁴⁶

In his dissenting opinion, Justice Thomas defended Michigan's distinction between defendants convicted by plea and those convicted by trial.⁴⁷ He averred that the *Halbert* majority's decision would redistribute resources in favor of plea-convicted defendants with frivolous appeals at the expense of defendants whose claims were more likely to be meritorious.⁴⁸ Justice Thomas further asserted that even if a right to appointed appellate counsel did exist, the right was nonetheless waived by Halbert during the dialogue in which he entered his plea.⁴⁹

D. The Significance of Halbert

The recent decision in *Halbert v. Michigan*⁵⁰ provides an in-depth examination of the fundamental right to gain access to the judicial system to resolve disputes. This right is guaranteed under the Sixth Amendment of the U.S. Constitution.⁵¹ The Supreme Court protects this right from State intervention through the Fourteenth Amendment. In *Halbert*, the Court

⁴⁶ *Id.*

⁴⁷ *Id.* at 2596 (Thomas, J., dissenting); Justice Scalia joined Justice Thomas' dissent. Chief Justice Rehnquist also joined, with the exception of Part III-B-3, in which Justice Thomas argued that Halbert knowingly and voluntarily waived his right to appellate counsel.

⁴⁸ *Id.* at 2598 (Thomas, J., dissenting).

⁴⁹ *Id.* at 2602-05 (Thomas, J., dissenting).

⁵⁰ *Halbert v. Michigan*, 125 S. Ct. 2582 (2005).

⁵¹ U.S. CONST. amend. VI.

scrutinized the Due Process and Equal Protection Clauses to determine the measures a State can take to limit an individual's right to access the courts.

The *Halbert* decision also focuses on balancing the State's interest in reducing the amount of appeals that an appellate court system hears without infringing upon a person's fundamental right. Many state legislatures seek to limit appeals in order to allow the appellate courts to hear cases not properly decided by the trial court as opposed to frivolous appeals submitted for ill-defined purposes. The *Halbert* Court goes to great lengths to discuss appropriate steps to protect indigents from invidious discrimination by legislative enactments that do not adequately achieve the intention sought by the state legislature. It also explains how providing indigents with appointed appellate counsel will better serve the purpose of judicial efficiency in the appellate court system as compared to the denial of such services to individuals with plea-based convictions.

E. Scope of Discussion: How the Court drew the balance between fair process and judicial efficiency

This note primarily focuses on whether an indigent defendant's denial of appointed counsel for an appeal based upon certain circumstances constitutes a violation of the Fourteenth Amendment. Part two of this note provides a historical overview of the right to gain access to the appellate court system in a criminal case. This part begins with the history of the appellate court system from the late nineteenth century to the twentieth century. Part two also includes an examination of more recent U.S. Supreme Court cases that dealt with the access of indigent defendants to the appellate courts. It will conclude with a look at how other intermediate appellate courts address the challenge of limiting meritless cases filed before appellate courts in order to maximize the output of judges and staff members.

Part three examines the Court's rationale in *Halbert v. Michigan*⁵². This section will scrutinize Justice Ginsburg's majority opinion holding that the denial of appointment of appellate counsel amounted to a violation of an indigent defendant's right to due process and equal protection under the Fourteenth Amendment. Finally, there will be a discussion of Justice Thomas' dissenting opinion. This opinion delivers a detailed analysis supporting the arguable infringement of a fundamental right of access to the courts in order to allow the States to reduce the workload of judges serving on the appellate courts.

Part four provides a critical assessment of the Court's decision while examining the contrasting views of Justice Thomas. This part focuses on why the U.S. Supreme Court properly applied a strict scrutiny analysis to hold unconstitutional Michigan's practice of denying appointed appellate counsel to indigents convicted by guilty or nolo contendere pleas. Furthermore, it will explore how providing indigents with the right to appointed counsel serves to promote fairness in the appellate court system while efficiently and lawfully discouraging the amount of excessive, non-meritorious filings in order to reduce the overall number of cases heard by appellate judges. In this section, the writer explains how the Court strategically applied the *Douglas-Ross* framework and properly interpreted the holdings in each case to arrive at its conclusion. This note concludes with an explanation of the impact this decision might have on the ability of state legislatures to balance the interest of achieving efficiency in the workloads of appellate court judges without unlawfully denying the fundamental right to access of certain indigents to the judicial system.

⁵² *Halbert v. Michigan*, 125 S. Ct. 2582 (2005).

II. HISTORICAL DEVELOPMENTS IN THE APPELLATE SYSTEM

A. *The Pre-Twentieth Century Approach to Appellate Court Review*

The U.S. Supreme Court first addressed the question of whether a State is obligated to provide appellate review of criminal convictions in *McKane v. Durston*⁵³. In this case, John Y. McKane was convicted of violating certain provisions of the voter registration laws of the State of New York.⁵⁴ Upon being sentenced to six years in the state prison, McKane, through counsel, presented an application for a writ of habeas corpus. McKane argued that he was deprived of his liberty in violation of the U.S. Constitution by his confinement in conformance with the sentence.⁵⁵ McKane further asserted that he was entitled to bail while seeking an appeal of his criminal conviction.⁵⁶ Under New York law, a defendant who sought an appeal when a stay of proceedings occurred may be admitted to make bail as a matter of right when the appeal is from a final judgment imposing a fine only, or as a matter of discretion in all other cases.⁵⁷

The Court found that there was no stay of proceedings of the judgment of conviction of McKane and further that McKane was not entitled to be admitted to bail pending his appeal under New York law.⁵⁸ Justice Harlan, writing for the Court, held that an appeal from a judgment of conviction is not a matter of absolute right, independent of constitutional or

⁵³ *McKane v. Durston*, 153 U.S. 684 (1894) (holding that the U.S. Constitution imposes no obligation on the States to provide appellate review of criminal convictions).

⁵⁴ *Id.* at 685.

⁵⁵ *Id.*

⁵⁶ *Id.* at 685-86.

⁵⁷ *Id.* at 686-87.

⁵⁸ *Id.* at 687.

statutory provisions permitting appeals.⁵⁹ The *McKane* Court continued, stating that a review by an appellate court of the final judgment in a criminal case is not a necessary element of due process of law and is within the discretion of the state to allow or disallow such a review.⁶⁰ The Court did not address McKane’s deprivation of liberty without due process of law claim.⁶¹

B. *The Protection of an Indigent’s Right to Utilize the Appellate Court System*

The *McKane* rationale remained the primary source of law in cases concerning the right of appellate review. However, it was not until *Griffin v. Illinois*⁶² that the Court addressed the issue of whether the Fourteenth Amendment protects indigent defendants from discrimination by state action in seeking access to the appellate court system. In *Griffin*, Petitioners Griffin and Crenshaw, following their conviction for armed robbery, filed a motion for a certified copy of the entire record, including a stenographic transcript, without cost to assist them in their appeal.⁶³ They contended that they were poor with no means of paying the necessary fees to acquire the transcript and court records needed to prosecute an appeal and that denial of their motion would

⁵⁹ *Id.*

⁶⁰ *Id.* at 687-88. The Court noted that the right of appeal may be accorded by the state to the accused upon “such terms as in its wisdom may be deemed [sic] proper.”

⁶¹ *Id.* at 688. McKane’s counsel invoked the Fifth Amendment of the U.S. Constitution in preparing his application for a writ of habeas corpus. *Id.* The Court, assuming that McKane’s counsel intended to refer to the Due Process Clause of the Fourteenth Amendment, found no merit in this contention. *Id.*

⁶² *Griffin v. Illinois*, 351 U.S. 12 (1955).

⁶³ *Id.* at 13.

violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁶⁴ The trial court denied the motion without a hearing.⁶⁵

Griffin and Crenshaw filed a petition to the Illinois Supreme Court under the Illinois Post-Conviction Hearing Act.⁶⁶ This statute allows indigents to obtain a free transcript for appellate review of constitutional questions but not of other alleged trial errors such as admissibility and sufficiency of evidence.⁶⁷ In their petition, Griffin and Crenshaw argued that there were non-constitutional errors in the trial which entitled them to have their convictions set aside and that the only impediment to full appellate review was their lack of funds to purchase a transcript.⁶⁸ The Illinois Supreme Court affirmed the dismissal by the trial court on the ground that the charges raised no substantial state or federal constitutional questions as required under the Post-Conviction Act.⁶⁹

Upon granting certiorari to Griffin and Crenshaw, the U.S. Supreme Court determined that they were entitled to a transcript without cost in compliance with the Fourteenth Amendment.⁷⁰ Justice Black, writing for the majority, concluded that a State that grants appellate review cannot do so in a way that discriminates against certain convicted defendants on

⁶⁴ *Id.* at 13-15.

⁶⁵ *Id.* at 15.

⁶⁶ *Id.*; see ILL. REV. STAT. §§ 826-32 (1955).

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 15-16.

⁷⁰ *Id.* at 19-20.

account of their poverty.⁷¹ He added that the denial of a court transcript to those unable to pay for it serves as a “misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.”⁷² The Court, however, allowed the Illinois Supreme Court to find other means of affording adequate and effective appellate review to indigent defendants.⁷³ Furthermore, the *Griffin* Court did not hold that Illinois must purchase a stenographic transcript in every case where a defendant cannot purchase one at his own expense.⁷⁴

C. *The Douglas-Ross Framework*

Eight years after the decision in *Griffin v. Illinois*⁷⁵, the U.S. Supreme Court, for the first time, took up the issue of whether an indigent defendant could be lawfully denied the assistance of counsel on appeal. In *Douglas v. California*⁷⁶, petitioners Meyes and Douglas appealed their convictions as of right to the California District Court of Appeal. That court later affirmed their convictions.⁷⁷ The record showed that Meyes and Douglas requested, and were denied, assistance of counsel on appeal even though it plainly appeared they were indigents.⁷⁸ However,

⁷¹ *Id.* at 18.

⁷² *Id.* at 19 (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).

⁷³ *Id.* at 20.

⁷⁴ *Id.*

⁷⁵ *Griffin v. Illinois*, 351 U.S. 12 (1955).

⁷⁶ *Douglas v. California*, 372 U.S. 353 (1963).

⁷⁷ *Id.* at 354.

⁷⁸ *Id.*

the court stated that it examined the record and came to the conclusion that “no good whatever could be served by appointment of counsel.”⁷⁹ Subsequently, petitioners sought further discretionary review in the California Supreme Court, but their petitions were denied without a hearing.⁸⁰

The *Douglas* Court held that an indigent defendant is entitled to assistance of counsel for first-tier, as-of-right appellate review.⁸¹ Writing for the majority, Justice Douglas reasoned that “where the merits of the one and only appeal an indigent has as of right are decided without the benefit of counsel, an unconstitutional line has been drawn between rich and poor.”⁸² The majority further stated that when an indigent is forced to make a preliminary showing of merit without assistance, the right to appeal does not comport with fair procedure.⁸³ It concluded that an indigent’s right to appeal warrants protection by the Fourteenth Amendment against State prevention of the assistance of appellate counsel.⁸⁴ The Court later adhered to the *Douglas* rationale by holding that comparable materials prepared by trial counsel cannot substitute for an appellate lawyer’s aid.⁸⁵ In his dissenting opinion, Justice Clark opined that the California District Court of Appeal was within their right to make an independent investigation of the record and in a better position to determine whether it would be helpful and of advantage to the

⁷⁹ *Id.* at 354-55.

⁸⁰ *Id.* at 354.

⁸¹ *Id.* at 355; Recent Case, *supra* note 41 at 200.

⁸² *Douglas*, 372 U.S. at 357.

⁸³ *Id.*

⁸⁴ *See id.* at 357-58.

⁸⁵ *See Swenson v. Bolser*, 386 U.S. 258 (1967) (*per curiam*).

defendant to have counsel appointed.⁸⁶ Justice Harlan, in his dissenting opinion joined by Justice Stewart, asserted that the Equal Protection Clause was not apposite, and that its application would only lead to mischievous results.⁸⁷ In addition, he stated that the California procedure, in his opinion, does not violate any provision within the Due Process Clause of the Fourteenth Amendment.⁸⁸

Eleven years after rendering its decision in *Douglas v. California*⁸⁹, the Court addressed the issue of whether appointment of counsel for indigent state defendants should be extended to require counsel for discretionary state appeals and for applications for review.⁹⁰ In *Ross v. Moffitt*⁹¹, respondent Moffitt sought to invoke the discretionary review procedures of the North Carolina Supreme Court after exhausting his right to appellate review in the North Carolina Court of Appeals.⁹² Moffitt also petitioned for discretionary review in the North Carolina Supreme Court.⁹³ After these appeals and other petitions throughout the state courts were denied, he sought federal habeas relief in the United States District Court for the Middle District

⁸⁶ *Id.* at 359 (Clark, J., dissenting).

⁸⁷ *Id.* at 361 (Harlan, J., dissenting).

⁸⁸ *Id.*

⁸⁹ *Douglas v. California*, 372 U.S. 353 (1963).

⁹⁰ *Ross*, 417 U.S. at 602-03.

⁹¹ *Ross v. Moffitt*, 417 U.S. 600 (1974).

⁹² *Id.* at 603. Because of his indigency, Moffitt received court-appointed counsel at trial and during the first appellate review.

⁹³ *Id.* at 604.

of North Carolina.⁹⁴ The District Court denied relief and respondent appealed to the United States Court of Appeals for the Fourth Circuit.⁹⁵ The Fourth Circuit reversed the District Court's judgment, holding that Moffitt was entitled to the assistance of counsel at the expense of the State for his petition for review in both the North Carolina Supreme Court and the United States Supreme Court.⁹⁶ The court stated that "as long as the state provides such procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court."⁹⁷

The *Ross* Court first noted the distinctions between the need for assistance of counsel during the trial stage in comparison to the need during appeal.⁹⁸ Justice Rehnquist, writing for the majority, stated that in the appellate stage, the defendant needs an attorney "not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."⁹⁹ The Court distinguished this case from *Douglas* by pointing out that Moffitt's claims were previously presented by a lawyer and passed upon by an appellate court prior to seeking discretionary

⁹⁴ *Id.* at 603-04. Moffitt unsuccessfully petitioned the Superior Court for Guilford County, North Carolina for court-appointed counsel to prepare a petition for a writ of certiorari to the U.S. Supreme Court.

⁹⁵ *Id.* at 604.

⁹⁶ *Id.*

⁹⁷ *Id.* at 604-05 (quoting *Moffitt v. Ross*, 483 F.2d 650, 654 (1973)).

⁹⁸ *See id.* at 610-11.

⁹⁹ *Id.*

review.¹⁰⁰ It further stated that the duty of the State is not to replicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse a conviction, but only to assure the indigent defendant an adequate opportunity to present claims fairly in the context of the State's appellate process.¹⁰¹ In holding that the *Douglas* rationale does not extend to discretionary appeals, Justice Rehnquist concluded that Moffitt was not denied meaningful access to North Carolina Supreme Court simply because the State did not appoint counsel to aid him in seeking discretionary review.¹⁰² Apparently, the emphasis in *Douglas* on the entitlement to appellate review by right did not carry over to the contrasting discretionary review process in the opinion of Justice Rehnquist and the majority. Furthermore, mere access, without adequate counsel, may be insufficient. Justice Douglas, in a dissenting opinion joined by Justices Brennan and Marshall, argued that the right to seek discretionary review remains a substantial one in which a lawyer can be of significant assistance to an indigent defendant.¹⁰³

D. Recent Developments in the Procedure of Appellate Review: The Civil vs. Criminal Case Dichotomy

1. The *M.L.B.* Decision

Approaching the end of the twentieth century, the Supreme Court unequivocally established that the right to assistance of counsel and court records shall be provided to an

¹⁰⁰ *Id.* at 614.

¹⁰¹ *Id.* at 616.

¹⁰² *Id.* at 615.

¹⁰³ *Id.* at 620 (Douglas, J., dissenting).

indigent defendant in all criminal cases.¹⁰⁴ However, the Court never addressed the question of whether the *Douglas-Ross* framework applied to “quasi-criminal” cases or cases in which an indigent’s property rights were at stake.¹⁰⁵

In *M.L.B. v. S.L.J.*¹⁰⁶, the Mississippi Supreme Court denied a mother’s petition for leave to appeal the lower court’s decision to terminate her parental rights.¹⁰⁷ The court held that the dispute was civil in nature and that the right to proceed without paying court costs in civil cases extends only at the trial level.¹⁰⁸ The Supreme Court rejected the claim that the mother’s denial of her parental rights amounted to a civil case.¹⁰⁹ Justice Ginsburg, writing for the majority, stated that there was nothing “distinguishable from criminal condemnation” the potential loss a parent would suffer in losing a custody battle along with the permanent impact it would have.¹¹⁰

The Court noted various statutes from other States that provided appeals for indigents in parental termination actions.¹¹¹ It went on to comment that these States deemed cases involving

¹⁰⁴ See *Mayer v. Chicago*, 404 U.S. 189 (1971) (arguing that a State may not block an indigent’s attempt to appeal because the convicted offense is a misdemeanor as opposed to a felony).

¹⁰⁵ See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a State may not deny an indigent appellate review of the sufficiency of the evidence on which the trial court based its parental termination decree).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 108-09.

¹⁰⁸ *Id.* at 109.

¹⁰⁹ *Id.* at 119-20.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 122.

the termination of parental rights to be “quasi-criminal”.¹¹² Because of the property interest a parent has in raising a child, the Court ruled that to preclude access to appellate review in such a case would constitute a violation of the Due Process Clause.¹¹³ The Court further held that the differentiation of appeals available to indigents as applied by Mississippi amounted to denial of equal access to resolve disputes through the judicial system.¹¹⁴ It concluded that such actions do not escape the scope of the Equal Protection Clause.¹¹⁵ Justice Kennedy, separately concurring, wrote that the State may not erect a barrier to appeals in a criminal case in the form of transcript and filing costs beyond an indigent’s means.¹¹⁶ Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, dissented, arguing that the majority’s decision would extend beyond the criminal courts and burden the States to provide free assistance to indigents in civil cases involving interests similar to the one at issue.¹¹⁷ He further criticized the majority’s reliance on cases requiring assistance of appellate counsel which he deemed questionable when decided and which cases have, in his view, since been undermined.¹¹⁸

¹¹² *Id.* at 122-24.

¹¹³ *Id.* at 123.

¹¹⁴ *Id.* at 124-28.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 129 (Kennedy, J., concurring).

¹¹⁷ *Id.* at 129-30 (Thomas, J., dissenting). Chief Justice Rehnquist did not join Part II of Justice Thomas’ dissent in which he argued that he would be inclined to overturn the decision in *Griffin v. Illinois*.

¹¹⁸ *Id.* at 130.

2. Case-Management Approaches Utilized by the Appellate Courts

Efficiency in the appellate court system is a concern vigorously addressed throughout judiciaries. One of the approaches intermediate appellate courts took to reduce the surfeit of cases was to develop case-management systems tailored to the needs of each court's jurisdiction.¹¹⁹ For instance, the New Mexico Court of Appeals focused on identifying and expediting a large number of relatively uncomplicated cases assigning them to half of the staff attorneys to prepare memorandum for the judges.¹²⁰ This work enabled the court to make effective use of the summary calendar while permitting roughly half of the central staff attorney group to conduct research on cases on the court's general calendar.¹²¹ Courts also rely on electronic legal research services, computerized management information systems, e-mail and other forms of modern technology to assist judges and staff members in managing and resolving cases.¹²² Although some of these approaches are within the discretion of the appellate court

¹¹⁹ See generally Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467 (2002) (providing a study on the approach six appellate courts to survey proper methods of achieving judicial efficiency in state intermediate appellate courts).

¹²⁰ *Id.* at 484.

¹²¹ *Id.*

¹²² *Id.* at 490. Philip Talmadge, a former justice of the Washington Supreme Court, wrote that:

Many appellate courts are doing their work at the dawn of the twenty-first century in a fashion not entirely dissimilar to the way they were doing their work at the dawn of the twentieth. Appellate courts process paper files physically

judges and staff, state legislatures are within their power to decide the jurisdiction of appellate courts and the responsibilities of personnel.¹²³ The implementation of such tactics began to grow throughout the United States as more State intermediate appellate courts sought to find methods to minimize delays and devote a greater amount of attention to meritorious cases.¹²⁴

III. THE COURT'S CHOICE BETWEEN *DOUGLAS* AND *ROSS*

A. *The Extension of the Douglas Rationale*

Upon granting certiorari to review the Michigan Courts of Appeals' decision, the United States Supreme Court confronted the issue of whether the denial of appointed counsel to assist Halbert during his first-tier leave of appeal violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹²⁵ The Fourteenth Amendment provides, in part, that "No State shall...deprive any person of life, liberty, or property, without due process of law; nor

transmitted to them by the trial courts. Appellate judges and their staffs read paper briefs. Upon the publication of a written opinion, the paper record is placed in physical storage. Too often, because of resistance from attorneys, staff, and the judges themselves, and because resources are unavailable to move to an electronic environment, appellate courts have not utilized that can facilitate the business of those courts.

Id. at 491; *see* Philip A. Talmadge, *New Technologies and Appellate Practice*, 2 J. APP. PRAC. & PROCESS 363, 363 (2000).

¹²³ *See* Hoffman & Mahoney, *supra* note 119, at 541 n.91.

¹²⁴ *Id.* at 470-41.

¹²⁵ *Halbert*, 125 S. Ct. at 2590.

deny to any person within its jurisdiction the equal protection of the laws.”¹²⁶ Before addressing the issue at hand, the Court needed to decide whether Halbert’s case should be aligned with either *Douglas* or *Ross*.¹²⁷

After reviewing the decisions established in both cases, the Court determined that *Douglas* provided the controlling instruction to guide them in resolving the question presented.¹²⁸ Prior to reaching this conclusion, Justice Ginsburg first noted that Michigan’s intermediate appellate court looks to the merits of the claims made in an application for leave to appeal.¹²⁹ Thus, the Michigan Court of Appeals, unlike the Michigan Supreme Court, sits as an error-correction mechanism through which a defendant addresses his application.¹³⁰ The Court additionally interjected that indigent defendants pursuing first-tier review in Michigan’s appellate court system are ill-equipped to represent themselves.¹³¹

The Court first analyzed the Michigan appellate system to determine how it relates to the *Douglas-Ross* framework previously established.¹³² Justice Ginsburg distinguished the appellate review system in Michigan from *Ross* by pointing out that the *Ross* Court recognized that leave-granting determinations by North Carolina’s Supreme Court turned on considerations other than

¹²⁶ U.S. CONST. amend. XIV, § 1.

¹²⁷ *Halbert*, 125 S. Ct. at 2590.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 2951-92.

the commission of error by a lower court.¹³³ By contrast, the Michigan Court of Appeals, as an error-correction device, is guided in “responding to leave to appeal applications by the merits of the particular defendant’s claims, not by the general importance of the questions presented.”¹³⁴ Furthermore, the Court explained that the Court of Appeals’ ruling on a plea-convicted defendant’s claims provides the first, and likely the only, direct review the defendant’s conviction and sentence will receive.¹³⁵ It concluded that a first-tier review applicant, forced to act pro se, will face a record not reviewed by appellate counsel, and will be equipped with no attorney’s brief prepared for, or reasoned opinion by, a court of review.¹³⁶

The Court later discussed the *Bulger* decision by the Michigan Supreme Court which held that a pro se defendant seeking discretionary review is adequately armed because he “will have the benefit of a transcript, trial counsel’s framing of the issues in a motion to withdraw, and the trial court’s ruling on the motion.”¹³⁷ Justice Ginsburg contended that this ruling was directly adverse to *Douglas* and other subsequent Supreme Court rulings.¹³⁸ She further cited statistical information on indigent defendants that supported the argument that indigents are put at a severe

¹³³ *Id.* at 2591. In *Ross*, the principal criteria for state high court review included “whether the subject matter of the appeal has significant public interest.” *Ross*, 417 U.S. at 615.

¹³⁴ *Id.*

¹³⁵ *Id.* at 2591-92.

¹³⁶ *Id.* at 2592.

¹³⁷ *Id.* (quoting *People v. Bulger*, 614 N.W.2d 103,113 (Mich. 2000)).

¹³⁸ *Id.*; *see also* *Swenson v. Bolser*, 386 U.S. 258 (1967) (per curiam) (holding that comparable materials prepared by trial counsel are no substitute for an appellate lawyer’s aid).

disadvantage in representing themselves on appeal.¹³⁹ Moreover, the Court stated that Michigan's procedures for seeking leave to appeal after sentencing on a plea might serve to intimidate an indigent defendant who is not assisted with counsel.¹⁴⁰

While acknowledging that the State has a legitimate interest in reducing the workload of its judiciary, the majority concluded that this interest cannot interfere with the fundamental right of an individual to have access to the courts.¹⁴¹ The Court argued that providing indigents with appellate counsel will yield applications easier to comprehend while permitting intermediate state appellate courts to deny leave to appeal in cases not warranting further review.¹⁴² Justice

¹³⁹ *Id.* at 2592-93.

¹⁴⁰ *Id.* at 2593-94. Justice Ginsburg stated the following in her opinion:

Michigan does provide “a three-page form application accompanied by two pages of instructions for defendants seeking leave to appeal after sentencing on a...plea. But th[e] form is unlikely to provide adequate aid to an indigent and poorly educated defendant. It directs the defendant to provide information such as “charge code(s), MCL citation/PACC Code,” “state the issues and facts relevant to the appeal, and” “state the law that supports your position and explain how the law applies to the facts of your case.” This last task “would not be onerous for an applicant familiar with law school examinations, but it is a tall order for a defendant of marginal literacy.”

Id. at 2593-94 (quoting *Kowalski v. Tesmer* 125 S. Ct. 564, 574 (2004) (Ginsburg, J., dissenting)).

¹⁴¹ *Id.* at 2594.

¹⁴² *Id.*

Ginsburg also disagreed with Michigan’s contention that Halbert waived his right to first-level appellate review by entering a nolo contendere plea.¹⁴³ She stated that Halbert was not directly informed by the trial court that there would be no access to appointed counsel.¹⁴⁴ The Court reasoned that to permit Michigan to require defendants to waive all forms of appeal as a condition of entering a plea would leave indigents without access to counsel in the narrow range of circumstances where the State must affirmatively ensure that they receive the legal assistance necessary to provide meaningful access to the judicial system.¹⁴⁵ It later vacated the judgment of the Michigan Court of Appeals and remanded the case for further proceedings.¹⁴⁶

B. The Dissent Votes in Favor of the Direction of the Ross Decision

Justice Thomas began his dissenting opinion by providing a brief overview of the purpose behind the enactments created by the Michigan Legislature to reduce the workload in the Michigan Court of Appeals.¹⁴⁷ He also commented how, by the early 1990’s, nearly one-third of the appeals for over a thousand cases awaiting decisions from the Court of Appeals were submitted by defendants who pleaded guilty or nolo contendere.¹⁴⁸ Going further, Justice Thomas stated that plea-convicted defendants lack appellate counsel only in certain types of cases, and only then when they were seeking leave to appeal.¹⁴⁹

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2595.

¹⁴⁷ *Id.* at 2595-96 (Thomas, J., dissenting).

¹⁴⁸ *Id.* at 2595 (Thomas, J., dissenting).

¹⁴⁹ *Id.* at 2596 (Thomas, J., dissenting).

Justice Thomas argued that the majority did not specifically state where in the Constitution that all plea-convicted indigent defendants have the right to appellate counsel when seeking leave to appeal.¹⁵⁰ He claimed that the majority ignores the entirety of Supreme Court jurisprudence, which does not require paid appellate assistance for indigent criminal defendants, and relies solely on the *Douglas* rationale.¹⁵¹ Justice Thomas challenged this approach by insisting that Michigan did not engage in the sort of invidious discrimination against indigent defendants condemned in *Douglas*.¹⁵² In his opinion, Michigan did nothing more than recognize the difference between defendants who plead guilty and those who maintain their innocence, in an attempt to divert resources from largely frivolous appeals to more meritorious ones.¹⁵³

Justice Thomas disagreed with the majority's conclusion that because error-correction review falls within the discretion of the Michigan Court of Appeals, they are required to hear all appeals that seek such review.¹⁵⁴ He argued that, as the Court often considers correcting errors in both plenary and summary dispositions at its own discretion, the Court of Appeals does not forfeit its discretion by reviewing errors from lower courts.¹⁵⁵ Justice Thomas went on to

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 131-38 (1996) (Thomas, J., dissenting)).

¹⁵² *Halbert*, 125 S. Ct. at 2596 (Thomas, J., dissenting).

¹⁵³ *Id.* at 2596-98 (Thomas, J., dissenting) (“Today’s decision will therefore do no favors for indigent defendants in Michigan—at least, indigent defendants with nonfrivolous claims. While defendants who admit their guilt will receive more attention, defendants who maintain their innocence will receive less.”).

¹⁵⁴ *Id.* at 2599 (Thomas, J., dissenting).

¹⁵⁵ *Id.*

challenge the Court's extension of the *Douglas* decision to require States to appoint appellate counsel for discretionary appeals.¹⁵⁶ He pointed out that the *Ross* decision permitted the use of materials that can aid an indigent defendant in identifying claims appropriate for plenary review¹⁵⁷. In comparing the *Ross* decision to the Michigan appellate system, Justice Thomas found that the application for leave to appeal provided instructions for defendants to aid them in identifying appropriate claims for appeal.¹⁵⁸ Moreover, in Justice Thomas' view, Michigan's procedures are more than sufficient to enable discretionary review.¹⁵⁹ In sum, the dissent asserted that the Court was misguided in following the *Douglas* rationale as opposed to the more fact-driven precedent established in *Ross*.¹⁶⁰

Justice Thomas' final argument examined the scope of Halbert's plea and whether he waived his right to appointed appellate counsel.¹⁶¹ He claimed that Halbert did not possess a recognized right to appointed appellate counsel that he could forgo under Michigan law.¹⁶² Accordingly, the majority's conclusion that Michigan law prohibited Halbert from exercising this right was irrelevant in Justice Thomas' opinion.¹⁶³ Furthermore, Justice Thomas asserted that even if Halbert was entitled to appellate counsel, he waived his right during his plea

¹⁵⁶ *Id.* at 2600-01 (Thomas, J., dissenting).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 2601 (Thomas, J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2600-02 (Thomas, J., dissenting).

¹⁶¹ *Id.* at 2602 (Thomas, J., dissenting).

¹⁶² *Id.* at 2603-04 (Thomas, J., dissenting).

¹⁶³ *Id.* at 2604 (Thomas, J., dissenting).

colloquy.¹⁶⁴ Such dialogue, Justice Thomas concluded, fell within the Court’s jurisprudence for determining when a person adequately waives legal rights.¹⁶⁵

IV. PROMOTING FAIRNESS WHILE PRESERVING EFFICIENCY

A. *Drawing the Line between Douglas and Ross*

Justice Black argued that there can be no equal justice where the kind of appeal a man enjoys “depends on the amount of money he has.”¹⁶⁶ In *Douglas*, the Court clarified that when an indigent defendant is entitled to a first-tier review of his case, the State must provide the benefit of counsel to assist in handling his appeal.¹⁶⁷ In contrast and by distinction, the *Ross* Court held that appointment of counsel is not required for discretionary appellate review.¹⁶⁸ Neither of these cases addressed the question of whether an indigent defendant is entitled to assistance of appellate counsel during a first-tier discretionary review. Such an insight must turn on the similarities of the facts in comparison to the dispute before the *Halbert* Court. Arguably, if a person is only permitted one opportunity to appeal a lower court decision at the discretion of the appellate court system invoking jurisdiction, it is reasonable to maintain that such an opportunity falls within the realm of first-tier review. Furthermore, the facts in *Halbert* are more similar in detail to those presented to the *Douglas* Court in determining the right to appellate counsel for an as-of-right appeal. Justice Ginsburg failed to specifically state which facts distinguish *Halbert*’s case from the one before the *Ross* Court; however, it can be inferred that

¹⁶⁴ *Id.* at 2604-05 (Thomas, J., dissenting).

¹⁶⁵ *Id.* at 2602 (Thomas, J., dissenting).

¹⁶⁶ *Douglas*, 372 U.S. at 355 (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1955)).

¹⁶⁷ *Id.* at 355-56.

¹⁶⁸ See Recent Case, *supra* note 41 at 200-01.

the majority found the *Douglas* rationale more beneficial in determining the outcome of the issue at hand. Furthermore, the Ginsburg analysis mentioned fidelity with Justice Black's caveat that access to appellate review should not be reduced to a question of money.

Although the dissent relies heavily on the *Ross* Court's analysis in refusing to extend *Douglas* to discretionary appeals, there are some key factual differences that support the Court's approach in *Halbert*. In *Ross*, Moffitt exhausted the appeals he was entitled to as of right with the assistance of counsel before seeking habeas relief in the federal courts.¹⁶⁹ By the time he exercised his discretionary appeal, Moffitt received the full panoply of guarantees the *Douglas* Court held were in compliance with the Fourteenth Amendment.¹⁷⁰ To extend the *Douglas* rationale to individuals in Moffitt's circumstances would not serve the best interest of promoting fair process while preserving efficiency in the intermediate state appellate courts. The result would be an overwhelmed appellate judiciary with matters already properly decided on the merits by lower courts. An incorrect extension of the *Douglas* rationale would erode the effectiveness of decisions rendered and lessen the access of indigents with meritorious appeals. In short, a proper balancing mechanism is necessary to address States' legitimate concerns for resource allocation.

In contrast, by allowing individuals like Halbert, with only one opportunity to file an appeal, to have assistance of counsel in determining if there are adequate grounds to support an appeal, the same result would not occur. The appellate courts remain within their discretion to decide these disputes on the merits with or without hearing oral arguments on the issues

¹⁶⁹ *Ross*, 417 U.S. at 604.

¹⁷⁰ *Douglas*, 372 U.S. at 357 (“Absolute equality is not required; lines can be drawn and are drawn and we often sustain them.”).

presented. Furthermore, the assistance of appellate counsel in first-tier reviews complies with the history of American jurisprudence that seeks to promote the fundamental right of access to the courts. Therefore, the Court properly extended the reasoning in *Douglas* to provide an indigent defendant the right to assistance of counsel in all first-tier appellate reviews regardless of whether they are appeals as of right, or discretionary appeals.

B. Protecting Indigent Defendants Helps Ensure Due Process for All

Justice Douglas, dissenting in *Ross v. Moffitt*¹⁷¹, stated that “the technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.”¹⁷² Section 770.3a creates a limited choice for those persons that fall within the scope of the statute: either fill out an application to seek a discretionary appeal without the assistance of a court-appointed attorney or waive any right to appeal that might exist upon receiving a plea-based conviction. The latter choice strips the defendant of any chance to resolve an issue even if there is a clear presence of a reversible error. The former, on the other hand, provides a complex method in which a defendant must be able to state a legal claim without possessing the knowledge to spot an issue and the skill to articulate it before a panel of legal scholars.¹⁷³ It is without question that the Constitution imposes no obligation on the States to provide appellate review of criminal convictions.¹⁷⁴ However, when a State provides such an

¹⁷¹ *Ross v. Moffitt*, 417 U.S. 600 (1974).

¹⁷² *Id.* at 357.

¹⁷³ *Halbert*, 125 S. Ct. at 2593-94.

¹⁷⁴ *McKane*, 153 U.S. at 687.

avenue, it must neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.¹⁷⁵

The State's responsibility under the Due Process Clause is to provide justice for all.¹⁷⁶ There is no guarantee that a trial attorney representing a non-indigent defendant will adequately inform his client of any issues appropriate for appellate review.¹⁷⁷ Under the Michigan appellate system, if a non-indigent does not wish to retain the trial attorney to handle an appeal, there is no difference between the non-indigent and the indigent defendant as far as access to the appellate courts is concerned.¹⁷⁸ Neither will have the opportunity to the benefit of appointed counsel from the courts. Unless the non-indigent is in a position to afford another attorney to handle an appeal, he, like the indigent, will have no way to receive sufficient legal assistance in seeking a reversal of the trial court's decision. This creates a significant burden on the fundamental right of access to the courts on all citizens, indigent and non-indigent, wishing to correct a harmful error made during a plea-based conviction. Although the State has a compelling interest in reducing the workload of intermediate appellate courts, such an interest cannot thwart a fundamental right granted under the Due Process Clause.

The *Halbert* rationale serves as the alternative that falls within the purpose and intent of the Due Process Clause. The right to assistance of appellate counsel furthers the goal of creating fair and reasonable legislation that promotes a legitimate governmental objective. The expansion of this right provides a meaningful remedy for indigents to assert well-established fundamental

¹⁷⁵ *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring),

¹⁷⁶ *Douglas*, 372 U.S. at 819 (Stewart, dissenting).

¹⁷⁷ *Halbert*, 125 S. Ct. at 2592 n.5.

¹⁷⁸ See Recent Case, *supra* note 41 at 205 tbl.1.

rights without interference from the state legislatures. It also permits indigents and non-indigents the ability to receive the assistance necessary when a legitimate appeal exists. Moreover, this method still allows States to achieve the objective of reducing the workload of appellate courts through the actions of judicial and legislative bodies. In sum, applying the *Halbert* decision, State legislatures promote the fundamental rights guaranteed under the Due Process Clause while permitting them to find ways to address concerns of overburdening appellate courts.

C. Securing Efficient Justice through Equal Protection

Most indigent defendants lack the skill, knowledge and ability to capably navigate the appellate process alone.¹⁷⁹ Both the *Halbert* Court and the Michigan Supreme Court acknowledged that the appointment of appellate counsel at state expense would be more efficient and helpful not only to indigent defendants, but also to the appellate courts.¹⁸⁰ Justice Ginsburg properly relied on statistical information as evidence to conclude that indigent defendants are “handicapped as self-representatives.”¹⁸¹ Moreover, neither Justice Thomas nor the State of Michigan demonstrates that allowing indigent defendants assistance from court-appointed counsel would create a severe burden on the appellate court system that can survive an equal protection challenge.

Applying the Equal Protection Clause to ensure indigent defendants assistance of appellate counsel in first-tier discretionary appeals provides the best tool to assist in creating a more efficient appellant court system. The defendant’s counsel can review the record to ascertain if there is a legitimate claim worthy of arguing on appeal. Providing assistance of

¹⁷⁹ See *Halbert*, 125 S. Ct. at 2593.

¹⁸⁰ *Id.* at 2594; see *Bulger*, 614 N.W.2d at 114.

¹⁸¹ *Id.* at 2592-93.

counsel will not lead to an unreasonable increase in the number of appeals filed in the appellate courts.¹⁸² Appellate court judges will be able to better comprehend and understand arguments presented by an attorney on behalf of an indigent defendant. This allows the judges to render efficient decisions on meritorious appeals in an expeditious manner. Furthermore, the *Halbert* decision still permits appellate courts to deny leave applications in those cases where further review will only cause improper delay.¹⁸³

When State action seeks to limit an indigent defendant's access to the appellate court system, the Equal Protection Clause serves to balance the interests of both parties. Here, the majority acknowledged that a State has a legitimate interest in limiting the number of frivolous appeals filed in its judiciary.¹⁸⁴ However, such an interest cannot override nor infringe upon an indigent's fundamental right to access to the courts. The practice of applying a strict-scrutiny analysis in cases dealing with an indigent defendant's right to appointment of counsel is consistent throughout the Court's jurisprudence.¹⁸⁵ Although some might argue that a rational-basis analysis is the better test to determine whether the State action violates the Equal Protection Clause, such an argument cannot be supported by an examination of established precedent. The dispute centers on the protection of a fundamental right and not on the classification of the individual asserting that right. Therefore, the appointment of counsel administers a fair process

¹⁸² *Id.* at 2594 (“When a defendant’s case presents no genuinely arguable issue, appointed counsel may so inform the court.”); *see Anders v. California*, 386 U.S. 738, 744 (1967); Transcript of Oral Argument at 27, *Halbert*, 125 S. Ct. 2582 (No. 03-10198).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

to allow indigent defendants meaningful access to the courts while providing more efficient measures for reducing the workload of appellate courts.

D. Rebutting the Dissent

The majority clearly relies on the provisions guaranteed under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Throughout her opinion, Justice Ginsburg mentions the significant disadvantages indigent defendants suffer under section 770.3a.¹⁸⁶ This statute, as applied by Michigan, does nothing more than infringe upon the indigent's right to meaningful access to the courts. It cannot be said, as Justice Thomas argued, that the Court's argument is not supported by the provisions of the Fourteenth Amendment. The *Halbert* Court might not point specifically to a portion of the text of the Fourteenth Amendment in order to support its position. However, looking at the language of section 770.3a and how it was applied by the Michigan Court of Appeals, there is no doubt, as the majority contended, that the statute serves as a form of invidious discrimination in its application. Access to appellate relief is effectively denied based upon a distinction no more complex than a matter of financial resources.

Justice Thomas relied heavily on the decision in *Ross v. Moffitt*¹⁸⁷ to conclude that the majority's decision unduly burdens States to provide assistance of counsel to indigent defendants. However, as noted above, the *Ross* decision does not provide a similar set of facts to conclude that it provides the best source of precedent in comparison to *Douglas*. That both *Ross* and *Halbert* dealt with discretionary appeals does not, alone, suffice to support an argument that the two cases are indistinguishable. Given that Moffitt sought a discretionary appeal after exercising all of his as-of-right appeals, the use of materials provided by the trial court would not

¹⁸⁶ *Halbert*, 125 S. Ct. at 2592-94.

¹⁸⁷ *Ross v. Moffitt*, 417 U.S. 600 (1974).

constitute a violation of due process or equal protection.¹⁸⁸ However, the same cannot be said about the instructions presented in Halbert's application for leave of appeal, which did arguably raise a due process issue.¹⁸⁹ Although Justice Thomas is correct in stating that appellate courts are not required to hear all appeals that are within its discretion, the majority does not propose such a measure in rendering its decision. Instead, it suggests a method in which state appellate courts can secure indigents' fundamental rights without interfering with judicial discretion.

Justice Thomas dedicated a significant amount of his dissent arguing that Halbert waived any right to a court-appointed appellate counsel during his colloquy.¹⁹⁰ While it is true that a person can waive any legal rights provided by the Constitution, this does not appear supported by an examination of the plea colloquy. Halbert clearly was aware that some of his rights would be terminated upon entering a plea of *nolo contendere*. However, the trial judge only listed a few instances in which he would not receive a court-appointed attorney to handle his appeal.¹⁹¹ Thus, Halbert's decision to waive any rights to appeal was tainted in that he did not fully understand its effect. In conclusion, the Court correctly held that Halbert's plea was not made with the knowledge sufficient to constitute a satisfactory waiver of the access to appointed counsel.

V. CONCLUSION

The requirement of due process and equal protection in the judicial system is a necessity in providing all individuals with the opportunity to have their cases decided fairly. Although the

¹⁸⁸ *Id.*

¹⁸⁹ *Halbert*, 125 S. Ct. at 2593-94.

¹⁹⁰ *Id.* at 2603-06.

¹⁹¹ *Id.* at 2589.

reduction of frivolous appeals is a compelling governmental interest, it is not one that can deny indigent defendants access to the appellate court system during a first-tier review. The *Halbert* decision does not create a situation where the States will not be able to limit the number of appeals submitted before appellate judges. Moreover, the States are still within their will to find alternatives that will reduce the volume of cases heard to prevent undue burdens on the courts without limiting indigent defendants' right to gain access to the courts.

The steps taken by other appellate courts throughout the United States supports the notion that judicial efficiency does not require the infringement of fundamental rights. However, it is not clear whether state legislatures will completely follow the *Halbert* rationale. Some States may continue to propose laws that fall within the scope of *Halbert* but do not clearly infringe upon those rights guaranteed under the Fourteenth Amendment. While it is uncertain whether the Court will continue to follow *Halbert* in future cases, it is clear that such future laws will need to survive a strict scrutiny analysis in order to be deemed constitutional.

The *Halbert* decision creates a new roadmap for courts to follow in balancing the interests of the State and indigent defendants. The majority's approach protects indigents from invidious discrimination by legislative enactments that do not adequately achieve the intention sought by the state legislature. Moreover, it presents the best method to advance judicial efficiency in the appellate court system as compared to the denial of such services to individuals with plea-based convictions. Thus, providing indigent defendants with the right to appointed counsel serves to promote fairness in the appellate court system while efficiently reducing the amount of cases heard by appellate judges.

