COMMENTS

RESTRICTING THE INDIGENT'S RIGHT TO A TRANSCRIPT
United States v. MacCollom, 96 S. Ct. 2086 (1976)

A federal prisoner,[1] who failed to exercise his right of direct appeal,[2] petitioned in forma pauperis[3] for a transcript of his trial to aid him in

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1. In 1970, Colin MacCollom was convicted of uttering forged currency in violation of 18 U.S.C. § 472 (1970), and sentenced to ten years' imprisonment. United States v. MacCollom, 96 S. Ct. 2086, 2089 (1976).

2. Under FED. R. APP. P. 4(b), MacCollom had ten days from the date of his conviction to file notice of appeal. He took no steps to initiate the appeal process, and the time for appeal had long since lapsed when the action was brought. 96 S. Ct. at 2089.

3. In forma pauperis procedure allows defendants who cannot pay court costs or post the security often required in court actions to proceed in spite of their indigence. 28 U.S.C. § 1915 (1970). In forma pauperis status is available at all levels of adjudication. It allows indigents access to appellate courts without facing the high costs of appeal. *See* Coppedge v. United States, 369 U.S. 438, 442-43 (1962). To qualify for in forma pauperis status, the "litigant does not have to impoverish himself to the extent that he and his dependents would become public charges." He must show that the cost of court action will cause more than mere financial hardship. Martin v. Gulf States Util. Co., 221 F. Supp. 757, 759 (W.D. La. 1963). *See* United States v. Pellegrini, 201 F. Supp. 65 (D. Mass. 1962).

Section 1915 requires the trial court to certify that the indigent's appeal is taken in good faith prior to allowing an appeal in forma pauperis. The Supreme Court has held that indigents demonstrate good faith within the meaning of the statute if they present a nonfrivolous ground of appeal. *Cf.* Farley v. United States, 354 U.S. 521 (1957); Johnson v. United States, 352 U.S. 565 (1957). In Coppedge v. United States, 369 U.S. 438, 447-48 (1962), the Court defined frivolous issues as those that would be dismissed on motion by the government in appeals by nonindigent litigants. *Coppedge* placed the burden on the government to show that an issue was frivolous. *Id. See also* Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (pro se petitions filed by indigent prisoners may not be dismissed unless it appears beyond doubt that petitioner can prove no set of facts supporting his claim for relief). Additionally, indigents are entitled to a transcript, or some appropriate substitute, and the assistance of counsel to help demonstrate that they are entitled to appeal in forma pauperis. *See* Hardy v. United States, 375 U.S. 277 (1964) (transcript necessary to enable new attorney to faithfully discharge obligations to represent client and "notice errors" as required by FED. R. CRIM. P. 52(b)); Ellis v. United States, 356 U.S. 674 (1958) (indigents entitled to the effective assistance of counsel in search for nonfrivolous issue); Johnson v. United States, 352 U.S. 565 (1957) (indigents have right to transcript and counsel to search for appealable nonfrivolous issue). *Cf.* Anders v. Cali-

preparing a motion to vacate sentence under 28 U.S.C. § 2255.[4] After the clerk of the sentencing court denied his request,[5] petitioner brought an action to obtain a free transcript in federal district court,[6] arguing that he would otherwise be "unable to frame his arguments for fair and effective review."[7] The district court treated the transcript motion as a section 2255 petition[8] and dismissed for failure to state a claim upon which relief could be granted.[9] On appeal, the Court of Appeals for the Ninth Circuit held that indigent federal prisoners proceeding in forma pauperis are entitled to free transcripts for use in preparing section 2255 motions.[10] The Supreme Court granted certiorari,[11] reversed, and *held*: Neither due process nor equal protection entitles an indigent to a free transcript for use in a collateral attack on his conviction.[12]

Although the equal protection clause of the fourteenth amendment applies only to states, courts have held that the fifth amendment due process clause imposes similar restrictions on the federal government.[13] Thus, while most cases discussing equal protection in the criminal jus-

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fornia, 386 U.S. 738 (1967) (duties of counsel in indigent appeals). *See generally* LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME LAW. 41 (1974); Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973).

4. *See* note 34 *infra* and accompanying text.

5. The court clerk denied MacCollom's petition for a transcript on the ground that he was powerless to act until MacCollom filed a motion under 28 U.S.C. § 2255 (1970), *discussed in* note 34 *infra* and accompanying text. United States v. MacCollom, 96 S. Ct. 2086, 2087 (1976).

6. MacCollom alleged that he "intend[ed] to move [the District] Court for vacation of his sentence pursuant to 28 U.S.C. § 2255." 96 S. Ct. at 2089. MacCollom argued that he could not afford a transcript, that a transcript would enable him to show that he had been denied the effective assistance of counsel at trial, and that there was insufficient evidence to support the guilty verdict. *Id.*

7. *Id.*

8. In treating the pro se petition as an action under 28 U.S.C. § 2255, the court acted in accord with FED. R. CIV. P. 8(f) and Haines v. Kerner, 404 U.S. 519 (1972), which require district courts to interpret pro se petitions liberally and reframe them if necessary to do substantial justice.

9. United States v. MacCollom, 96 S. Ct. 2086, 2089 (1976).

10. MacCollom v. United States, 511 F.2d 1116 (9th Cir. 1975), *rev'd*, 96 S. Ct. 2086 (1976). For discussion of the Ninth Circuit opinion see notes 41-43 *infra* and accompanying text.

11. 423 U.S. 821 (1975).

12. United States v. MacCollom, 96 S. Ct. 2086 (1976).

13. *See* Bolling v. Sharpe, 347 U.S. 497 (1959); Hurd v. Hodge, 334 U.S. 24 (1948). *See also* note 18 *infra*.

tice system have arisen in the context of state proceedings, the principles developed in those cases apply equally to the federal government.

In *Griffin v. Illinois*,[14] the Supreme Court held that the fourteenth amendment requires a state to provide indigents with a free transcript of their trials for use in direct criminal appeals.[15] The Court reasoned that all defendants are entitled to " 'stand on an equality before the bar of justice in every American court.' "[16] Although states need not provide any appellate review of criminal convictions, the fourteenth amendment prohibits wealth-based discrimination in all proceedings the state elects to establish.[17] While *Griffin* rested on both due process and equal protection,[18] the Warren Court subsequently emphasized the

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14. 351 U.S. 12 (1956), *noted in* Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191 (1958); Hamley, *The Impact of Griffin v. Illinois on State Court-Federal Court Relationships*, 24 F.R.D. 75 (1958); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Wilcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957); 9 ALA. L. REV. 354 (1957); 55 MICH. L. REV. 413 (1957); 17 OHIO ST. L.J. 553 (1956); 30 S. CAL. L. REV. 350 (1957); 34 TEXAS L. REV. 1083 (1956); 4 U.C.L.A. L. REV. 274 (1957); 10 VAND. L. REV. 141 (1956).

15. 351 U.S. at 19. The Illinois procedure attacked in *Griffin* gave every person convicted in a criminal trial the right to direct appeal. Full appellate review was possible, however, only if the appellate court was presented with a bill of exceptions or a report of trial proceedings certified by the trial judge. Although preparation of these documents often required a trial transcript, indigent defendants convicted of noncapital offenses were not entitled to a free transcript. *Id.* at 13-14. The Court ruled that this procedure, technically allowing review to indigents, in effect denied them appellate relief because of their poverty. Accordingly, it violated both the due process and equal protection clauses. *Id.* at 18.

16. *Id.* at 17, *quoting* Chambers v. Florida, 309 U.S. 227, 241 (1940).

17. 351 U.S. at 18.

18. Justice Black, author of the plurality opinion, emphasized due process, arguing that all persons were entitled to the same review of guilt:

> Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or defend themselves in court. . . . Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . .
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> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor adequate appellate review accorded to all who have money enough to pay the costs in advance.

Id. at 17-18 (footnote omitted). *See also* Douglas v. California, 372 U.S. 353, 359 (1963) (Harlan, J., dissenting). Under the plurality view, mere access to the appellate system was a hollow procedural safeguard without the means to use the system effectively to overturn an unjust conviction.

All of the States now provide some method of appeal from criminal con-

equal protection component to extend the holding. In *Smith v. Bennett*,[19] the Court held that a state could not condition the right to prosecute a collateral attack upon the payment of a filing fee.[20] In

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victions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.

351 U.S. at 18-19.

In a concurring opinion Justice Frankfurter noted that states could not condition access to justice upon wealth:

> when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court . . . .

Id. at 23. *See also* Burns v. Ohio, 360 U.S. 252, 257 (1959).

A comparison of the majority and concurring opinions reveals that Justice Black's due process analysis and Justice Frankfurter's equal protection analysis are very similar. *Compare* 351 U.S. at 17-18 (Black, J.) ("Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence . . ."), *with id.* at 22 (Frankfurter, J., concurring) (Court cannot sanction "differentiations by a State that have no relation to a rational policy of criminal appeal . . ."). Each position rests on the assumption that all persons accused of a crime must "stand on an equality before the bar of justice in every American court," Chambers v. Florida, 309 U.S. 227, 241 (1940), and each recognizes that due process and equal protection spring from a common source, the "American ideal of fairness." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See* Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 182 (1955).

The *Griffin* equal protection analysis has been equally useful in requiring the federal government to provide indigents transcripts of their federal criminal proceedings. Several cases, including *MacCollom*, have implicitly adopted the reasoning of Bolling v. Sharpe, 347 U.S. 497 (1954) (companion case to Brown v. Board of Educ., 347 U.S. 483 (1954)), and Hurd v. Hodge, 334 U.S. 24 (1948) (companion case to Shelley v. Kraemer, 334 U.S. 1 (1948)), which held that principles of equal protection, though not expressly applicable to federal action under the fourteenth amendment, are implicit in the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 499. *See, e.g.*, Benthiem v. United States, 403 F.2d 1009 (1st Cir. 1968), *cert. denied*, 396 U.S. 945 (1970); United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964); Bozeman v. United States, 354 F. Supp. 1262 (E.D. Va. 1973).

19. 365 U.S. 708 (1961).

20. *Id.* at 713-14. In *Smith*, indigent state prisoners were required to pay a four-dollar filing fee before the state courts would hear their habeas corpus petitions. The requirement violated equal protection:

> The gist of [*Griffin*] is that because "[t]here is no rational basis for assuming that [any petition filed by an indigent] will be less meritorious than those of other defendants, . . . [t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."

Id. at 710, *quoting* Burns v. Ohio, 360 U.S. 252, 257-58 (1959), *and* Griffin v. Illinois,

Long v. District Court[21] and *Lane v. Brown*,[22] the Court held that indigents appealing the denial of a petition for collateral relief are constitutionally entitled to a free transcript of the collateral proceedings.[23] A trial judge's determination that an appeal would not promote justice[24] or would be frivolous[25] was insufficient ground for denying a transcript. Finally, in *Douglas v. California*,[26] the Warren Court again relied on *Griffin's* equal protection component to hold that states must provide indigents with counsel on a direct appeal of right.[27]

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351 U.S. 12, 19 (1956). *See also* Burns v. Ohio, 360 U.S. 252 (1959) (applying *Griffin* to overturn filing fees required for a discretionary state appeal).

21. 385 U.S. 192 (1966) (per curiam).

22. 372 U.S. 477 (1963) (right to transcript in appeal from denial of state coram nobis petition).

23. *Id.* at 478 (state coram nobis proceeding). The *Lane* Court emphasized that the *Griffin* rule was applicable to any phase of appellate procedure afforded by the state. *Id.* at 483-84. *See also* Gardner v. California, 393 U.S. 367 (1969) (state habeas corpus).

24. Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958) (per curiam). In *Eskridge*, the Court held unconstitutional a Washington statute that required the court to furnish indigents with a transcript for direct appeal only if in the trial judge's opinion "justice [would] thereby be promoted." *Id.* at 215. The Court reasoned that a trial judge's conclusion that no reversible error had occurred was an inadequate substitute for appellate review of the record. *Id.* at 216.

25. Draper v. Washington, 372 U.S. 487 (1963). Under procedures adopted after Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958), *see* note 24 *supra*, indigent defendants in Washington who desired a transcript for use on direct appeal were entitled to a copy of trial records only if the trial judge determined that the claims presented were not frivolous. 372 U.S. at 498. The Supreme Court, relying heavily on *Eskridge* and *Griffin*, held that a trial judge's determination that an appeal was frivolous was an inadequate substitute for appellate review. The Court also held that an indigent was entitled to " 'a record of sufficient completeness' to permit proper consideration of [his] claims." *Id.* at 499, *quoting* Coppedge v. United States, 369 U.S. 438, 446 (1962).

26. 372 U.S. 353 (1963).

27. The California procedure challenged in *Douglas* required state appellate courts to independently investigate the trial record before appointing counsel to represent indigent criminal defendants in their only appeal of right. Counsel would be appointed if the reviewing court felt that it would be advantageous to either the court or the defendant. *Id.* at 355, *quoting* People v. Hyde, 51 Cal. 2d 152, 331 P.2d 42, 43 (1958). The Court found that this system conditioned an effective appeal on a person's ability to pay for counsel. Indigents lacking counsel were forced to go forward with only the barren record; courts were forced to prejudge the merits of his case prior to the appointment of counsel. Such an arrangement was anathema to due process. The Court also held that the California procedure violated equal protection.

> The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases,"

In *Ross v. Moffitt*,[28] the Burger Court reconsidered the equal protection principles underlying *Griffin* and refused to extend *Douglas*. *Ross* held that indigents prosecuting discretionary appeals are not entitled to assistance of appointed counsel.[29] The Court reasoned that equal protection does not require absolute equality in all phases of the criminal justice system;[30] the state must afford indigents no more than an initial opportunity to present their claims fully and fairly,[31] and maintain

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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.

Id. at 357.

The Court's conclusion in *Douglas* shows how closely due process and equal protection intermesh:

> There is lacking [in the California procedure] that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Id. at 357-58.

28. 417 U.S. 600 (1974), *noted in* 60 A.B.A.J. 956 (1974); 36 LA. L. REV. 297 (1975); 35 MD. L. REV. 134 (1975); 53 N.C.L. REV. 560 (1975); 29 U. MIAMI L. REV. 153 (1974); 9 U. RICHMOND L. REV. 369 (1975); 14 WASHBURN L.J. 650 (1975). *See also* Note, Ross v. Moffitt: *The End of the* Griffin-Douglas *Line*, 24 CATH. U.L. REV. 314 (1975); Note, *Appellate Representation of Indigents in Indiana*, 50 IND. L.J. 154 (1974).

29. 417 U.S. at 619. In *Ross*, the petitioner, an indigent convicted of forgery, was represented by court-appointed counsel at trial and on an appeal of right before the state intermediate appellate court, which affirmed his conviction. *Id.* at 603. Under applicable state law, an appeal to the state supreme court would lie only if the case involved a matter of significant public interest, legal principles of major significance to state law, or a probable conflict between a decision by the supreme court and the certified decision of the court of appeals. *Id.* at 613-14, *quoting* N.C. GEN. STAT. § 7A-31(c) (1969). The United States Supreme Court held that the Constitution does not require the appointment of counsel during the certification process, reasoning that indigents completing a direct appeal of right in the state court of appeals would be armed with the transcript of their trial, the appellate brief, and, in many cases, an opinion disposing of the case. *Id.* at 614-15. These materials, together with any supplemental material submitted by the prisoner on his own behalf, would be sufficient to enable the state supreme court to determine whether the case fit within the statutory certification standards. *Id.*

30. *Id.* at 612, *quoting* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

31. *Id.* The Court emphasized that states cannot adopt procedures which cut off indigents "from any appeal at all," *id., quoting* Lane v. Brown, 372 U.S. 477, 481 (1963), *discussed in* note 22 *supra* and accompanying text, or grant indigents a "meaningless ritual" while affluent defendants receive a "meaningful appeal." *Id., quoting* Douglas v. California, 372 U.S. 353, 357 (1963), *discussed in* notes 26-27 *supra* and

later phases of appellate review free from unreasoned distinctions.[32] Ross received a fair opportunity to present his claims on direct appeal, when he had the benefit of a transcript and counsel. The state was not required to provide counsel for subsequent discretionary appeals.[33]

Section 2255[34] is a collateral review statute that enables federal prisoners to challenge the constitutionality of their sentences.[35] Sec-

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accompanying text. The regulations limiting access to discretionary appeal had neither effect and therefore did not violate equal protection. The Court stated:

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

Id. at 616.

32. *Id.* at 612, *quoting* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

33. In *Ross,* appointed counsel represented the petitioner before the intermediate appellate court. *Id.* at 603. The state apparently supplied him with a transcript as well. *Id.* at 615. Thus, he was afforded a full opportunity to present his claim.

34. 28 U.S.C. § 2255 (1970).

35. Subject matter jurisdiction under § 2255 is limited to persons in federal custody asserting certain kinds of claims. Prisoners may use § 2255 only to challenge their sentences

> upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . .

28 U.S.C. § 2255 (1970). *See* Lee v. United States, 501 F.2d 494, 500 (8th Cir. 1974); Tanner v. Moseley, 441 F.2d 122 (8th Cir. 1971). Section 2255 prohibits prisoners from using habeas corpus to attack the constitutionality of their confinement unless a § 2255 action will be "inadequate or ineffective" to test the sentence's constitutional validity. 28 U.S.C. § 2255 (1970). It is unclear from the case law whether failure to issue a free transcript to an indigent seeking § 2255 relief renders a § 2255 proceeding inadequate to challenge the validity of the sentence.

There is no constitutional right to counsel in either state or federal postconviction relief proceedings. *See* United States v. Parman, 461 F.2d 1203 (D.C. Cir. 1971) (per curiam) (no right to counsel in § 2255 proceeding); Miranda v. United States, 455 F.2d 402 (2d Cir.), *cert. denied,* 409 U.S. 874 (1972); Day v. United States, 428 F.2d 1193 (8th Cir. 1970) (no right to counsel in review of § 2255 proceeding); Abraham v. Wainwright, 407 F.2d 826 (5th Cir. 1969) (no right to counsel in state postconviction relief proceeding); Gallegos v. Turner, 386 F.2d 440 (10th Cir. 1967), *cert. denied,* 390 U.S. 1045 (1968) (no right to counsel in state habeas corpus proceeding); LaClair v. United States, 374 F.2d 486 (7th Cir. 1967) (appointment of counsel in habeas corpus and postconviction relief proceedings is discretionary); Fleming v. United States, 365 F.2d 587 (1st Cir. 1966) (appointment of counsel is discretionary in matters other than direct appeal); Putt v. United States, 363 F.2d 369 (5th Cir. 1966) (per curiam), *rehearing denied,* 392 F.2d 64 (1968) (counsel not required in motion for relief from sentence); Dirring v. United States, 353 F.2d 519 (1st Cir.

tion 753(f) of the Court Reporter Act,[36] which regulates the issuance of free transcripts to indigent federal prisoners pursuing collateral attacks, grants a free transcript to indigent petitioners proceeding under section 2255 only if the trial judge certifies that the action is not frivolous and that a transcript is necessary to decide the issue presented.[37] Prior to the Ninth Circuit decision in *MacCollom*,[38] lower federal courts uniformly held that this restriction violated neither due process nor

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1965) (counsel not required in post-appeal new trial motion); Robison v. United States, 329 F.2d 156 (9th Cir.), *cert. denied*, 379 U.S. 859 (1964) (no right to counsel on appeal from denial of § 2255 motion); United States v. Visconti, 261 F.2d 215 (2d Cir. 1958), *cert. denied*, 359 U.S. 954 (1959) (no right to counsel on appeal from denial of motion for reduction of sentence).

36. 28 U.S.C. § 753 (1970). The Act regulates the content and production of transcripts in federal courts and prescribes the duties of court reporters.

37. Section 753(f) provides:

> Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States . . . . Fees for transcripts furnished in proceedings brought under [28 U.S.C. § 2255 (1970)] shall be paid by the United States . . . if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

Prior to the adoption of the current § 753(f), it was unclear whether federal courts had power to issue free transcripts in § 2255 cases. *Compare* United States v. Stevens, 224 F.2d 866 (3d Cir. 1955) (courts had no power to issue free transcripts in § 2255 cases), *with* United States v. Glass, 317 F.2d 200 (4th Cir. 1963) (earlier version of § 753(f) conferred power to issue transcripts to § 2255 petitioners after they showed that transcript would be useful). *See* Sokol, *The Availability of Transcripts for Federal Prisoners*, 2 AM. CRIM. L.Q. 63, 63-67 (1964).

The legislative history of the 1965 version of § 753(f) contains no specific justification for the certification requirements. In a letter to the Senate, Deputy Attorney General Clark stated:

> The reason for this distinction [in certification requirements] is not apparent if the motion remedy under section 2255 is to be a remedy commensurate with the writ of habeas corpus.

Letter from Deputy Attorney General Clark to Senate Judiciary Committee, May 27, 1964, *reprinted in* S. REP. No. 617, 89th Cong., 1st Sess. 4 (1965). Despite Clark's letter, the committee gave the distinction little, if any, consideration. *See* Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 357 (1967).

When the Judicial Conference initially considered § 2255, it rejected as a possible justification for certification that it prevents prisoners from filing baseless motions in order to receive a "joy ride" away from prison at government expense. *See* United States v. Hayman, 342 U.S. 205, 217 n.25 (1952).

38. MacCollom v. United States, 511 F.2d 1116 (9th Cir. 1975), *rev'd*, 96 S. Ct. 2086 (1976).

equal protection.[39] In *Wade v. Wilson*,[40] the Supreme Court expressly refused to decide whether indigents prosecuting collateral attacks are

39. These courts held that § 753 does not mandate issuance of a transcript unless the indigent could demonstrate a "particularized need" for some or all of the record. United States v. Jones, 542 F.2d 1169 (4th Cir. 1976); Jones v. Superintendent, 460 F.2d 150, 152 (4th Cir.), *rehearing denied*, 465 F.2d 1091 (1972), *cert. denied*, 410 U.S. 944 (1973); Ellis v. Maine, 448 F.2d 1325, 1327 (1st Cir. 1971); Hines v. Baker, 422 F.2d 1002, 1006 (10th Cir. 1970); Benthiem v. United States, 403 F.2d 1009, 1011 n.5 (1st Cir. 1968), *cert. denied*, 396 U.S. 945 (1970); McGarry v. Fogliani, 370 F.2d 42, 44 (9th Cir. 1966) (per curiam); United States v. Shoaf, 341 F.2d 832, 835-36 (4th Cir. 1964); Harris v. Nebraska, 320 F. Supp. 100, 104 (D. Neb. 1970); United States v. Wiley, 238 F. Supp. 1008, 1010 (D.D.C. 1965). *Cf.* United States *ex rel.* Buford v. Henderson, 524 F.2d 147 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 1133 (1976). Some courts, however, have omitted mention of the requirement, possibly indicating its rejection. *See, e.g.*, Pate v. Holman, 341 F.2d 764, 768-69 (5th Cir. 1965) (failure to provide a transcript for use on appeal may give rise to habeas corpus claim).

The standard of need that indigents must meet has been variously stated. *See* Pollard v. Kidd, 383 F. Supp. 1056, 1058 (E.D. Va. 1974). The First Circuit defined the standard in Ellis v. Maine, 448 F.2d 1325, 1327 (1st Cir. 1971):

> Appellant's petition is wholly for collateral relief. . . . [T]here should be a burden on the petitioner to come into court with his case, not simply to try to make one out. This does not mean . . . with his full case, but he must show merit, not just personal opinion.

Id. at 1327.

In Bozeman v. United States, 354 F. Supp. 1262 (E.D. Va. 1973), the court held that to be entitled to a transcript, an indigent must attack elements of his conviction that "were transcribed and that can be reviewed only on the basis of a transcript." Additionally, he must state a claim of "constitutional dimensions [which is] neither frivolous on its face nor rendered moot under law by other applicable doctrines" and specify the questionable portions of the proceedings with sufficient clarity to permit a court to make an initial determination of relevance. *Id.* at 1264.

Other courts have been less specific. *See, e.g.*, United States v. Brown, 443 F.2d 659 (D.C. Cir. 1970) (per curiam) (prisoner must show specific prejudice caused by lack of transcript); Brown v. United States, 438 F.2d 1385 (5th Cir. 1971) (per curiam) (government need not provide free transcript where postconviction motion does not set forth grounds of attack on sentence); Grace v. Dillow, 296 F. Supp. 311 (E.D. Tenn. 1968) (prisoner must challenge sufficiency of evidence adduced at trial before free transcript will be granted).

Courts have advanced several justifications for the "particularized need" rule. In United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964), Judge Haynsworth reasoned that the usual grounds for a successful collateral attack on a criminal conviction are events, occurring either inside or outside the courtroom, which the defendant can recall without resort to a transcript. An indigent would rarely, if ever, need a transcript to discover grounds for collateral relief. *Id.* at 835.

In Aubut v. Maine, 431 F.2d 688, 689 (1st Cir. 1970), Judge Aldrich held that absent the requirement that a petition for collateral relief set out more than an undetailed allegation of error or deprivation of rights, courts would be inundated with frivolous requests, since every prisoner could obtain a hearing by filing a complaint composed of generalizations and conclusions. *See also* Bozeman v. United States, 354

automatically entitled to a free transcript.[41] Nevertheless, in the opinion of the Ninth Circuit, *Griffin* and its progeny prohibited the imposition of any restrictions on the right to a transcript.[42] The court did not hold section 753(f) unconstitutional, however, because it concluded that the statute did not bar immediate issuance of a transcript to an indigent who, as in the instant case, requested one *prior* to asserting a section 2255 claim.[43]

In *United States v. MacCollom*,[44] the Supreme Court disagreed with

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F. Supp. 1262, 1262-64 (E.D. Va. 1973) ("particularized need" rule necessary to determine whether an indigent needed the whole transcript or only a portion to support his claims).

The "particularized need" rule underlies those decisions holding that indigents have no right to a free transcript merely "to comb the record in search of a flaw." *See* United States v. Herrera, 474 F.2d 1049 (5th Cir. 1973) (per curiam), *cert. denied*, 414 U.S. 861 (1974); United States *ex rel.* Nunes v. Nelson, 467 F.2d 1380, 1380-81 (9th Cir. 1972) (per curiam); Doyal v. United States, 456 F.2d 1292, 1293 (5th Cir.) (per curiam), *cert. denied*, 409 U.S. 870 (1972); Bentley v. United States, 431 F.2d 250, 254 (6th Cir. 1970), *cert. denied*, 401 U.S. 920 (1971); United States v. Glass, 317 F.2d 200, 202 (4th Cir. 1963). *Cf.* Weathers v. United States, 322 F. Supp. 602 (D.S.C. 1970) (prisoner who had evidentiary hearing on merits of collateral claim not entitled to transcript to search for new grounds).

In a series of cases prior to *MacCollom*, the Ninth Circuit adhered to the "particularized need" standard. *See* United States *ex rel.* Nunes v. Nelson, 467 F.2d 1380, 1380-81 (9th Cir. 1972) (per curiam); Wilson v. Wade, 390 F.2d 632, 634 (9th Cir. 1968), *vacated and remanded*, 396 U.S. 282 (1970); McGarry v. Fogliani, 370 F.2d 42, 44 (9th Cir. 1966) (per curiam); Brown v. United States, 270 F.2d 80 (9th Cir. 1959) (per curiam). *But cf.* Doyle v. United States, 366 F.2d 394, 399 (9th Cir. 1966):

> When a defendant is granted leave to proceed in forma pauperis, he must be furnished . . . a sufficient record to make manifest the basis of his claim of error.

40. 396 U.S. 282 (1970).

41. *Id.* at 286.

42. MacCollom v. United States, 511 F.2d 1116, 1117 (9th Cir. 1975), *rev'd*, 96 S. Ct. 2086 (1976).

43. *Id.* at 1119, 1124. The Ninth Circuit held that 28 U.S.C. § 753(f) (1970), *see* notes 35-36 *supra*, did not forbid courts from requiring the government to supply indigents with transcripts *before* they filed a § 2255 motion. The court thought this construction "would fill a constitutional deficit not addressed by the statute." *Id.* at 1119-20. Under the Ninth Circuit's approach the timing of a petition was crucial. Indigents who sought a transcript for use in preparation of a § 2255 motion were entitled to receive one free, since § 753(f) did not provide for this contingency. Indigents who initially filed a § 2255 motion, however, would still be required to show nonfrivolity, since the statute expressly covered such an event.

44. United States v. MacCollom, 96 S. Ct. 2086 (1970). Before proceeding to the main issues, the Court quickly disposed of two preliminary matters: the effect of the Ninth Circuit's opinion on the expenditure of public funds, and the effect of

the Ninth Circuit's interpretation and held that the frivolity provisions of section 753(f) violated neither due process nor equal protection. The Court relied heavily on *Ross*, reasoning that equal protection requires only that indigents be given a fair opportunity to present their claims,[45] not "absolute equality or precisely equal advantages."[46] Although MacCollom would have received a free transcript[47] had he

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§ 753(f) on the constitutional right to habeas corpus. The Court noted that the Ninth Circuit opinion, which allowed public funds to be expended on transcript production except when prohibited by statute, *see* note 41 *supra*, was inconsistent with the established rule that:

> Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized. Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929); Passenger Corp. v. Passenger Assn., 414 U.S. 453, 458 (1974).

Unfortunately, the Court failed to consider 28 U.S.C. § 1915 (1970). Section 1915(a) allows indigents to prosecute *all* civil, criminal, and appellate actions in forma pauperis; section 1915(b) specifically authorizes production of court records at government expense. *See also* 28 U.S.C. § 1915(e) (1970) (monies spent by government to purchase transcript for indigent are taxable against him as costs if he prevails); Whitt v. United States, 259 F.2d 158 (D.C. Cir. 1958) (power to order transcripts is inherent in § 1915); Young v. United States, 246 F.2d 901 (8th Cir. 1957) (§ 1915 allows courts to order transcripts); Parsell v. United States, 218 F.2d 232 (5th Cir. 1955) (courts may rely on § 1915 as authority to issue free transcripts). Thus, despite the Supreme Court's assertion to the contrary, there is ample authority for the Ninth Circuit's holding in *MacCollom*.

The Court also ruled that the frivolity requirements in § 753(f) do not constitute a suspension of the right of habeas corpus in violation of article I, § 9 of the Constitution. In reaching this conclusion, the Court asserted that access to a transcript is not a "necessary concommitant" of the right to habeas corpus, 96 S. Ct. at 2090; Congress can limit use of a transcript as it sees fit, even to the extent of imposing differing regulations on the access of indigent habeas corpus and § 2255 prisoners to transcripts. *Id.* at 2090-91.

45. 96 S. Ct. at 2091, *quoting* Ross v. Moffitt, 417 U.S. 600, 616 (1974).

46. 96 S. Ct. at 2091, *quoting* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973).

47. Respondent in this case had an opportunity for direct appeal, and had he chosen to pursue it he would have been furnished a free transcript of the trial proceedings.

96 S. Ct. at 2091. In the same paragraph, the Court also indicated that MacCollom would have been entitled to the assistance of counsel on direct appeal. *Id., citing* Douglas v. California, 372 U.S. 353 (1963). MacCollom's failure to exercise his right of direct appeal is crucial to the majority's decision; it is discussed five times during the course of the opinion. On four occasions, Justice Rehnquist noted that MacCollom would have had an adequate opportunity to attack his conviction on direct appeal; he now had to accept the consequences of his decision. *See, e.g.*, 96 S. Ct. at 2091. In a concurring opinion, Justice Blackmun, insisted that MacCollom's failure to prosecute a direct appeal was irrelevant to the decision. *Id.* at 2093-94. *See also* note 58 *infra*.

exercised his statutory right of direct appeal,[48] his failure to do so resulted in a waiver of the right to receive a free transcript on demand.[49] The frivolity provisions of section 753(f) "comported with fair procedure"[50] and thus satisfied due process.[51] The Court found no violation of equal protection because unlike mandatory filing fees,[52] the section 753(f) restrictions did not make access to section 2255 proceedings impossible.[53] Finally, the Court noted that because successful collateral attacks are usually based on events not shown in the

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48. The Court emphasized that there is no constitutional right to a direct appeal. 96 S. Ct. at 2091, *citing* Griffin v. Illinois, 351 U.S. 12, 18 (1956). *See* notes 14-17 *supra*; note 69 *infra*.

49. Neither due process nor equal protection required the government to provide indigents with such a delayed right:

> Having foregone this right [to a direct appeal], . . . he may not several years later successfully assert a due process right to review of his conviction and thereby obtain a free transcript on his own terms as an ancillary constitutional benefit.

96 S. Ct. at 2091.

> Equal protection does not require the Government to furnish to the indigent a delayed duplicate right of appeal with attendant free transcript . . . .

Id at 2092.

50. *Id.* at 2091, *quoting* Douglas v. California, 372 U.S. 353, 357 (1963).

51. The conditions which Congress had imposed on obtaining [a transcript for use in § 2255] in § 753(f) are not "so arbitrary and unreasonable as to require their invalidation . . . ."

96 S. Ct. at 2091, *quoting* Douglas v. California, 372 U.S. 353, 365 (1963) (Harlan, J., dissenting).

52. The Court has held that when a State grants a right to collateral review, it may not deny the right to an indigent simply because of inability to pay the required filing fee, Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961). There is no such impediment here; respondent was permitted to proceed in forma pauperis in his § 2255 action.

96 S. Ct. at 2091.

53. According to the majority, the basic question was whether MacCollom received an adequate opportunity to seek review of his conviction. 96 S. Ct. at 2092. The majority concluded:

> the fact that a transcript was available and respondent chose to appeal from his conviction, and remained available on the conditions set forth in § 753(f) to an indigent proceeding under § 2255, afforded respondent an adequate opportunity to attack his conviction.

Id. at 2093. Since equal protection does not require absolute equality, *id.* at 2091, *citing* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973), the inequalities created by § 753(f) do not violate equal protection.

The equal protection standard adopted by the Supreme Court conflicts with that adopted by the Ninth Circuit, which held that indigents are entitled to the same level of assistance as "wealthy defendants." MacCollom v. United States, 511 F.2d 1116, 1122 (9th Cir. 1975), *rev'd*, 96 S. Ct. 2086 (1976). *See also* notes 79-81 *infra* and accompanying text.

transcript,[54] the inequality resulting from denial of a free transcript on demand would be minimal.[55]

Justice Brennan dissented vigorously,[56] arguing that *MacCollom* was a "plain departure" from *Griffin*.[57] Equal protection requires that an indigent's opportunity to present his claims be commensurate with that afforded an affluent defendant in any proceeding centering on the validity of criminal confinement.[58] MacCollom's failure to prosecute a direct appeal was irrelevant.[59] Under *Griffin* and its progeny, indigents are entitled to a transcript in any procedure to challenge a criminal conviction;[60] all distinctions between indigents and affluent defendants,

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54. 96 S. Ct. at 2093. The majority adopted this argument from Judge Haynsworth's opinion in United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964), *discussed in* note 39 *supra*. The Ninth Circuit had rejected the *Shoaf* rationale, noting:

> Assuming that the "usual" grounds for collateral relief do involve either events outside the courtroom or events inside the courtroom which some defendants might recall without the aid of a transcript—and we are aware of no empirical study to support this assumption—we have no reason to know whether a particular transcript would contain a basis for collateral attack, not obvious to a layman with even a good memory. No one has seen MacCollom's trial transcript, and some statistical probability concerning the content of most trial transcripts seems a poor reason to deny MacCollom access to his own.

MacCollom v. United States, 511 F.2d 1116, 1122 (9th Cir. 1975), *rev'd*, 96 S. Ct. 2086 (1976) (footnote omitted).

55. 96 S. Ct. at 2093, *citing* United States v. Shoaf, 341 F.2d 832, 835 (4th Cir. 1964).

56. 96 S. Ct. at 2094. Justice Marshall joined in Justice Brennan's dissent.

57. *Id.* Justice Brennan stated:

> The Constitution demands that respondent, despite his indigency, be afforded the same opportunity for collateral review of his conviction as the nonindigent.

Id. at 2095 (footnote omitted). Earlier, the dissent noted that "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Id.* at 2094, *quoting* Roberts v. LaVallee, 389 U.S. 40, 42 (1967).

58. 96 S. Ct. at 2096.

59. Justice Brennan rejected the majority's argument that MacCollom could be denied access to a transcript because he failed to prosecute a direct apeal. *See* note 49 *supra* and accompanying text.

> It bears emphasis that where, as here, denial of equal protection is the issue, it matters not, under our cases that the indigent had a fair opportunity to present a defense and have his conviction reviewed on direct appeal.

96 S. Ct. at 2095.

60. According to the dissent, *Griffin* and its progeny permit no distinction between trials, collateral review, and direct appeals. *Id.* at 2096. *See also id.* at 2094-95 (describing expansion of *Griffin* line). Justice Brennan also found the distinction irreconcilable with the explicit constitutional recognition of the role of habeas corpus. *Id.* at 2096, *citing* Fay v. Noia, 372 U.S. 391, 399-403 (1963). Under this view, since the scope of the § 2255 remedy is coextensive with that of habeas corpus, the

whether on direct appeal or collateral attack, are intolerable.[61]

Despite lip service to the Warren Court precedents,[62] *MacCollom* and *Ross* embody a fundamentally different conception of equal protection in criminal justice. *Griffin, Smith,* and *Douglas*[63] proscribed *any* wealth-based distinctions in state proceedings to challenge a criminal conviction.[64] This standard implied that the equal protection clause imposed an affirmative duty upon the states to provide indigents with *all* services available to affluent defendants.[65] *Ross* and *MacCollom* reject this concept of equal protection. The government is no longer obligated to provide indigents with all services available to their wealthy counterparts, or to compensate for natural disadvantages. Because equal

proceeding was entitled to equal constitutional importance. *Id., quoting* Davis v. United States, 417 U.S. 333, 343 (1974).

61. 96 S. Ct. at 2096 (Brennan, J., dissenting).

Justice Stevens, joined by Justices Brennan, White, and Marshall, also dissented, arguing that the majority had created a frivolity standard incapable of fair and uniform application by the district courts. *Id.* at 2097 (Stevens, J., dissenting). Additionally, Justice Stevens noted that in many cases judges would be unable to determine whether a petitioner's claims were frivolous without first having a transcript for his own use. *Id.* Immediate production of transcripts would eliminate "a serious cause of delay in the processing of criminal appeals." and speed the incarceration of guilty prisoners. *Id.* at 2098 & n.7. Justice Stevens thought any budgetary impact caused by such a policy would be minimal, *id.* at 2098 n.8, and outweighed by savings in one of the "Nation's scarcest resources": judicial time. *Id.* at 2098.

Finally, Justice Stevens argued that the precise issues presented by the case could have been disposed of, and the constitutional issues avoided, if the majority opinion had defined the term frivolity in § 753(f) and proceeded no further. *Id.* at 2097 n.2. Under Justice Stevens' view of the statute, indigents who pass the hurdle of frivolity imposed by 28 U.S.C. § 1915 (1970), *see* note 3 *supra,* also pass the hurdle imposed by § 753(f). Accordingly, transcripts would be issued in all cases where the indigent presented issues that could not be dismissed on motion of the government in actions by non-indigents. *See* Coppedge v. United States, 369 U.S. 438 (1962), *discussed in* note 3 *supra*; Note, *The Indigent's Right to a Transcript of Record,* 20 KAN. L. REV. 745, 762 (1972). *See also* Haines v. Kerner, 404 U.S. 519 (1971), *discussed in* note 3 *supra.*

62. *See* United States v. MacCollom, 96 S. Ct. 2086, 2091-92 (1976); Ross v. Moffitt, 417 U.S. 600, 611-12 (1974).

63. *See* notes 14-19 & 26-27 *supra* and accompanying text.

64. *See* Lane v. Brown, 372 U.S. 477, 484-85 (1963), *discussed in* note 22 *supra* and accompanying text; Smith v. Bennett, 365 U.S. 708, 713-14 (1961), *discussed in* notes 19-20 *supra* and accompanying text; Burns v. Ohio, 360 U.S. 252, 257 (1959).

65. MacCollom v. United States, 511 F.2d 1116, 1122 (9th Cir. 1975), *rev'd,* 96 S. Ct. 2086 (1976) (comparing services provided indigent under "particularized need" rule with those provided for his "wealthy cellmate"); 35 MD. L. REV. 134, 143-44, 144 n.69 (1975). *But see* Douglas v. California, 372 U.S. 353, 361-62 (1963) (Harlan, J., dissenting) (equal protection does not require states to equalize economic conditions but only to treat its citizens equally).

protection is measured by "adequacy," rather than equality, the government need only afford indigents a minimum quantity of procedural rights. For the Burger Court, a full and fair opportunity to present one's claims satisfies this minimum.[66]

The logical conclusion of this approach is to define equal protection solely in terms of due process. If a criminal justice system provides the requisite due process rights, there is no equal protection violation. If the government does violate equal protection, it does so only by failing to provide due process. Equal protection thus becomes irrelevant to criminal justice; the sole question is whether due process is satisfied.[67]

MacCollom and *Ross* held that a fair trial and one direct appeal of right provide an indigent with a full and fair opportunity to present his claims and thereby satisfy due process.[68] The Court insisted in both

66. *See* United States v. MacCollom, 96 S. Ct. 2086, 2091 (1976), *quoting* Ross v. Moffitt, 417 U.S. 600, 616 (1974). Under the *Ross-MacCollom* standard, the key issue is one of fairness; if the state provides an indigent with a fair opportunity to present his claims, there is no violation of equal protection. On the other hand, unfairness results only if indigents are singled out by the state and denied meaningful access to the appellate system because of their poverty. Ross v. Moffitt, 417 U.S. 600, 611 (1974). Although neither *Ross* nor *MacCollom* adequately defines "meaningful access," it may mean that "a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." *Id.* at 607.

67. This appears to be a vindication of Justice Harlan's view that whether due process has been satisfied is the only appropriate question in the transcript-counsel cases. *See* Douglas v. California, 372 U.S. 353, 363 (1963) (Harlan, J., dissenting):

> The real question in this case . . . and the only one that admits of satisfactory analysis, is whether or not the state rule . . . is consistent with the requirements of fair procedure guaranteed by the Due Process Clause.

See also Griffin v. Illinois, 351 U.S. 12, 29 (1956) (Harlan, J., dissenting) (Illinois procedure did not arbitrarily or capriciously deny the right to appeal); 35 MD. L. REV. 134, 145-46 (1975) (due process analysis used in Gideon v. Wainwright, 372 U.S. 335 (1963), should be applied to transcript cases).

68. United States v. MacCollom, 96 S. Ct. 2086, 2091 (1976); Ross v. Moffitt, 417 U.S. 600, 614-15 (1974).

While the two decisions fail to offer explicit reasons for this conclusion, several arguments have been made to support it. First, because a direct appeal provides review of both factual and legal issues, Sunal v. Large, 332 U.S. 174, 177 (1947), it is the most appropriate forum for reexamination of a trial court's determination of guilt or innocence. The crucial role of the direct appeal has been underscored in numerous discussions of the propriety of upsetting an affirmed conviction through the use of habeas corpus. *See* Stone v. Powell, 96 S. Ct. 3037, 3044-45 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 250-66 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 242 (1969) (Black, J., dissenting); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970) (arguing that since habeas corpus produces "no result in the

cases that nothing in the due process clause requires the government to provide any appeal.[69] If a direct appeal is not a prerequisite to a "full and fair opportunity to present claims," the government would ordinarily

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overwhelming majority of cases," its use should be strongly limited). Lower federal courts have held that § 2255 is not an adequate substitute for appeal. *See, e.g.*, United States v. Durhart, 511 F.2d 7 (6th Cir. 1975); Garcia v. United States, 492 F.2d 395 (10th Cir. 1974); Peterson v. United States, 467 F.2d 892 (8th Cir. 1972), *cert. denied*, 410 U.S. 933 (1973); Levine v. United States, 430 F.2d 641 (7th Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

Second, the continued reexamination of a criminal matter undermines the necessary finality in litigation. There is justification for the theory that collateral review should not be used to relitigate issues already determined to be correct within acceptable tolerances. *See* Stone v. Powell, *supra*; J. FRANK, COURTS ON TRIAL 14-26 (1949); Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957). As one commentator has put it:

> [I]f a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding "count"? Why should we duplicate effort?

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963). Thus, the question becomes whether "the complex of arrangements and processes which previously determined the facts and applied the law validating detention" was adequate to its purpose. *Id.* at 449.

Third, the Court has stated that litigation beyond a direct appeal hampers efficient allocation of judicial resources without offering a significant opportunity for legal development. Stone v. Powell, *supra* at 3050 n.31. In Sunal v. Large, 332 U.S. 174 (1947), the Court noted:

> Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable.

Id. at 182. *See also* Friendly, *supra* at 148-49, *cited in* Stone v. Powell, *supra* at 3050 n.31:

> Indeed, the most serious single evil with today's proliferation of collateral attack is to drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms. . . . The time of judges, prosecutors, and lawyers now devoted to collateral attacks, most of them frivolous, would be much better spent in trying cases.

Additionally, it has been argued that prolonged collateral review postpones incarceration of the guilty, Friendly, *supra* at 146-47, and implies that the trial court acted improperly. *See* Stone v. Powell, *supra* at 3051 n.35; Schneckloth v. Bustamonte, *supra* at 264-65 (Powell, J., concurring); Bator, *supra* at 451.

69. United States v. MacCollom, 96 S. Ct. 2086, 2091 (1976), *citing* Griffin v. Illinois, 351 U.S. 12 (1956); Ross v. Moffitt, 417 U.S. 600, 611 (1974), *citing* McKane v. Durston, 153 U.S. 684 (1894).

have no obligation to provide collateral relief.[70] Nevertheless, the Court would probably uphold a constitutional right to collateral review if the trial and appeal were wholly inadequate to determine properly innocence or guilt.[71] Applying this standard to transcript cases, due process would entitle an indigent to a free transcript to prosecute a collateral attack only if he could make an unaided showing prior to a hearing that the direct appeal process had broken down, depriving him of a fair opportunity to present his claims. To reach this conclusion, the Court seems to have adopted a balancing approach. The magnitude of error required to trigger the constitutional right to collateral attack is so great that a transcript would be necessary to prove it only in extremely unusual cases.[72] Policies favoring judicial economy,[73] finality,[74] and the need to preserve trial court judgments[75] outweigh the need for unconditioned issuance of a free transcript in the vast majority of cases.

The Supreme Court had little difficulty upholding the section 753(f) frivolity regulations at issue in *MacCollom* because the statutory requirement that an indigent demonstrate nonfrivolity as a condition to issuance of a transcript[76] was far less stringent than the showing required by due process.[77] MacCollom's complaint satisfied neither standard and he was therefore required to proceed without the benefit of a free transcript.[78]

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70. *Cf.* Friendly, *supra* note 68, at 164-66. Judge Friendly further notes that if federal collateral review is seen as a means of providing a federal forum to determine constitutional issues, then federal prisoners, who have such a forum on direct appeal, ordinarily have no need for collateral review. *Id.*

71. Stone v. Powell, 96 S. Ct. 3037, 3050 n.31 (1976). *See also* Kaufman v. United States, 394 U.S. 217, 235-36 (1969) (Black, J., dissenting); Friendly, *supra* note 68, at 142.

72. *See* United States v. MacCollom, 96 S. Ct. 2086, 2093 (1976), *quoting* United States v. Shoaf, 341 F.2d 832, 835 (4th Cir. 1964), *discussed in* notes 39 & 54 *supra.*

73. *See* note 68 *supra.*

74. *Id.*

75. *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037, 3050 n.31 (1976).

76. *See* note 39 *supra* and accompanying text.

77. *See* notes 70-72 *supra* and accompanying text.

78. United States v. MacCollom, 96 S. Ct. 2086, 2092 (1976). There was some concern among the dissenters that MacCollom's counsel, who was unwilling to have a poor performance transcribed, heavily influenced him to forego a direct appeal. *Id.* at 2097 n.5 (Stevens, J., dissenting). The majority disposed of this contention by noting that any discussion between MacCollom and his counsel as to the desirability of an appeal would not have been transcribed. Hence, a transcript would be of no assistance in "flesh[ing] out" the claim. *Id.* at 2092. *Cf.* Friendly, *supra* note 68, at 152 n.6.

The majority's failure to articulate fully either its view of equal protection or the basis of its disagreement with the principles underlying *Griffin* may create constitutional anomalies. The Court chose to distinguish *Smith v. Bennett*,[79] which held it unconstitutional for a state to condition the right to pursue a collateral attack upon the payment of a filing fee. Justice Rehnquist insisted that, unlike a filing fee, restrictions on the right to a free transcript do not make it impossible for an indigent to obtain collateral relief.[80] This explanation is unsatisfactory. If due process or equal protection require a state to grant all indigents access to collateral proceedings, surely the state must also provide all services indispensable to such challenges.[81]

More seriously, the majority failed to consider cases such as *Long* and *Lane*, which held that indigents appealing from adverse determinations in habeas corpus and coram nobis proceedings are entitled to free transcripts of those proceedings.[82] Since both habeas corpus and coram nobis are collateral attacks, these cases are only distinguishable if there is a greater right to a transcript of a collateral proceeding for use in a direct appeal from an unsuccessful collateral attack than to a transcript of the initial trial for use in the original collateral attack. Since a trial transcript will probably be more valuable in the latter situation than a transcript of the collateral proceeding in the former, this proposition is untenable.

Griffin and its progeny are built on a view of equal protection wholly at odds with the Burger Court's concept of criminal justice. The Court should have explicitly repudiated the Warren Court's equal protection rationale rather than ignoring some relevant precedents and constructing artificial distinctions in others.

As a practical matter, *MacCollom* may not yield any significant saving of judicial time. Because the Court is apparently willing to retain

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79. 365 U.S. 708 (1961), *discussed in* notes 19-20 *supra*.

80. *See* note 53 *supra* and accompanying text.

81. If neither due process nor equal protection requires any collateral review, the access-service distinction is irrelevant as applied to the states. At the federal level, however, one form of collateral review, habeas corpus, has a constitutional foundation independent of fifth amendment due process. Article I, section 9, prohibits congressional suspension of the writ of habeas corpus except in time of national emergency, but does not alone require the federal government to provide the services necessary to make the writ effective. *See* United States v. MacCollom, 96 S. Ct. 2086, 2090-91 (1976). The access-service distinction may have some merit, therefore, applied to indigent federal prisoners.

82. *See* notes 21-23 *supra* and accompanying text.

the result in *Griffin*,[83] if not the rationale, *MacCollom* may encourage indigent prisoners to pursue direct appeals in order to obtain transcripts for later use. Thus, savings realized from reduction of the number of transcripts issued to indigents pursuing collateral attacks may be offset by a substantial increase in the number of free transcripts issued to indigents pursuing direct appeals.[84] Finally, *MacCollom* may not significantly reduce the number of transcripts that must be produced for indigent collateral attacks, since the "particularized need," apparently required by *MacCollom*,[85] can be shown by careful drafting.[86] The *MacCollom* majority admitted that a transcript would have been issued had the petitioner made stronger factual allegations.[87]

MacCollom reflects the Burger Court's restrictive view of equal protection and the role of collateral review in the criminal justice process.[88] It remains to be seen whether the Court will explicitly adopt

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83. *See* United States v. MacCollom, 96 S. Ct. 2086, 2091 (1976); Ross v. Moffitt, 417 U.S. 600, 614 (1974), *discussed in* notes 28-33 *supra* and accompanying text. *See also* note 47 *supra*.

84. Approximately 75 percent of all criminal cases are currently appealed. *See* United States v. MacCollom, 96 S. Ct. 2086, 2089 n.8 (1976) (Stevens, J., dissenting). According to Justice Stevens, the appeal rate is more likely to increase than decrease. *Id.*

85. *See id.* at 2092. Justice Blackmun, concurring separately, asserted that MacCollom was

> required to show only that . . . there was a basis, grounded on *some* articulable facts, for believing that a transcript would assist him in his § 2255 proceeding.

Id. at 2099 (Blackmun, J., concurring) (emphasis original).

86. *See* Huey v. North Carolina, 364 F. Supp. 447 (W.D.N.C. 1973):

> The "need" standard was developed in order to prevent a petitioner's putting the state to expense merely in order to allow him to "comb the record" (as other appellants do) searching for previously unspecified errors. On the other hand, the cases may have reduced the "need" standard to a merely formal obstacle, which a sufficiently trained writer can usually hurdle by careful phrasing.

87. United States v. MacCollom, 96 S. Ct. 2086, 2092 (1976).

It appears that some courts routinely issue free transcripts, a practice not proscribed by *MacCollom*. *See* MacCollom v. United States, 511 F.2d 1116, 1123 (9th Cir. 1975), *rev'd*, 96 S. Ct. 2086 (1976), *discussing* Hardy v. United States, 375 U.S. 277, 279 n.1 (1964) (transcripts routinely issued in District Court for District of Columbia if production cost is less than $200).

The current system of transcript production has come under strong attack. *See* Mayer v. City of Chicago, 404 U.S. 189, 200 n.1 (1971) (Burger, C.J., concurring). Prompt legislative action to speed production of transcripts, a frequently suggested course, may yield the only lasting solution. The American Bar Association urges that "[c]ontinuing efforts should be exerted to improve techniques for the preparation of records . . . ." AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS

the trial-direct appeal/collateral review dichotomy implicit in *Ross* and *MacCollom*, or explicitly recognize its subordination of equal protection to due process in criminal justice cases.

RELATING TO CRIMINAL APPEALS § 3.3(a). The ABA recommends that indigents be provided transcripts at government expense for use in the direct or collateral appellate process. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS § 3.3(b). The National Advisory Commission on Criminal Justice Standards and Goals has recommended that courts take advantage of technological developments to speed production of transcripts. Failing this, the Commission has urged an immediate increase in the funds provided for transcript production. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 140-41 (1973).

88. *See* Stone v. Powell, 96 S. Ct. 3037 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). Several commentators have advocated that the Court adopt this position. *See* Amsterdam, *supra* note 68; Bator, *supra* note 68; Friendly, *supra* note 68; Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966).