

# THE RIGHT TO COUNSEL ON APPEAL IN MISSOURI: A LIMITED INQUIRY INTO THE FACTUAL AND THEORETICAL UNDERPINNINGS OF DOUGLAS v. CALIFORNIA\*

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There is lacking 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. *Douglas v. California*.<sup>1</sup>

These words were the major premise for the Supreme Court's decision, announced in March 1963, that the equal protection clause requires states which permit appeals as a matter of right in criminal cases to furnish lawyers for indigents wishing to appeal. The Court adduced no evidence for its statement that an appeal without a lawyer is a "meaningless ritual." Indeed, it refused to search the case before it for signs that the petitioners had been prejudiced by an unclear record or hidden errors. This treatment was strikingly different from that in *Gideon v. Wainwright*,<sup>2</sup> decided the same day, where the Court offered a series of practical considerations to support its conclusion that a state must furnish trial attorneys to all persons accused of "crime." It is, therefore, impossible to say at present whether the major premise in *Douglas* is a categorial imperative, subject to debate but not to investigation, or whether it is simply an assumption of fact subject to proof.

Research for this article was begun as an attempt to discover whether the premise has any basis in fact. No one would argue that reversal per-

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Steven Edelstein, Class of 1966, conducted the field research and prepared the Tables. Professor Frank W. Miller's incisive criticism helped me organize my own thinking and saved me some embarrassing blunders.

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1. 372 U.S. 353, 357-58 (1963).

2. 372 U.S. 335 (1963).

centages are the sole—or even a direct—measure of the value of lawyer participation in the appellate process. But they give some indication of that value, and they have the advantage of being available. After all, law is not a science and courts are not laboratories. The variables constituting the judicial process cannot on the one hand be eliminated or on the other hand be controlled so as to produce results that are confined to the factor whose influence is being tested. One of the reasons Missouri seemed ideal for study is that all felony appeals go directly to the supreme court.<sup>3</sup> It was thought this would obviate the need to correlate data from different courts. However, the Missouri Supreme Court hears felony appeals in two divisions, and, occasionally, en banc. As will be seen later, there may be significant differences between the three sets of appeals.

Missouri seemed peculiarly appropriate for testing the Supreme Court's *ipse dixit* for a more important reason also. By placing its decision squarely on the equal protection clause, the majority in *Douglas* made lawyer participation the constitutionally crucial feature. Dissenting Justice Harlan argued that the basic problem was one of due process, and that the crucial factor should be whether the indigent was offered a fair method of protecting his substantial rights, with or without a lawyer. When *Douglas* was decided, there were three ways of appealing a felony conviction in Missouri. They varied in the extent of lawyer participation from perfunctory to complete. A study contrasting the results in the three types of appeals for a given time period would, it was thought, offer some insight into the value of lawyer participation in the appellate process. After *Douglas*, the Missouri Supreme Court amended its rules to require trial courts to appoint lawyers for indigent defendants wishing to appeal.<sup>4</sup> A study contrasting the results of appeals after the rule change with those before should then reveal whether formal compliance with *Douglas* had worked any noteworthy changes. A period of two years was chosen as a span that would yield a manageable but statistically significant number of cases. This article is the study of the first period, March 1, 1962, till the effective date of the new rule, March 1, 1964. I expect to make the follow-up study next year.

## I. BACKGROUND INFORMATION

### A. *Research Method*

Information was obtained from two sources. Official supreme court records of all cases decided during the two years ending March 1, 1964 were studied.<sup>5</sup> Then questionnaires were sent to all lawyers listed as attor-

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3. Mo. CONST. art. 5, § 3.

4. Mo. SUP. CT. R. 29.01 as printed in 19 J. Mo. B. 439-40 (1963).

5. A data sheet was compiled on each case; a sample will be found in Appendix A.

neys of record in the official files.<sup>6</sup> From the questionnaires came such data as whether the attorney was retained or appointed, the stage at which he had entered the case, etc.

The court decided 163 cases during the period. Five were proceedings under Missouri Supreme Court Rule 27.26, which provides that

A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution . . . or is otherwise subject to collateral attack, may file a motion at any time . . . .<sup>7</sup>

These five cases are ignored because they were collateral attacks rather than appeals.<sup>8</sup> The core of this study, then, consists of 158 routine appeals. Supplemental information about 115, or 73 per cent, of them was obtained from questionnaires returned by lawyers.<sup>9</sup>

### B. *Pre-Douglas Missouri Procedure*

At the time *Douglas* was decided, there were three ways of appealing a felony conviction. The most perfunctory, in terms of lawyer involvement, was to appeal on the motion for new trial. A lawyer, almost always the trial attorney, prepared the motion. A defendant wishing to appeal without a lawyer then had only to file a notice of appeal in the trial court. The trial court prepared a transcript, and the transcript and motion for new trial constituted the record on appeal. The Missouri Supreme Court reviewed against the transcript all assignments of error properly preserved in the motion, and could also consider plain errors not raised.<sup>10</sup> Table 1, which breaks down the cases by method of appeal and division of the court, discloses that more than half (81 of 158) took this form.

The second method was to appeal on a brief without oral argument. Only points preserved in the motion for new trial could be argued in the brief.<sup>11</sup> However, when a brief was filed the supreme court considered

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6. A sample is set out in Appendix B.

7. Mo. SUP. CT. R. 27.26.

8. In Missouri a collateral attack under Rule 27.26 is in the nature of a habeas corpus proceeding. It is intended to provide a more convenient and expeditious remedy than habeas corpus. *State v. Thompson*, 324 S.W.2d 133, 135 (Mo. 1959).

9. Supplemental information about 155 cases was sought. Questionnaires concerning 115 cases were answered, which is a response of 76%.

10. See *State v. Bosler*, 366 S.W.2d 369, 372 (Mo. 1963). Subsequent cases state that the supreme court will review all assignments of error properly preserved in the motion for a new trial, but, by their lack of comment upon the subject, cast doubt upon the proposition that the court will consider plain errors not raised in the motion for a new trial. See, e.g., *State v. Price*, 362 S.W.2d 608, 611 (Mo. 1962).

11. Cf. *State v. Tucker*, 362 S.W.2d 509 (Mo. 1962).

TABLE 1<sup>1</sup>  
METHOD OF APPEAL

	MNT	Brief Only	Full Argument	Total
Division 1				
Total cases	41	15	22 <sup>2</sup>	78
Retained att'y	10	7	12	29
Pro se	—	4	2	6
Other att'y	12	2	5	19
No data	19	2	3	24
Division 2				
Total cases	39	13 <sup>2</sup>	18	70
Retained att'y	13	6	11	30
Pro se	—	2	—	2
Other att'y	8	1	4	13
No data	18	4	3	25
En banc				
Total cases	1	1	8	10
Retained att'y	1	1	2	4
Pro se	—	—	—	0
Other att'y	—	—	3	3
No data	—	—	3	3
Total				
No. cases	81	29	48	158
Retained att'y	24	14	25	63
Pro se	0	6	2	8
Other att'y	20	3	12	35
No data	37	6	9	52

1. Excludes five cases filed under Missouri Supreme Court Rule 27.26. This provision permits a collateral attack upon the conviction under certain limited circumstances. See the text for further discussion.

2. Includes one case in which the state was the appellant. There were two such cases altogether.

only those points properly raised (i.e., it did not consider plain errors not raised),<sup>12</sup> and confined its attention to those parts of the transcript appended to it.<sup>13</sup> There were 29 such appeals, 18 per cent of the total.

Under a long-standing policy of the Attorney General, the state did not present oral argument unless the defendant did. Whenever the defendant was proceeding on a motion for new trial or on a brief without argument,

12. Mo. SUP. CT. R. 28.02.

13. Mo. SUP. CT. R. 28.08.

the state's case was presented only by brief. In the former, the state briefed all of the points raised in the motion.<sup>14</sup> Two deviations from this policy occurred during the period. The Attorney General made an oral argument in one case in which the state was the appellant, although the defendant only filed a brief; the defendant argued once when the state merely briefed the case. Both judgments were affirmed.

The third method of appeal was, of course, the traditional one with a brief and oral argument. Table 1 reveals that slightly less than a third (48 of 158) of the appeals were heard in this manner.

As a practical matter, the method available to indigents was the motion for new trial.<sup>15</sup> This is not to say that indigent appeals always took this form; Table 1 discloses that some appointed attorneys filed briefs for their clients, and some others made oral argument. And nothing prevented the defendant from filing his own brief and making his own oral argument, as a few did. So far as lawyer involvement is concerned, however, the typical indigent appeal was on a motion for new trial. The reason for this is that appointed lawyers are paid neither fees nor expenses in Missouri.<sup>16</sup>

On the other hand, Missouri's indigent appellant was guaranteed at least this much. Throughout the state, lawyers appointed to defend indigents at trial almost uniformly considered the preparation and filing of the motion for new trial to be part of their original obligation.<sup>17</sup> In only two of the 158 appeals was there a possibility that the defendant himself had had to prepare it. In essence, then, it can be said that, before the rule change, the indigent's right to insist upon a lawyer's help was limited to the motion for new trial appeal. The effect of the change is an open question. It was discovered during the investigation for this article that such appeals are still reaching the court. This indicates that some judges interpret the amendment to mean only that they have to appoint lawyers in those rare instances in which the trial attorney fails or refuses to file a motion for new trial, and that the appointed attorney retains the same choice of methods of appeal previously available. Other judges and lawyers interpret the change to mean that the lawyer appointed for an appeal now must file a brief and present oral argument.

Missouri's motion for new trial appeal differs from the procedure declared unconstitutional in *Douglas* in two respects: (1) the court decides

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14. Interview with a member of the Criminal Division, Office of Attorney General of Missouri.

15. See Gerard, *A Preliminary Report on the Defense of Indigents in Missouri*, 1964 WASH. U.L.Q. 271, 314.

16. Mo. SUP. CT. R. 29.01.

17. Gerard, *supra* note 15, at 314.

the case on its merits instead of simply deciding whether it warrants the appointment of an attorney; and (2) the lawyer has in fact helped the court find alleged errors by preparing the motion for new trial. The latter point probably is insignificant, however, because the time requirements in Missouri are such that the lawyer normally must prepare the motion before the transcript becomes available to him, and before he has had time to research the law beyond that done in preparation for the trial.<sup>18</sup> Because he is required to rely upon his memory, and has little time for research, the lawyer preparing the motion tends to blanket everything that could conceivably amount to error. Hence, in the terms of *Douglas*, there is no examination into the record and no research of the law. Obviously there is no marshalling of arguments in such a motion.

Table 1 points up a fact which needs emphasis, namely, that indigents were not the only defendants whose appeals did not involve full participation of lawyers. Attorneys were retained in 24, or approximately 30 per cent, of the 81 cases heard on motions for new trial. If the 37 cases about which no data was available are eliminated, 55 per cent (24 of 44) of the cases heard in this way were filed by retained attorneys. By the same token, nearly half (14 of 29) of the cases appealed on briefs without oral argument were filed by retained attorneys; eliminating the no data cases raises the figure to 61 per cent. Overall, if the 52 no data cases are eliminated, retained lawyers were willing to have appeals heard on less than full argument 36 per cent (38 of 106) of the time.

One possible explanation for this has a direct bearing on this study, namely, that some non-indigents were unable, with what they could afford to pay, to find lawyers willing to do more than file motions for new trial. If the majority in *Douglas* was correct in concluding that the problem is simply one of equal protection—of providing the indigent with the same lawyer-services a non-wealthy but non-indigent defendant could buy—then it is arguable that Missouri's pre-*Douglas* procedure was constitutional except in those rare instances in which defendants themselves had to prepare motions for new trial. It would also be arguable that an interpretation of the new rule as only formalizing what previously had been the virtually uniform practice would be constitutional, even if it could be demonstrated to a certainty (which it cannot) that an appeal on the motion for new trial is "a meaningless ritual."

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18. A motion for a new trial should be filed ten days after the verdict. Upon application by the defendant the court may extend the time to thirty days. The court has no power to make a further extension. Mo. SUP. CT. R. 27.20.

### C. *Lawyers' Opinions about the Pre-Douglas Procedure*

Another possible explanation, of course, is that a significant number of lawyers believed that their clients were adequately protected without a traditional appeal. Many Missouri attorneys believe the defendant is better off appealing on the motion for new trial than he would be having an appointed lawyer brief and argue his case. Their contention is that because the Attorney General briefs, and the court considers, every point raised in the motion, it is possible to assert many more grounds for reversal than would be permitted if the defendant's attorney were confined to a brief.

Questionnaires were sent to all lawyers listed as attorneys of record in the official files of the court, in some instances to two lawyers about the same case.<sup>19</sup> Altogether, questionnaires went to 132 lawyers, 98 of whom answered, a response rate of 74 per cent. Twenty-four of the 132 had represented more than one defendant during the period, and 17 of them responded.<sup>20</sup> All were asked, "Some lawyers say that the old rules were more beneficial to the defendant than the new rules—that is, that the defendant had a better chance of securing a reversal under the old rules than under the new. Do you agree or disagree?" The results are shown in Table 2. Nine, or slightly more than half, of the 17 who represented two or more defendants agreed. But 42 of the 81 who represented only one defendant, also slightly more than half, disagreed. Taking the two groups together, one third (33) of the 98 responding agreed while one half (48) disagreed.

The lawyers were invited to comment about their answers, and many of them did so. Two arguments, in addition to that already set out, appeared frequently in questionnaires from agreeing lawyers. One was that judges of the Missouri Supreme Court were likely to be more familiar with criminal law than an appointed lawyer. A second was that the court could do a better job than an attorney working without fees or expenses. A number said that an attorney required to undertake the additional burden of an appeal on top of a trial literally could not afford to prepare adequately.

Those who disagreed said such things as the court gives more attention to the case if the defendant is represented, and it is "an illusion" to believe that the court really searches the record for errors. One noted ironically, "I would hate to think that a lawyer by filing a brief and arguing before the Supreme Court wouldn't be performing a service for his client."<sup>21</sup> An-

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19. In one instance questionnaires were sent to three attorneys about the same case. Two attorneys were sent questionnaires concerning the same case in fourteen instances.

20. Of the seventeen attorneys who answered, fifteen handled two cases. The other two handled four and six cases.

21. This attorney, as well as others whose answers have been summarized, apparently assumed that the new rule requires a brief and oral argument by counsel. I made the same assumption when I drafted the questionnaire.

TABLE 2  
LAWYERS' RESPONSES TO QUESTION: DO YOU AGREE THAT OLD  
PROCEDURE WAS MORE FAVORABLE TO DEFENDANT THAN NEW?

	Agree	Disagree	Don't Know	No Answer	Total
Attorneys who, during period studied, represented:					
One defendant	24	42	11	4	81
More than one defendant	9 <sup>1</sup>	6	1	1	17
Total	33	48	12	5	98

1. Includes one attorney who said the change would make no difference.

other said, "The latter position presupposes that a court appointed lawyer on an appeal would slop through the case because he is not paid. I would not behave in such a manner, and I do not think other lawyers would either (at least not the great majority)." Perhaps the best statement of this attitude was put in these words:

It would be difficult to convince me that the lack of a lawyer would be beneficial to a defendant on appeal. Even though the Supreme Court may have been diligent in its review of the transcript, there is no substitute for a brief and argument which points out to the Court specific instances of error in the record and underscores these instances with argument and authority.

The purview of the Court is one of passing on questions presented and it is not its responsibility to search out error in the record. To require the Court to do so places a burden upon it which is not logically or historically its own. The Court should not be required to act as an advocate as well as an arbiter.

The defendant has a far greater chance under the recent rules change. I believe this is a return by the Court to its rightful place in the administration of justice.

Two points were made by attorneys on both sides of the question. The first was, in the words of one attorney, "The prime new advantage is reasonable assurance of oral argument—whatever that's worth." The other was that the efficacy of the new rule may depend upon whether the lawyer appointed for the appeal is the same one who appeared at the trial. A



TABLE 3<sup>1</sup>  
 CASES BY ATTORNEYS WHO PREPARED APPEALS

	Division 1	Division 2	En banc	Total
<i>Motion for new trial by</i>				
Trial att'y	27	23	1	51
Appeal att'y	3 <sup>2</sup>	3	—	6
Pro se	—	—	—	0
No data	11	13	—	24
<i>Brief by</i>				
Trial att'y	10	11 <sup>3</sup>	1	22
Appeal att'y	1	—	—	1
Pro se	4	2	—	6
No data	—	—	—	0
<i>Full argument by</i>				
Trial att'y	19 <sup>4</sup>	15	6	40
Appeal att'y	—	3	2	5
Pro se	2	—	—	2
No data	1	—	—	1
<i>Total</i>				
Trial att'y	56	49	8	113
Appeal att'y	4	6	2	12
Pro se	6	2	—	8
No data	12	13	—	25

1. Excludes attacks under Rule 27.26.

2. Includes one case in which trial attorney died prior to appeal.

3. Includes one case in which state appealed and made oral argument. Defendant simply filed a brief.

4. Includes (a) one case in which an attorney who had not appeared at the trial was listed on the brief with the trial attorney, and (b) one case in which the state appealed from a quashing of the information.

number of lawyers argued that a defendant would be better off proceeding under a motion for new trial prepared by the lawyer who conducted his defense than with oral argument made by an appointed attorney who had not participated in the trial. Table 3 shows what happened during this period. Trial attorneys prepared 72 per cent of the appeals; if the 25 no data and 8 pro se cases are eliminated, the proportion rises to 90 per cent (113 of 125). In only 9 per cent (12 of 133) of the cases were appeals prepared by different attorneys.

#### D. *Problem Areas*

##### 1. *Identifying Indigents*

Table 1 shows that 63, or 40 per cent, of the 158 appeals were filed by "retained attorneys." This proportion increases to 59 per cent (63 of 106) if the no data cases are eliminated. There are a number of reasons why this designation should not be equated to "non-indigent." First, it does not mean the lawyers were paid; three lawyers who returned questionnaires noted that they were never paid even though they had been "retained." Second, inclusion of his case in this category does not indicate the defendant had a retained attorney at his trial. Two lawyers stated that they were listed as attorneys of record as a matter of courtesy only; that they had been appointed to represent the defendants at their trials, and that the defendants had then "found some money" to retain different lawyers for the appeals. Third, two cases are included in this category in which attorneys were hired for trials only, and took appeals without fee because they thought them meritorious. Fourth, all cases in which lawyers were retained are included without regard to who did the retaining; two were retained by families of the defendants, one by the defendant's employer. In summary, this category includes all cases in which a lawyer was retained (a) either at the trial or for the appeal, (b) whether or not he was paid, and (c) irrespective of who retained or paid him. The weakness of classifying all such cases "non-indigent" is obvious.

However, it is unnecessary to identify those cases involving indigents. The question is whether the method of appeal to which the indigent had a *right* was less effective than the methods available to defendants able to pay fees. Since, during the period under investigation, the indigent, practically speaking, had a *right* only to an appeal on motion for new trial, the issue is whether this method was less effective than the others. For purposes of comparing the effectiveness of methods, indigency of the defendants is irrelevant.

##### 2. *Pro se Appeals*

A more difficult problem is presented by the eight *pro se* appeals. Two of these were presented on full argument, six by briefs without argument. Beyond that, little crucial information is available.

Of the six appeals presented on briefs, it is thought that one defendant himself prepared both the motion for new trial and the brief. In another, the defendant wrote his own brief, but it was impossible to determine who prepared the motion for new trial. It was also impossible to determine whether the defendants in these two cases were lawyers. Lawyers did

prepare motions for new trial in the other four instances, while the defendants prepared their own briefs. One of these defendants was a lawyer. In the two cases presented on full argument, it is known that attorneys represented the defendants at their trials and prepared the motions for new trial. The defendants proceeded beyond this point on their own, so far as could be determined. One of them was a lawyer.

These cases could have been handled a number of ways. One possibility was to eliminate from consideration the two in which the extent of the non-defendant lawyers' participation was unknown, and to treat the remaining six as though they were appeals on motions for new trial, since the non-defendant lawyers' participation terminated at that point. Another possibility was to eliminate the six cases in which it could not be determined whether the defendants were lawyers, and to treat the remaining two in the usual manner. Still another possibility, justified by the maxim that "a lawyer who represents himself has a fool for a client," was to eliminate all eight from consideration, on the theory that they would be atypical whether or not the defendants were lawyers. (The fact that all were affirmed may indicate this would have been the wiser choice.) It was finally decided to put them in the categories in which they would have been included had the defendants been represented on the appeals, and to permit the reader to assess their significance.

### 3. *Habitual Criminal Cases*

One function of Missouri's Habitual Criminal Statute is to transfer the duty of sentencing from the jury to the judge whenever the defendant has previously been convicted of a felony.<sup>22</sup> In 5 of the 158 appeals, the only error found was one concerning prior convictions. In four of them, the proof of prior convictions was defective; in the other, the information was defective in its allegation of prior convictions. None of these cases is counted as an affirmance (except in Table 5, where the former four are specifically identified). Yet no errors were found in any of the trials. In the four cases of inadequate proof, new trials will be unnecessary if the state can properly prove the prior convictions. Hence, it is arguable that these cases should not be considered reversals. But it did not seem satisfactory to eliminate them or to consider them affirmances either.

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22. Mo. REV. STAT. § 556.280 (1959).

Prior to 1959, § 556.280 included a subsection which imposed a harsher sentence upon habitual criminals. Since 1959 the sole function of the habitual criminal act has been to transfer the function of determining sentence from the jury to the judge.

#### 4. *En banc* Cases

En banc decisions are atypical also. The ten decided during this period represents less than 8 per cent of the court's criminal business. All appeals from sentences of capital punishment go to the court en banc automatically.<sup>23</sup> In addition, cases can be transferred to the full court when there has been a dissent in the division to which it was assigned, and at other times on the court's own motion.<sup>24</sup> Five of the ten en banc decisions were capital cases. One of the remaining five appeals was transferred to the court en banc because a federal constitutional question was involved. Why the other four were decided en banc is not known. The judgment in one was affirmed without dissent in Division 2, and then again affirmed by the court en banc. Two others were first assigned to divisions, and then transferred to the full court before decisions were rendered. The earlier history of the remaining case was not available.

Since there were so few en banc decisions, and half of them were capital cases, it is doubtful that they afford a separate basis for conclusions. It might be mentioned parenthetically, however, that two of the five capital cases were presented on less than full argument. In both, the defendants were represented by retained attorneys upon appeals from convictions for murder. Both were affirmed. The three capital cases heard on full argument were all presented by appointed attorneys working without compensation. Two were convictions for forcible rape, and one was reversed. The other was a conviction for murder, and it was reversed.

#### 5. *Cutoff Dates*

Another variable was introduced into this study by the cutoff dates. The use of such dates was dictated by the impossibility of determining for every appeal whether the trial judge was, or thought he was, functioning under the new rule or the old one, and whether he thought the new rule required anything more than the previous practice. There is no doubt that a few of the cases considered here should be included in the forthcoming study. This is because some lawyers and some judges read *Douglas* to require that indigents be given a full argument, and began acting accordingly, either as soon as the decision became known, one full year before the effective date of Missouri's new rule, or at the time the new rule was announced in October 1963,<sup>25</sup> six months before its effective date. On the other hand,

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23. Mo. SUP. CT. R. 28.19.

24. Mo. CONST. art. 5, § 9.

25. See 19 J. Mo. B. 439-40 (1963).

some appeals begun under the old rule undoubtedly will have been decided after March 1, 1964, and properly belong in this study although they will be picked up in the later one.

## II. THE CASES

In its simplest form, *Douglas* stands for the proposition that the difference between a meaningful appeal and a meaningless ritual is the presence of a lawyer. Stated in this way, the proposition cannot be tested by the Missouri cases, because in only one, or perhaps two, appeals was the defendant entirely without an attorney's aid. The Supreme Court, however, assumed that certain benefits flow automatically from the presence of counsel, viz., examination of the record, research of the law, and marshalling of arguments. *Douglas'* proposition can be tested by the Missouri cases if one disregards the Court's statements and focuses instead upon the assumed benefits. That is, the proposition can be tested if it is put in this form: the difference between a meaningless ritual and a meaningful appeal is a counsel's examination of the record, research of the law, and marshalling of arguments. If this is the proposition to be tested, the motion for new trial appeals may be treated as though the assistance of counsel were entirely absent, for, as has been pointed out, such appeals almost always lack the first, have very little of the second, and never have any of the third.

If the Supreme Court was correct, one would expect to find significant differences in results between, on the one hand, motion for new trial appeals, and, on the other hand, the other two kinds of appeal considered together. For it could be contended in both the latter that the lawyers had performed all of the tasks required by *Douglas*: they had examined the records, researched the law, and marshalled the arguments. By the same token, one would expect that there would be no significant differences in results between appeals heard on briefs only and those presented on full argument, for the only variation between these two is oral argument, a feature not mentioned in *Douglas*.

What, then, do the cases show?

Delay is one form of prejudice in criminal cases. A person unable to post bond may have to remain in jail awaiting decision of his appeal. Table 4 reveals no significant differences between methods of appeal with respect to the length of time between the entry of the trial judgment and the decision on appeal.

Table 5 breaks down the appeals in terms of gross results. One hundred eighteen, approximately 76 per cent, were affirmed without qualification. Table 6 establishes the proportions of these affirmances to total cases de-

TABLE 4  
ELAPSED TIME (MONTHS) BETWEEN TRIAL JUDGMENT AND DECISION  
ON APPEAL

	MNT	Brief Only	Full Argument
<i>(Number of cases studied)</i>	(81)	(29)	(48)
Minimum	5	8	3
Maximum	26	16	26
Median	12	12	12

TABLE 5<sup>1</sup>  
OUTCOME OF APPEAL BY DIVISION

	Division 1	Division 2	En banc	Total
Affirmed	61	52	5	118
Aff'd in part, rev'd in part	1	1		2
Aff'd except as to sentence	2	2		4
Reversed	3	1		4
Rev'd and remanded	10	13	5	28
Total	77	69	10	156

1. Excludes (a) two cases in which state appealed, and (b) five attacks under Rule 27.26.

cided, both by method of appeal and by division of the court. In Division 1, there was a difference between motion for new trial and brief only appeals. But there was no significant difference between the former and full argument appeals. Indeed, the affirmance rate was higher in the latter than in either of the first two categories. In Division 2, the difference in affirmance rates between cases heard on motions for new trial and those heard on briefs was insignificant. But the difference between these two categories and full argument appeals was a remarkable 33 points, dropping from 83 per cent to 50 per cent. In overall results, the significant difference was not between the first category and the others, but between the last category and the first two; the affirmance rate was 16 points lower than briefs only, and 21 points lower than motions for new trial.

TABLE 6<sup>1</sup>  
COMPARISON OF AFFIRMANCES BY METHOD OF APPEAL

	Division 1	Division 2	En banc	Total
<i>Motion for new trial</i>				
No. cases	41	39	1	81
No. affirmed	33 (80%)	33 (85%)	1 (100%)	67 (83%)
<i>Brief only</i>				
No. cases	15 <sup>2</sup>	12 <sup>3</sup>	1	28
No. affirmed	11 (73%)	10 (83%)	1 (100%)	22 (79%)
<i>Full argument</i>				
No. cases	21 <sup>4</sup>	18	8	47
No. affirmed	17 (81%)	9 (50%)	3 (37%)	29 (62%)
<i>Total</i>				
No. cases	77	69	10	156
No. affirmed	61	52	5	118
% affirmed	(79%)	(75%)	(50%)	(76%)

1. This table excludes (a) two cases in which the state was the appellant, and (b) five attacks under Rule 27.26.

2. Includes four cases in which defendants appeared *pro se*.

3. Includes two cases in which defendants appeared *pro se*.

4. Includes two cases in which defendants appeared *pro se*.

Affirmance rates were then plotted as a function of the type (i.e., retained or not) of attorney. The difficulty of defining "retained" has already been discussed. Briefly, a retained attorney was any lawyer who said he was retained, whether or not he was paid, and irrespective of who paid or retained him. An "other attorney" was any lawyer, except the defendant, who was not "retained" as thus defined.

The results are given in Table 7. The affirmance rate for retained lawyers was approximately 15 points lower in both divisions and overall than the affirmance rate for other attorneys in cases heard on motions for new trial. Ignoring the brief only appeals because the number of cases (three) involving other attorneys is so small, the figures in the last category are the most striking. Excluding the two capital cases in which convictions were reversed by the court en banc, "other attorneys" were uniformly unsuccessful in appeals presented on full argument. Their affirmance rate of 100 per cent compares to 64 per cent (7 of 11) in Division 1, and an

TABLE 7<sup>1</sup>  
AFFIRMANCES BY TYPE OF ATTORNEY

	Division 1		Division 2		En banc		Total		
	No. cases	No. aff'd	No. cases	No. aff'd	No. cases	No. aff'd	No. cases	No. aff'd	% aff'd
<i>Motion for new trial</i>									
Retained att'y	10	6	13	11	1	1	24	18	75%
Other att'y	12	10	8	8	—	—	20	18	90%
No data	19	17	18	14	—	—	37	31	84%
<i>Brief only</i>									
Retained att'y	7	4	5	5	1	1	13	10	77%
Other att'y	2	1	1	0	—	—	3	1	33%
Pro se	4	4	2	2	—	—	6	6	100%
No data	2	2	4	3	—	—	6	5	83%
<i>Full argument</i>									
Retained att'y	11	7	11	5	2	1	24	13	54%
Other att'y	5	5	4	4	3	1	12	10	83%
Pro se	2	2	—	—	—	—	2	2	100%
No data	3	3	3	0	3	1	9	4	44%
<i>Total cases</i>									
Retained att'y	77	61	69	52	10	5	156	118	
Other att'y	28	17	29	21	4	3	61	41	67%
Pro se	19	16	13	12	3	1	35	29	83%
No data	6	6	2	2	0	0	8	8	100%
No data	24	22	25	17	3	1	52	40	77%

1. Excludes (a) two cases in which state appealed, and (b) five attacks under Rule 27.26.

even lower 45 per cent (5 of 11) in Division 2, for retained lawyers. Overall, retained counsel were successful 33 per cent (20 of 61) of the time as compared to 17 per cent (6 of 35) for other attorneys. Considering only appeals about which information was available, other attorneys were successful only once in Division 2, in an appeal on a brief without argument.

#### CONCLUSIONS

Obviously, none of this data lends factual support to the underlying assumptions of *Douglas*. First, the Supreme Court was wrong in assuming that the mere presence of a lawyer is enough to secure an examination of the record and a marshalling of arguments. The defendant appealing on a motion for new trial gets neither. Since, however, this Missouri pro-



cedure is unusual, it would be carping to criticize the Court for not being familiar with it.

Second, the Court was wrong if it believed that the crucial factor is an attorney examining the record and marshalling arguments on behalf of the defendant. The defendant appealing on a brief without oral argument has both of these. And yet the difference in results between brief only and motion for new trial appeals was much smaller than that between brief only and full argument appeals, except in Division 1. Looking at Division 1, the Court was wrong because there was no significant difference; looking at Division 2, or the overall results, the Court was wrong because the significant variation occurred at a point where the factors thought to be crucial by the Court remained constant.

Some things remain imponderables. Do the results depend upon the method of appeal and the type of attorney, or do the merits of the case determine the method and whether an attorney can be retained to prosecute it? Some of the data indicates the answer may be the latter: the proportion of cases heard on less than full argument filed by retained attorneys; the fact that seven attorneys said they preferred the old Missouri practice because it let them dispose of frivolous appeals with a minimum of time, energy and expense. If the requirements of *Douglas* are satisfied so long as this decision is made by the defendant's attorney, and so long as the attorney participates in some kind of appeal, *e.g.*, on the motion for new trial, then the legal foundation for the decision, namely, the equal protection clause, will not stand analysis. On the one hand, the appeals of some non-indigents were heard on less than full arguments presumably because the fees were not large enough to induce lawyers to spend a day traveling to Jefferson City to make oral argument. And yet there were major variations between the results of full argument appeals and the other two categories. "Major" variations do not necessarily mean "constitutionally significant" variations, of course. But if the variations in results in Missouri were not constitutionally significant, one wonders what evidence the Court had that there would be greater variations between a lawyer and an appellate judge searching a record for errors.

On the other hand, an interpretation of the equal protection clause which requires that an indigent be given every conceivable service that a wealthy person could buy in the same circumstances is also unsatisfactory. A wealthy defendant can hire an experienced trial attorney, can afford to pay that attorney for extensive investigations, wide-ranging discovery in the form of depositions, and can also afford whatever expert witnesses are useful. All of these things are desirable and I think they should be provided

by the state to all defendants. But surely the equal protection clause is a poor justification for them. For one thing, the definition of "indigent" would have to be expanded to cover a vastly greater share of the population than anyone has yet imagined. For another, the clause would have to be a one-edged sword: if these services are provided free to anyone who cannot afford them all, why should the person who can barely afford them have to become a pauper in order to protect himself? Finally, in any community there are relatively few experienced trial lawyers who will undertake criminal defense work. If the equal protection clause provides the theory, then one of two things is inevitable: either the whole burden of defending indigents will be imposed upon this small group, or the outcome of appeals will be decided by such questions as whether the non-retained trial attorney performed as well as another who could have been retained if the fee had been large enough.

Significant differences in success rates between retained and other attorneys were noted. There are a number of possible explanations for this, and nothing to indicate which is to be preferred. One possibility is that the retained attorneys entered their cases much earlier (as, for instance, immediately after arrest) than other attorneys. The Supreme Court has assumed that this can make a crucial difference in the ultimate outcome of cases, and there is no reason to believe it was wrong.<sup>26</sup> Another possibility is that retained attorneys are more likely to be experienced criminal lawyers. There is some data that would partially support such a hypothesis. Of the 24 attorneys of record who handled more than one case during the survey period, 14 could be identified as criminal lawyers of reputation in their communities, and most of them were retained for most of their cases.<sup>27</sup> The other 10 lawyers were unknown to me. A third possibility is that if the case is good enough, some lawyer can be found who will take it for whatever the defendant can afford to pay.

The fourth possibility, one mentioned by many lawyers who returned questionnaires, is the reverse of the third: only retained attorneys can afford to devote the time and money necessary to be adequately prepared. The data is ambiguous on this point. Contradicting it are the facts that not all retained attorneys were paid and that two retained attorneys undertook appeals without fees solely because they thought the cases meritorious.

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26. See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

27. Of the seventeen attorneys who answered questionnaires concerning forty cases, five attorneys were not retained in six cases. This means that twelve attorneys were retained in all of their cases numbering thirty. It also means that only one was appointed to both of his cases. No information was available to determine whether the seven attorneys who did not answer questionnaires were retained or not retained.

Tending to confirm it is the fact that so many lawyers mentioned it. It does not seem unreasonable to assume that a lawyer will not devote adequate time to the preparation of an appeal if he has convinced himself, rightly or wrongly, that he cannot afford to do so.

Suppose one were able to conclude, on the basis of this study, that the difference in success rates between retained and other attorneys was constitutionally significant, and that the cause of the difference was the non-payment of appointed attorneys; what then? It seems to me the answer must be that Missouri would be required to compensate appointed lawyers. This follows, I submit, whether or not one agrees that the equal protection clause was a proper foundation for *Douglas*.

It may be the Court was incorrect in assuming that certain benefits would follow automatically if an attorney were somehow involved in the appellate process. But this does not mean that the Court was wrong in concluding that those benefits *should* follow; it only means the Court couched the language requiring them in unfortunate terms. It may be the Court was wrong in stressing examination of the record, research of the law and marshalling of arguments. But it is equally possible that the Court chose to emphasize those factors only because the pivotal issue in *Douglas* was not the extent of lawyer participation, but whether a lawyer was to participate at all. And it is conceivable that it chose to found its holding on the equal protection clause simply as a device to avoid the charge that it was meddling with state criminal procedure. If, for example, the Court had held that the appeal is a "critical stage"<sup>28</sup> of the criminal process, and the due process clause therefore required the appointment of an attorney, the question might have arisen whether states were required to permit appeals in all criminal cases. The clear thrust of *Douglas* is that the indigent criminal appellant must be given a fair method of raising substantial challenges to his conviction. Certainly one standard of fairness is what the state provides for those who can afford to pay their own way. The Court stopped short of this standard; it required that attorneys be appointed only for the first appeal as of right, and not for any later or discretionary appeals. That this is not logically equal protection does not detract from the fact that it is practically due process.

If, as I believe, the correct interpretation of *Douglas* is that it is an amalgam of equal protection and due process designed to guarantee that an indigent appellant will have an advocate to present his appeal in a method at least roughly as effective as that permitted the non-indigent, serious questions are raised about the adequacy of the former Missouri practice, and,

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28. See, e.g., *Hamilton v. Alabama*, 368 U.S. 52 (1961).

perhaps, of the new rule. As has been noted, this study cannot be taken to prove that the result of an appeal often depends upon full argument being made by a retained attorney. But it does demonstrate that this is a definite possibility. If so, the equal protection ingredient of *Douglas* may require Missouri to compensate an appointed lawyer enough to make it feasible for him to prepare a traditional appeal without unconscionable sacrifice. Alternatively, it may require the creation of a state-wide public defender, analogous to the Attorney General, who would handle all indigent appeals. Such a system was recently instituted in Wisconsin.<sup>29</sup>

At a minimum, I believe *Douglas* invalidates the motion for new trial appeal, not because this method is demonstrably less effective than others, but because (a) it does not guarantee the indigent the full use of his lawyer's skills, and (b) because the method is largely invisible and therefore subject to abuse. There are three arguments against this position. The first is one already discussed: all *Douglas* requires is equal protection, and so long as some retained attorneys employed this method, the indigent is entitled to no more. But an appeal is not adequate in all cases simply because it is adequate in some. It is perfectly conceivable that some retained attorneys filing appeals on motions for new trial were convinced that the law was so clear that all they needed to do was mention the error and the conviction would be reversed. Even the equal protection theory would not sanction requiring the indigent to present a complex question in the same manner.

The second contrary argument has also been mentioned: the indigent is better off because the Attorney General briefs, and the court considers, many more possible grounds for error. This contention is so obviously specious that it hardly warrants comment. It assumes that a lawyer would be so incompetent that he would fail to include in his brief a potential reversible error that he already had preserved in the motion for new trial. One hopes that most Missouri lawyers are more capable than that.

The final argument is that abolishing this method of appeal would eliminate the most expeditious way of disposing of frivolous appeals. But if the concern truly is about frivolous appeals, why is there no way of eliminating those filed by defendants with money? The real fear is not that the number of frivolous appeals will increase, but that the amount of time and money lawyers will be required to expend on indigent appeals, frivolous or not, will increase intolerably. No one will slight that fear. But it may be questioned whether the solution should be paid for with the indigent's liberty rather than society's money.

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29. WIS. STAT. ANN. § 957.265 (1965).

If the real thrust of *Douglas* is that the indigent must be provided with the full range of a lawyer's skills at least once during an appeal, it is obvious that the motion for new trial appeal does not meet the standard. Even if this were not so, the method should be eliminated because it is largely invisible. How can one be sure that the real determinant of these appeals is not the strength of the Attorney General's brief? The Anglo-American legal system is founded on the theory that the best way of arriving at truth is to have two advocates make the strongest possible arguments on opposite sides of a question. Why, then, should it be complacently assumed that judges of the Supreme Court of Missouri have a talent denied all other judges, namely, that of conjuring up arguments in opposition to one side of a question about which they are supposed to be impartial?

APPENDIX A

1. Style: .....
2. Number: .....
3. Division:           1       2       en banc
4. Session: .....
5. Court file number: .....
6. Date trial judgment entered: .....
7. Date appeal decided: .....
8. County where trial was held: .....
9. Results of trial:
 

	<i>Charge</i>	<i>Verdict</i>	<i>Sentence</i>
Count 1	.....	.....	.....
Count 2	.....	.....	.....
Count 3	.....	.....	.....
Other counts	.....	.....	.....

(List in Remarks)
10. This was a (circle one):
  - a. Regular appeal.
  - b. 27.26 appeal.
11. Case for the state was presented by (circle one):
  - a. Brief without argument.
  - b. Brief plus argument.
12. Case for the defendant was presented by (circle one):
  - a. Motion for new trial without argument.
  - b. Brief without argument.
  - c. Brief plus argument by counsel.
13. If an attorney either argued or filed a brief for defendant, answer the following:
  - a. What was the attorney's name? .....
  - b. Was the attorney (circle one):
    - (1) Appointed by the trial court?
    - (2) Appointed, or requested to appear, by Supreme Court?

- (3) Retained by the defendant?
- (4) A public defender?
- (5) No data.

- c. The attorney on appeal, if there was one, was (circle one) :
  - (1) The same as at the trial level.
  - (2) Different than at the trial level.
  - (3) No data.

14. If the state was the appellant, circle the number 14 and explain in Remarks.

15. (Circle all of the letters applicable. For example, suppose defendant was convicted on three counts of burglary, and suppose the Supreme Court affirmed his conviction on the first count, reversed on the second count, and reversed and remanded for new trial on the third, directing that some particular piece of evidence be excluded at the next trial. In such a case, letters b, f and g should *all* be circled, and the details set out in Remarks.)

As a result of this appeal, the judgement was (circle everything applicable) :

- a. Affirmed.
- b. Affirmed on counts .....; reversed on others.
- c. Affirmed except as to degree of offense on counts .....
- d. Affirmed except as to sentence, and sentence was (circle one) :
  - (1) Modified by Supreme Court.
  - (2) Remanded to trial court for modification.
- e. Reversed.
- f. Reversed and remanded with directions.
- g. Reversed and remanded for new trial.
- h. Other (give details) .....

16. Remarks. (If any of the above answers need elaboration or qualification, give the necessary additional details here.)

APPENDIX B

[The case was identified by style, docket number, and date, and the attorney was asked to answer the following questions.]

- 1. Did you represent the defendant at his trial?
  - a. Yes
  - b. No
- 2. Did you prepare the motion for new trial?
  - a. Yes
  - b. No
- 3. If you represented the defendant at his trial, were you:
  - a. Appointed by the trial judge, without compensation.
  - b. Appointed by the trial judge, but arranged for a fee.
  - c. Retained by or on behalf of the defendant.
  - d. A public defender.
  - e. Other (explain in Remarks section).
- 4. On the appeal, were you:
  - a. Appointed by the trial judge to represent the defendant at his trial, and performed your services on appeal as part of that appointment.
  - b. Appointed by the trial court specifically for this appeal.
  - c. Appointed by the Supreme Court specifically for this appeal.
  - d. Retained by or on behalf of the defendant.
  - e. A public defender.
  - f. Other (explain in Remarks section).

5. Under the old rules, when a defendant was unrepresented on appeal, the Supreme Court reviewed the transcript on the basis of the motion for new trial. Under the new rules, lawyers must be appointed to represent defendants who wish to appeal. Some lawyers say that the old rules were more beneficial to the defendant than the new rules—that is, that the defendant had a better chance of securing a reversal under the old rules than under the new. Do you:

a. Agree

b. Disagree

(If you wish to elaborate, please feel free to do so in Remarks section.)

6. Remarks.

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