In the

Supreme Court of the United States

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Fred R. Ross and State Of North Carolina, Petitioners,	)	73-786
v.	)	
Claude Franklin Moffitt, Respondent,	)	

Pages 1 thru 48

Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

FRED R. ROSS and STATE OF NORTH CAROLINA, Petitioners, v. CLAUDE FRANKLIN MOFFITT, Respondent.	No. 73-786

Washington, D. C.,

Monday, April 22, 1974.

The above-entitled matter came on for argument at 1:19 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JACOB L. SAFRON, ESQ., Assistant Attorney General of North Carolina, Post Office Box 629, Justice Building, Raleigh, North Carolina 27602; for the Petitioners.

THOMAS B. ANDERSON, JR., ESQ., Loflin, Anderson & Loflin, 119 Orange Street, Post Office Box 1315, Durham, North Carolina 27702; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-786, Ross and North Carolina against Moffitt.

Mr. Safron, you may proceed whenever you're ready.

ORAL ARGUMENT OF JACOB L. SAFRON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SAFRON: Mr. Chief Justice, and may it please the Court:

This case is before the Court upon a petition for writ of certiorari to the Fourth Circuit Court of Appeals, to review that question reserved by this Court in its opinion in Douglas vs. California.

That is, whether or not the Constitution mandates the requirement of counsel to be appointed for indigent defendants to seek discretionary review. That is, discretion review from the highest court of a State to this Court, and to the highest court of a State in those States which have multi-tiered appellate systems.

In the consolidated Moffitt cases, the Fourth Circuit reached the conclusion that the issue reserved in Douglas should be answered in the affirmative, although all courts which had reviewed the question prior to Moffitt had answered this question in the negative.

The Fourth Circuit drew an analogy between the North Carolina appellate system and the Virginia appellate

system, and, by drawing this analogy, found the North Carolina system to be inadequate.

We argue that this analogy is itself faulty. In the State of Virginia there is no appeal as of right. All review in the Commonwealth of Virginia is by writ of error to the Supreme Court of Virginia. And counsel is appointed, I'm told by the Fourth Circuit, to represent all petitioners seeking a writ of error to the Supreme Court of Virginia; and that the Supreme Court of Virginia accepts enough cases to keep the law of the Commonwealth of Virginia current.

In North Carolina --

QUESTION: There's no intermediate appellate court in Virginia?

MR. SAFRON: None at all, Your Honor. Nor are there any appeals as of right in Virginia.

QUESTION: Unh-hunh.

MR. SAFRON: Now, that is the Virginia system. Counsel is appointed to seek the writ of error to the Supreme Court of Virginia.

QUESTION: We're talking about criminal cases only here.

MR. SAFRON: Oh, yes, Your Honor, we're talking about criminal matters here.

QUESTION: Only.

MR. SAFRON: And I'm advised that in the State of

Virginia, the writ of error, if it's denied, is summarily denied. There is no briefing, there is no opinion.

Now, in the State of North Carolina --

QUESTION: Does Virginia have a full court situation?

MR. SAFRON: I really can't speak for the State of Virginia, Your Honor. I'm told that it is possible, and this is according to the Fourth Circuit, that oral argument can be had by the attorney for the petitioner in support of his petition, but --

QUESTION: I just wondered, does it take a majority vote of the Supreme Court of Virginia? To reject.

MR. SAFRON: I have to plead ignorance on that fact, Your Honor.

QUESTION: How about in North Carolina, is it --

MR. SAFRON: All right, in North Carolina we have a multi-tiered system. We have the North Carolina Court of Appeals, and we have the Supreme Court of North Carolina. Appeal is as of right from the trial courts to the North Carolina Court of Appeals, except in a case in which the sentence is death or life imprisonment, and in that case the appeal is of right to the Supreme Court of North Carolina.

QUESTION: Directly?

MR. SAFRON: Direct appeal as of right. If the sentence is death or life imprisonment, you bypass the Court

of Appeals and go to the Supreme Court.

All other cases, appeal is as of right to our Court of Appeals.

In each one of these cases, counsel is appointed.

In each one of these cases, a full record is prepared.

In each one of these cases, a full brief is prepared; oral arguments are had, and an appeal is filed by the Court of Appeals or the Supreme Court, as the case may be.

QUESTION: You mean an opinion? You said an appeal is filed by --

MR. SAFRON: Oh, I'm sorry. What I meant, Your Honor, we have a full appellate system, and there's full record filed, briefing, oral argument, and at the conclusion the applicable court, either the Court of Appeals or the Supreme Court, files its written opinion.

So the first question we're confronted with --

QUESTION: May I just ask -- to go from the Court of Appeals to the Supreme Court on an application, what do you call it there, cert?

MR. SAFRON: Petition for writ of certiorari.

QUESTION: Petition for writ of certiorari. Is there any situation of appeal of right on a division in the Court of Appeals?

MR. SAFRON: Yes, Your Honor, that is one of the two

instances.

QUESTION: Yes.

MR. SAFRON: One, a dissent in the Court of Appeals permits an automatic appeal; two --

QUESTION: Of right.

MR. SAFRON: Of right.

QUESTION: Yes.

MR. SAFRON: And, two, if there is a substantial question presented under either the Constitution of the United States or of the State of North Carolina.

These are the two instances in which there is an appeal as of right. And all other instances, the appeal is purely discretionary by petition for writ of certiorari.

QUESTION: And how many votes does it take to grant in the Court of Appeals -- I mean in the Supreme Court?

MR. SAFRON: I must admit, Your Honor, I never even thought about that question in North Carolina, because --

QUESTION: Because what you've been describing is the system with which I'm familiar. That's exactly the New Jersey system, except that it takes three votes of the seven of the Justices of the Supreme Court to grant review on what we call a petition for certification, rather than petition for certiorari.

MR. SAFRON: I must admit that I never thought about that in North Carolina. All my discussions with members

of the court have never really raised that question.

Now, of course, the Moffitt case goes beyond that. So Moffitt says that the issue reserved in Douglas requires, as a matter of right, that counsel be appointed in all cases from the Court of Appeals to seek certiorari to the Supreme Court of North Carolina.

QUESTION: Was Moffitt's case one which could have been appealed as of right?

MR. SAFRON: No, Your Honor, --

QUESTION: From the Court of Appeals.

MR. SAFRON: -- I don't believe so at all. I have that discussed in our brief, and I believe it's conceded by the Fourth Circuit Court of Appeals that there are no questions, there was no dissent and no substantial constitutional question involved.

Now, the --

QUESTION: Mr. Safron, before you go on, who makes the decision as to whether or not there is a substantial question of federal or State constitutional law?

MR. SAFRON: That, of course, Your Honor, makes the distinction whether or not it's an appeal as of right, which would require briefing, or certiorari which can be summarily --

QUESTION: No, I'm thinking about certiorari.

MR. SAFRON: We have no guidelines, Your Honor.

QUESTION: Well, somebody must make that decision. Does an intermediate appellate court make it? Or does the Supreme Court of North Carolina make it?

MR. SAFRON: If the court, upon review of petition, determines that it is a matter of right, then of course counsel is appointed for full briefing and oral argument.

I have to admit, I don't believe we have any firm guidelines.

QUESTION: You think there's no certification by the intermediate appellate court.

MR. SAFRON: There is none, Your Honor.

QUESTION: Right.

MR. SAFRON: The only certification that truly exists is the certification based upon a dissent which triggers the appeal as of right.

QUESTION: Well, I suppose a person could appeal asserting, asserting that an important or substantial, or whatever your words are, question of federal or State constitutional law were involved, and then it's up -- might be up to the Supreme Court of North Carolina to decide whether or not it was.

MR. SAFRON: Your Honor, this is the typical catechism of these cases.

QUESTION: Right.

MR. SAFRON: In fact, in the case from Guilford

County in which Mr. Moffitt was represented by the Public Defender at trial, on appeal to the Court of Appeals and the Supreme Court, you will find that that is the note appended to the Supreme Court's denial of cert, that there's no substantial constitutional question involved in the petition, and the purported appeal is denied.

QUESTION: And that's where the decision is made, I suppose, isn't it?

MR. SAFRON: That's right.

QUESTION: The assertion is made by the appellant, and the decision is made by the --

MR. SAFRON: By the Court.

QUESTION: -- Supreme Court: No, you're mistaken, there isn't a substantial constitutional question.

But possibly they might go on to say, However, we'll consider this as a -- what do you call it -- motion to certify or --

MR. SAFRON: Petition for writ of certiorari.

QUESTION: -- petition for writ of certiorari. We will grant it because there's an evidentiary question involved here. Or something like that.

Could that happen?

MR. SAFRON: Well, the criteria for certiorari are also scheduled in our brief, and the situation there is whether or not it appears to be in conflict with an opinion of the

Supreme Court, or whether or not it's an issue of Statewide importance.

QUESTION: Right.

MR. SAFRON: The same criteria which this Court uses in making its determinations of whether or not to grant certiorari.

QUESTION: I suppose if there is a lawyer, he'll both -- he'll denominate his papers both in appeal and, alternatively, a petition for writ of certiorari.

MR. SAFRON: Or he will file both.

QUESTION: Separately?

MR. SAFRON: Yes, Your Honor. Quite often the attorney will file both the petition seeking discretionary review --

QUESTION: And an appeal.

MR. SAFRON: -- and an appeal, claiming it's as of right. And we have to respond to both.

QUESTION: Unh-hunh.

QUESTION: Who decides it in the court -- I'm still not certain; maybe you can answer -- in the Supreme Court, does one judge, two judges, the whole court, or what?

MR. SAFRON: Your Honor, whether or not to grant certiorari is determined in conference, and the number of justices of the seven who would have to vote on it is a number I'm unaware, and I don't believe it's ever been

released outside of the doors of the conference room.

Perhaps if we inquired, we might be told; but it's not a matter of common knowledge at all.

QUESTION: And so we don't know who determines this question as to whether there's a substantial question there.

MR. SAFRON: Well, that is determined by the court in conference, Your Honor; but I just cannot respond to the number of the seven justices who are required to vote to bring up certiorari.

QUESTION: Well, in these cases where there is assertion of a substantial constitutional question, on appeal from the -- or whatever it is -- from the Court of Appeals to the Supreme Court, in a criminal case, where the assertion is made of a substantial federal question, if true that would be an appeal of right --

MR. SAFRON: Yes, Your Honor.

QUESTION: -- is counsel provided?

MR. SAFRON: If the court determines that it is a substantial --

QUESTION: Well, how about the preparation of the -- whether it would be on appeal?

MR. SAFRON: We've had a -- up till now there's been confusion in the matter, Your Honor. The trial judges have been unable to really determine what our statute meant, and the Administrative Office of the Courts had not provided

them with guidelines. So determinations were made on an ad hoc basis, to find a schedule of all the petitions that are listed in the front of each volume of the North Carolina Court of Appeals and Supreme Court. All the petitions are scheduled, and it's a good number of petitions which are scheduled there.

Now, we go beyond the State question, because the Fourth Circuit then held that there is also a constitutional right to the appointment of counsel to come from the highest State court in which review may be had to this honorable Court, and that this, too, is a constitutional right.

QUESTION: This would be even in cases where the North Carolina Supreme Court refused certiorari?

MR. SAFRON: Yes, Your Honor. The -- in fact that is the very case. The Moffitt case from Guilford County, he was represented by counsel to the Court of -- to the Supreme Court, by a Public Defender, and counsel was not then provided -- oh, excuse me -- and in that case the Supreme Court entered an order that there was no substantial constitutional question.

And in that case, the Fourth Circuit Court of Appeals held that he was denied his right to counsel to seek a petition for a certiorari to this Court.

QUESTION: Does the North Carolina criminal defendant get his right to petition for certiorari to this

Court from a North Carolina statute or from an Act of Congress?

MR. SAFRON: Well, from an Act of Congress, Your Honor.

QUESTION: So it's no right the State confers on him?

MR. SAFRON: Oh, none at all. But the Fourth Circuit found that this is a constitutional right, and I think taking a simplistic approach to the Fourteenth Amendment.

QUESTION: You said that there was an Act of Congress?

MR. SAFRON: Well, the jurisdictional srtatute, Your Honor, which establish review and --

QUESTION: Oh, I'm sorry, I thought my Brother Rehnquist was asking you about appointment of counsel.

MR. SAFRON: Oh, no, I believe --

QUESTION: No, the certiorari jurisdiction --

MR. SAFRON: The certiorari jurisdiction of this Court, Your Honor.

QUESTION: Oh, yes. Right.

MR. SAFRON: And so --

QUESTION: Now that you're interrupted, if I may ask one other question about North Carolina practice. Is there an argument ever on the papers on appeal or petition for writ of certiorari in the Supreme Court of North Carolina?

MR. SAFRON: No, Your Honor, there is no oral argument. The oral argument is had once certiorari is

granted.

QUESTION: Only if there's a grant?

MR. SAFRON: Yes, Your Honor.

QUESTION: Similar to this Court?

MR. SAFRON: Exactly, Your Honor.

QUESTION: The system you have described is almost identical to that of my State of Ohio, except that in Ohio there is a 15-minute argument on the motion, what we call a motion to certify. You don't have that?

MR. SAFRON: We have no oral argument in the Supreme Court on a petition for writ of certiorari.

QUESTION: Unh-hunh.

QUESTION: And is the denial of a writ deemed a matter of substance, or is it just ignored? Does it create any precedent?

MR. SAFRON: The only precedent, Your Honor, would be an exhaustion of State remedies, so it's going to federal habeas corpus.

QUESTION: Yes, but on a -- does anyone ever argue that the denial of certiorari is a legally significant matter in some subsequent case?

QUESTION: It's the equivalent of a --

MR. SAFRON: I've never heard that, Your Honor. I've never heard that argued in that regard.

QUESTION: Unh-hunh.

MR. SAFRON: Now, we go, of course, on this question to this Court, and I would submit that the analogy, the easy analogy drawn between Virginia practice and North Carolina practice fails upon an analysis.

I would further argue this, that of all the cases decided by this Court up till now have not automatically and directly gone to the Fourteenth Amendment. That in Kirby, the Kirby case, this Court held that the right to counsel at a pre-indictment lineup wasn't constitutionally required because a pre-indictment lineup was not a critical stage of the proceeding.

Similarly in the Simmons case, this Court held that counsel was not required at a photographic lineup, because a photographic lineup was not a critical stage of the proceeding.

What we have here, the Fourth Circuit has now characterized a petition for writ of certiorari as a critical stage. Because I would argue that the predicate upon which the right to counsel is based is a previous determination that this is a critical stage of the proceeding.

And I believe that is not possible to characterize a discretionary review by petition for writ of certiorari as a critical stage. That discretionary review and critical stage are words which are not compatible.

To further characterize why it is not a critical

stage, the denial of a petition for writ of certiorari by this Court has always been stated not to be of any significance in the use by this Court.

Furthermore, the seeking of a petition for writ of certiorari is not a necessary prerequisite to the exhaustion of available State remedies as a prerequisite to going into federal habeas corpus.

QUESTION: Of course the denial of certiorari may be of no precedental significance in this Court, but it certainly is of significance to the litigant that petitioned and then lost.

MR. SAFRON: To the litigant, yes, Your Honor. But to the criminal defendant, I don't believe it's of any significance, because the denial of cert is of no significance, failing to seek certiorari is of no significance, because the criminal defendant can immediately go into federal habeas corpus. Or into State post-conviction.

We have a very complete State post-conviction remedy in North Carolina, with the appointment of counsel, with the appointment of counsel to seek certiorari from our Court of Appeals, which reviews post-conviction matters; and thorough review can also be had of constitutional questions by, one, State post-conviction matters, where there is counsel as of right, --

QUESTION: You don't entertain matters in collateral

proceedings if an issue has been raised on direct appeal? And actually decided.

MR. SAFRON: We have a case, State vs. White, which says we don't. But, as a practical matter, most superior court judges will review the question.

QUESTION: Even after your Supreme Court has decided it?

MR. SAFRON: Yes, Your Honor.

QUESTION: My heavens!

MR. SAFRON: But then again we have the complete federal --

QUESTION: But the federal court wouldn't insist on utilizing your collateral remedies if the issue has been raised and decided on direct appeal?

MR. SAFRON: No, there would be no -- the federal judges would not require that for exhaustion if the issue has been raised and decided. But there is a complete federal remedy, by writ of habeas corpus, and there is no preclusion from seeking this remedy by the failure to seek certiorari.

And I would argue this, that more complete review can be had of the record in the case in a petition for writ of habeas corpus in the federal district court, in which the judge reads that entire record, in which an opinion is written in each and every case, than can be had by the petition for writ of certiorari to this Court.

I don't mean to say anything which might sound slanderous, but the orders of the district court which review the contentions in detail are more meaningful than the denial of the petition for writ of certiorari by this Court, as this Court is aware. The last figures I saw was 3.3 percent of all petitions for writs of certiorari filed in forma pauperis are granted. Statements of this Court have said that 96 percent of such petitions are frivolous.

Now, if we are going to say that counsel is required, what we're doing, first of all, is turning the pyramid which has been accepted in the past, cases funneling up, filtering up to this Court.

QUESTION: You're addressing yourself now just to the writ in this Court, I take it, not to the Supreme Court of North Carolina?

MR. SAFRON: This Court, yes.

Up till now historically we've considered the appellate system a filtering system, and the figures I've seen, approximately 70 cases per week are filed here, about 4500 a year. And the cases filter up.

Now, if we are to follow the Fourth Circuit's reasoning that the appointment of counsel is constitutionally required in each and every case, to seek certiorari from this Court, we take that judicial pyramid, we open it wide, and we turn it more into a flood pipe, where this Court will then

become the ultimate reviewer of each and every conviction affirmed in the appellate courts of the United States. The --

QUESTION: You mean the State courts in the United States, do you not?

MR. SAFRON: Oh, yes, Your Honor.

QUESTION: I don't follow that. Whether or not we would grant cert doesn't depend on whether or not the petitioner is represented by an attorney.

MR. SAFRON: But the Fourth Circuit has said, Your Honor, that he has a constitutional right to the appointment of counsel to seek certiorari from this Court.

QUESTION: Yes.

MR. SAFRON: And so, if you have a constitutional right, just like the other constitutional rights where you have a right to counsel, you have that right unless you freely, understandably, and voluntarily waive that right.

QUESTION: No, no, no, but you're not arguing that we have to hear the case --

MR. SAFRON: No.

QUESTION: -- because he has a constitutional right, if he does.

MR. SAFRON: No. Hardly. But I'm saying --

QUESTION: I think that you're arguing that instead of 4,000 more or less, we might have a great many more.

MR. SAFRON: I'm arguing, Your Honor, that the

factor by which cases would -- filings would multiply in this Court would probably be in the nature of three to four within the next two terms.

QUESTION: But wouldn't we be in better shape if we had an opinion of the Supreme Court of North Carolina?

MR. SAFRON: Of course, Your Honor, this case had never come through that procedure.

QUESTION: Well, if the Supreme Court had taken it. And decided it. Wouldn't we have been in better shape than to get it without an opinion of the Supreme Court of the State?

MR. SAFRON: Of course, Your Honor, --

QUESTION: If you want to help us out, maybe that would help.

MR. SAFRON: The Fourth Circuit has disregarded questions of State law. We don't have State law questions here. The Fourth Circuit disregarded that and went directly to the Federal constitutional issue, and determined that as a matter of constitutional right the appointment of counsel is mandated.

QUESTION: Well, I can understand -- I'm trying to separate two points. Why couldn't, one, he have counsel in the Supreme Court of North Carolina, have an appeal as a matter of right, and have an opinion as a matter of right?

MR. SAFRON: If Your Honor please, we have a multi-

tiered system.

Now, the very idea of establishing our Court of Appeals in 1968 was to take the work load off the Supreme Court of North Carolina, to permit it to have discretionary review and not be bogged down to review each and every conviction.

Now, to follow through with Your Honor's suggestion, the Supreme Court of North Carolina is back where it was. It now is burdened to review each and every conviction. We might as well do away with our Court of Appeals, because they won't really serve a function. And that was the idea when we established the Court of Appeals.

Appeal of right to the Court of Appeals --

QUESTION: You established it in order to get away from the Supreme Court having automatic appellate jurisdiction.

MR. SAFRON: Well, in the first instance, prior to the change, our Supreme Court did have, as a matter of right -- well, all appeals were as a matter of right to our Supreme Court and they were totally overworked.

QUESTION: Was that not substantially the same as the passage of the so-called certiorari bill in 1925, with reference to this Court?

MR. SAFRON: Exactly, Your Honor. The idea was to give the court discretionary review and remove the requirement that the Justices of the Supreme Court, who are --

QUESTION: Mr. Safron, I'm just puzzled. I don't understand -- assuming the Fourth Circuit were affirmed, why does this mean that the Supreme Court of North Carolina has to decide more of these criminal cases on the merits, which I gather they don't when they refuse certiorari.

Now, why does the appointment of a counsel to prepare a petition for certiorari mean that there is going to be that much more for the North Carolina Supreme Court to decide on the merits?

MR. SAFRON: Your Honor, the question -- when I was answering Mr. Justice Marshall's question, I don't think I was answering that question.

Of course, any time that there is an additional workload, it diminishes the time available by an appellate court to do other matters. Were this Court to hold here that counsel is constitutionally required from the highest State appellate courts to this Court, and if the filings increase at what would probably be a geometrical rate, I would submit that the Justices of this Court would have less time to consider the matters which they believe to be of real merit, and would probably so super-saturate the functioning of this Court --

QUESTION: Well then, you must -- I gather what you must be arguing, then, is that if there is a constitutional right to a counsel, that counsel must prepare a petition for

certiorari.

MR. SAFRON: Yes, Your Honor, that's what the Fourth Circuit says. That's what the Fourth Circuit said.

Now, there is another point I'd like to make --

QUESTION: Incidentally, while I have you interrupted, did the Fourth Circuit say that counsel provided in the manner that the court said he constitutionally had to be provided, also say that the State had to pay him for his services?

MR. SAFRON: Yes, Your Honor.

QUESTION: Said it in so many words?

MR. SAFRON: Well, let's say this -- they didn't say it in so many words, but they said the State has to appoint; and if the State must appoint, --

QUESTION: Well, I know North Carolina -- I think, does it not -- ordinarily compensates attorneys --

MR. SAFRON: Your Honor, this --

QUESTION: -- not only at trial on direct review, but also on your State post-conviction --

MR. SAFRON: Yes, Your Honor.

In fact, this year our General Assembly has appropriated $3,230,000 for the appointment of counsel for indigent defendants. And I would submit that a figure in excess of three and one-quarter million dollars for one year certainly illustrates our good faith.

In closing, because I see my time is short, I'd like to say this: that the Fourth Circuit has directed the issuance of a writ of habeas corpus in this case to secure Moffitt's release from custody. Because the Fourth Circuit found that his constitutional right to the appointment of counsel has in fact been violated.

Now, if this were to be retroactively applied, and counsel have been appointed in so few cases, we would be opening wide the doors to most penitentiaries, because the States have not appointed counsel to seek review in this Court.

Additionally, I point out this, that there would be a floodtide of post-conviction hearings and a floodtide of federal habeas corpus hearings to determine whether or not any question which might have been reviewed in this Court was presented.

QUESTION: Mr. Safron, what's the posture of that mandate, did we stay it?

MR. SAFRON: It was stayed by the Fourth Circuit, Your Honor.

QUESTION: I see. Very well.

MR. SAFRON: And so, Your Honor, it is our contention that the Fourth Circuit's determination in this case is not founded in law nor required by the Constitution.

MR. CHIEF JUSTICE BURGER: Mr. Anderson.

ORAL ARGUMENT OF THOMAS B. ANDERSON, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ANDERSON: Mr. Chief Justice, and may it please the Court:

Gideon and Douglas are now a little over ten years old. Since their decision, the principle, that fundamental in due process and equal protection, is that in trial and on appeal an indigent defendant must have counsel appointed for him if he cannot afford it.

And that principle has been expanded or further delineated to hold that the right is not diluted by the nature of the offense so long as imprisonment is threatened, or by the age of the defendant; for instance, in juvenile cases.

As Mr. Safron pointed out that right attaches at the beginning or at the issuance of formal adversary proceedings, usually by indictment.

Now, the question which we have before us today is whether or not, after the right accrues, and further along in the adversary process, whether or not the right diminishes or disappears.

Or, to be put another way, whether or not the right attaches according to the nature of the court, or how far along the adversary process the court might happen to be.

In 1969 the Tenth and Seventh Circuits decided that

indeed the right to counsel stopped after the first appeal, the courts there limiting their decisions to the facts in Douglas.

More recently, however, the Fourth Circuit and now the Sixth Circuit find that the right does continue on throughout the adversary proceedings.

This Court is already familiar with the background of the case, how it arrived in this particular Court.

In the Mecklenburg case, the defendant received a letter from his attorney, stating that after his first appeal, that he had approached the Superior Court, the trial court in our State, and had been informed that he no longer could represent him because there was no longer the right to counsel.

Thereupon, the right to counsel in that particular case ceased.

In the Guilford County case, the Public Defender in that County represented the defendant and carried it through discretionary review in the North Carolina Supreme Court, but did not carry it to this Court.

We have before us today -- perhaps it is better to define what we do not have before us. We are not deciding, or this Court is not going to decide, nor has to decide, whether right to counsel exists before or after the adversary process begins or ends.

QUESTION: Well, what do you mean by the adversary process, Mr. Anderson?

MR. ANDERSON: The Kirby decision, Mr. Justice Rehnquist, delineates that the right to counsel accrues when the adversary, formal adversary proceedings are instituted by indictment or warrant.

QUESTION: Are you suggesting, for instance, that federal habeas is not part of the adversary process?

MR. ANDERSON: Well, it's adversary in nature, it's not -- it doesn't emanate from the actual accusation, the trial; it's an attack, in fact, that's civil in nature as viewed by the courts, and is the defendant's attack upon his conviction, rather than the other way around. He's defending in what I term the adversary procedures on direct review.

But federal habeas corpus, I think is a little bit different nature, even though it does involve the adversary process, it is not the criminal process, because the defendant is already convicted, his judgment is final.

And it's that particular judgment he's in fact seeking to overthrow.

So we're not asking for counsel on post-conviction or federal habeas corpus; although, on many occasions, they are appointed.

QUESTION: Let me ask you, to see if this will clarify it for me: Suppose you went through all the tiers

that are provided by your State, the trial court, the Court of Appeals, the Supreme Court, and then you go into the federal District Court on habeas corpus, and you're still losing, and so you take an appeal to the Court of Appeals, and then, at that stage, the man runs out of money, no longer can finance an appeal or a petition for cert; then, under the Fourth Circuit holding, is it -- who is required, if anyone, to provide counsel to prepare a petition for a writ of certiorari to this Court?

MR. ANDERSON: On habeas corpus?

QUESTION: Unh-hunh. Coming up through the Court of Appeals, the federal Court of Appeals.

MR. ANDERSON: I know of no provision other than the Criminal Justice Act, and that Act provides that once counsel is appointed by the Fourth Circuit for argument in the Fourth Circuit, that the attorney shall not abandon his client, that if he wins that he shall -- and petition for certiorari is made by the opposite side, he shall answer the petition and shall continue in the case until this Court either relieves him or further appoints him.

QUESTION: Now, in my hypothetical illustration, the man has had five tiers of the judicial process, State and federal, and your position is that he must be provided with free counsel to prepare a petition here?

MR. ANDERSON: No, Your Honor.

QUESTION: Oh, I thought -- I misunderstood you.

MR. ANDERSON: No, that is -- that is what I would term a collateral proceeding as opposed to direct review, where the defendant has had his conviction affirmed by an intermediate appellate court, and seeks discretionary review by the highest State court, or discretionary review by this Court after failing to gain either review or reversal in the highest State court.

QUESTION: You're carving out these last two stages, because it's not direct review and it's partly, I gather, because you view it as a civil action in forma pauperis.

MR. ANDERSON: Well, traditionally, it has been viewed as civil in nature, and they are not direct review; although the courts have used their discretion to appoint counsel in particular cases where they are needed.

Indeed, that's not what I'm arguing. Here the judgment isn't final, so to speak, until the final appellate court has made their decision, either to review it or to affirm, or to reverse.

QUESTION: To the extent that Douglas is based on the equal protection clause, the idea that if the State grants a right of appeal, it has to make it equally available to everybody, regardless of money, I take it -- would you agree that your claim for appointment of counsel in this Court is

a weaker one than your claim for appointment of counsel in the Supreme Court of North Carolina?

The thought being that North Carolina doesn't confer any right on the criminal defendant to come to this Court; it's an Act of Congress.

MR. ANDERSON: That's true, Your Honor. But the State does convict the defendant, and it's that State trial that's being reviewed. And for the defendant of means, who can afford to take review, whether by Act of Congress or by Act of the North Carolina Legislature, the particular criminal proceeding being reviewed is a State prosecution.

QUESTION: But Douglas made it perfectly clear that the State didn't have to give any right of appeal at all.

MR. ANDERSON: That's true.

QUESTION: I would think that if your reasoning is right, that part of Douglas is wrong.

QUESTION: Well, why should the State have to finance an appeal here?

MR. ANDERSON: Well, the State, as I read the statute, Your Honor, the statute requires the State to do so. I've set that statute out on page 3 of my brief.

QUESTION: Well, I know, but we're talking about the Constitution.

MR. ANDERSON: The Constitution. I see no --

QUESTION: And that's what the Fourth Circuit

decided.

MR. ANDERSON: Well, the Fourth Circuit's decision remanded it for a determination of whether or not there was a substantial constitutional claim; and, if there was, then the State had to appoint counsel to --

QUESTION: So if there is a substantial constitutional claim, there's a constitutional right to counsel in preparing a petition for certiorari here.

MR. ANDERSON: Yes, sir.

QUESTION: Which the State ultimately is going to pay for under the Fourth Circuit decision?

MR. ANDERSON: That's correct, Your Honor. They will pay for it, but still it's their conviction.

QUESTION: Well, I know, but it's nevertheless the federal Constitution, the federal court system that is involved.

MR. ANDERSON: Well, the State of North Carolina, of course, will be the -- the court will be the executive agency which will imprison the defendant; and it is the State which initially sought the conviction, and Congress, of course, puts a remedy by way of certiorari to this Court.

QUESTION: What is the percentage of criminal cases that are sought to be reviewed here from affirmances by the North Carolina Supreme Court?

MR. ANDERSON: I do not -- I have no statistics as to how many are or whether or not they are represented by

counselon that.

I might say this, that if --

QUESTION: Well, do you know how many petitions -- what percentage of cases in the Courts of Appeals, criminal cases in the Courts of Appeals are sought to be reviewed here?

MR. ANDERSON: I don't know the answer to that one. I do know that a very small majority, or very small number of cases are even appealed from the trial court level. Most cases are disposed of by guilty pleas. So, very few cases even reach the first appellate level.

I think the argument that affirming the Fourth Circuit would create a flood of litigation in this Court not heretofore seen might be stretching our imagination. And I also --

QUESTION: Are you familiar with the figures in the federal courts on the increase in appeals in criminal cases from district court judgments to the Courts of Appeals, after it became free under the Criminal Justice Act, accompanied by the Bail Reform Act?

MR. ANDERSON: You are asking me, Mr. Chief Justice, am I familiar with the figures?

QUESTION: Yes.

MR. ANDERSON: This Court --

QUESTION: What the trend was.

MR. ANDERSON: I think the trend -- and I'm only

reaching back in my memory -- was that there was no substantial change. I think the trend was first encountered in, when this Court was concerned about right to counsel for probation and before Marcey? and Scapelli?, at that point. I do not know, and I cannot say whether or not that has increased or decreased.

However, I would submit that the denial of equal protection still remains the same. If the State were to establish a five or ten-tier system, and I don't mean to be facetious, that the indigent should have just as much right to have counsel before the third, fourth, or fifth tier as his more wealthy companion.

QUESTION: But if it's established by the State, I certainly see that, that you can make a point on the Supreme Court of North Carolina; but do you think the equal protection argument really has any weight at all in the discretionary review here?

MR. ANDERSON: I would, Your Honor, based upon the fact that the remedy exists to review a State court conviction.

QUESTION: But North Carolina doesn't give it.

MR. ANDERSON: It doesn't give the remedy, that's correct, Mr. Justice Rehnquist, it doesn't.

QUESTION: And if the test is conviction, that you're attacking a conviction, it seems to me that your argument is equally applicable to habeas, where you're certainly attacking

a State conviction.

MR. ANDERSON: It's the process that you're attacking, the conviction, I would say, would be the difference. In one, the defendant or the former defendant is an adversary seeking to overturn a final judgment; whereas, in one, the final judgment is still, theoretically at least, open until he has let the time run. And that would be my position in answer to your question.

The federal practice, of course, does provide right to counsel in all stages, and I think that this is, of course, done by statute and not by decision of this Court, except, of course, by interpretation.

The argument that there would be created a floodtide presents another problem, in that they would be admitting that there are defendants who are deterred from seeking a higher reveiw because they can't afford a counsel.

And I would say that this, this deprivation itself is, on its face, a denial of equal protection.

If counsel is appointed, on the other hand, I don't think that counsel, either being a member of this Court or a member of the Supreme Court bar of our State, would be so presumptious as to insist that he take every appeal or petition for direct review that every client asked him to take. If he --

QUESTION: Well, he would be taking some risk if he

didn't, wouldn't he?

MR. ANDERSON: If he did not or if he did?

QUESTION: If he did not.

MR. ANDERSON: He --

QUESTION: Of an attack later in post-conviction or something, of ineffective assistance of counsel.

MR. ANDERSON: Well, that would be presuming that the defendant and the counsel had no dialogue, which, in most cases, they do. And it was my personal experience, in most, in fact every defendant I've ever represented has taken my advice not to proceed further than the highest State court; because there is no substantial --

QUESTION: You're more persuasive than some counsel, because the pattern in many districts has been that when one counsel refused to take an appeal, there was a demand for another counsel. And that continued until they got someone who would take it.

MR. ANDERSON: I would say that would be the exception rather than the rule, Mr. Chief Justice. That in most cases you would find that the defendant would see that his counsel is not his adversary but is his representative, and therefore seeking the route or the remedy that is best for him.

In those cases where the man insists on a petition for certiorari to this Court or to the North Carolina Supreme

Court, he'll take it whether or not he has counsel, if he's going to be so insistent. He'll take it anyway. Which puts this Court and our Supreme Court with the problem of trying to decide, from his illiterate petition, in many cases, whether or not his case does have merit.

The burden is very small, I would think. In fact, I would submit that it's a grievous waste; you already have counsel through one appeal. He's familiar with the issues; he, more than likely, has tried the case; he has gone through the record; has appealed it; and now all that's left is to fashion a petition for certiorari to our highest State court or to this Court.

Other than any other method, will require someone new taking over the case, perhaps a law clerk and -- or even perhaps a writ writer in one of the State's prisons.

QUESTION: Well, what do you think of the financial burden on the State to compensate attorneys if the Fourth Circuit is right?

MR. ANDERSON: I think the financial burden would be very small. It's my experience that State superior court judges who award counsel fees after the process is through, the counsel submits a time list to the superior court judge, who then determines the nature of the case and how much time is involved, what the fee award is.

QUESTION: And does that include petitioning your

Supreme Court?

MR. ANDERSON: Every -- I would put it this way, I read the statute, the enabling statute, to say that we are required to do so. And --

QUESTION: You mean your North Carolina statute?

MR. ANDERSON: I do, Your Honor.

QUESTION: Unh-hunh.

MR. ANDERSON: And in the Appendix to the Fourth Circuit brief, there is a letter from the Administrative Office of the Courts which states that the Administrative Office pays for at least in those cases where the petitioner or the defendant went to the highest State court, and the statute itself reads: direct review even in the Supreme Court of the United States.

So the Legislature has already provided a financial remedy for our situation. Now all we've got to do is to get the courts to uphold the, what I would say is the intent of the Legislature; however, the Attorney General's office and the courts have interpreted the statute very narrowly.

QUESTION: The State has done this as a matter of policy up to this point, have they not?

MR. ANDERSON: I think there's been no policy, Mr. Chief Justice.

QUESTION: It sounds like a pretty good policy, the way you've described it.

MR. ANDERSON: Maybe I misinterpreted your question. Are you --

QUESTION: Well, the decision by the State of North Carolina to provide this assistance has been one of a decision of public policy by the Legislature, perhaps influenced by the views of judges or perhaps not. But the question before us now is not a policy question, but whether the Constitution requires it, is it not?

MR. ANDERSON: That's correct, Mr. Chief Justice, it is.

And the policy of the Legislature, however good-intended it might be, is of no import when the courts don't interpret the policy the same way. Which is what, I would submit, we have here; that the policy of the Legislature was to give full right to counsel on any direct review, which would include the full tier from the superior court level all the way up to this Court.

QUESTION: Just let me ask you a hypothetical question that may seem extreme, but I want to test it: Suppose that the Fourth Circuit position became the law, and they've gone all the way through and filed a petition for a writ here, the writ is denied. Query: Is there a constitutional requirement to furnish a lawyer to prepare a petition for reviewing on the petition for a writ of certiorari?

Since that's open to every litigant as a discretionary matter.

MR. ANDERSON: I would say that the only constitutional mandate that would be there would be whether or not the traditional notions of when this Court does rehear a case are met. The same value judgment which is made by counsel at, after the first appeal stage, whether or not there is a substantial constitutional question, whether or not there is a substantial question of public importance or interest to the judicial bar of the State.

Those -- all these value judgments are made along the way. And I would say, in answer to your question, that it would be required if counsel thought it would be. And if, in this particular instance, the demand by the defendant that he be afforded a review, when the review has already taken place in the same court, it could be carried --

QUESTION: No, no; you're going to turn this last decision over to the counsel and take it away from the client? Suppose the lawyer advises the client: No, there's no point in filing a petition for rehearing, the court almost never grants them. And the man, the client now, responds: I want a petition for rehearing filed.

MR. ANDERSON: In that particular case, I think he is required to do so.

QUESTION: At public expense?

MR. ANDERSON: At the public expense.

QUESTION: You might get some help if you get the figures from the Solicitor General's office, that handles sixty percent of the work in this Court, to find out how many petitions for rehearing the United States has ever filed. That would help. It would be close to zero.

MR. ANDERSON: Well, I would say that in most instances that the average defendant, even after being advised that you can have rehearing, would not take advantage of that and would follow his counsel's advice.

QUESTION: Well, that doesn't really bear on the constitutional question before us, does it?

MR. ANDERSON: It does -- it does if we're worried about the balancing of the burden in implementing the decision, as opposed to the mandate or the strength of the mandate the Constitution requires.

In conclusion, I would like to say that our notions of basic fairness and justice would mandate that the defendant not be sent off on his own, that he be given the guiding hand of counsel, so to speak --

QUESTION: Would it satisfy you if, under the North Carolina rules, a copy of the brief in the North Carolina Court of Appeals and a copy of the opinion in the North Carolina Court of Appeals would be -- if filed in the North Carolina Supreme Court would be adequate, an adequate filing,

would be considered a petition for certiorari?

MR. ANDERSON: No, Mr. Justice White, I wouldn't, for two reasons:

First of all, if it was considered adequate, then I think it would have been done before.

Secondly, the criteria which the Supreme Court uses on discretionary review is quite different than those that the appellate court uses.

QUESTION: Well, it might be, but they could apply whatever criteria they are going to apply to whatever is revealed by the papers filed in the court of Appeals.

MR. ANDERSON: Which would require the court to take the task of reading --

QUESTION: Well, that may be, that's the burden on the court, that doesn't create a constitutional right in you.

MR. ANDERSON: Well, it does in the sense that the indigent defendant therefore puts the court to a burden, which is more --

QUESTION: I know, but if the North Carolina Supreme Court wrote in its own rules, said, It shall be an adequate petition for certiorari to file here the brief and the opinion in the Court of Appeals.

Now, if it accepts that burden, what objection would you have to that?

MR. ANDERSON: The only objection is that the defendant

of means has counsel who can lay out the contentions which he feels will catch the court's eye, which will, when the petition comes across their desk for review, will be to, so to speak, jump out at the justice, as opposed to here is another brief --

QUESTION: Well, that's a good theory about petitions for cert; but only a theory.

MR. ANDERSON: Well, in -- I would think that with this Court's burden that the counsel would aid the court, and by aiding the court it would aid the defendant, because he would have the assurance that his cause had been passed upon by having his cause stated clearly, rather than having it stated in terms aimed at either a different court or by his own words.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Anderson.

You have about three minutes left, Mr. Safron, if you need them.

REBUTTAL ARGUMENT OF JACOB L. SAFRON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SAFRON: If Your Honor please, in my first presentation I did not reach the question of our State statute, which I did say was in a state of confusion.

Our General Assembly just adjourned last week, and

in the dying hours of the 1974 General Assembly, they passed a bill amending the provision which Mr. Anderson spoke to.

That particular provision now reads: Review of any judgment or decree pursuant to G.S. 7A-27, that is, direct review to the Court of Appeals, or direct review to the Supreme Court in an applicable case, G.S. 7A-30(1), that is the substantial constitutional question from the Court of Appeals to the Supreme Court, G.S. 7A-30(2), that is the dissent case, and G.S. 15-222, that is the petition for writ of certiorari in post-conviction.

So the language which was causing the trouble and which the justices or the judges of our superior court had difficulty in applying has been rewritten, and our statute now reads: that the right to counsel in these instances is counsel to the Supreme Court or Court of Appeals, when it's as of right, and in post-conviction matters.

So it's a clearcut constitutional question without any State statute being involved.

QUESTION: Mr. Safron, can I ask you what your understanding is -- I perhaps should know, but -- on federal habeas corpus, where a State prisoner files in the United States District Court, if there's a hearing required, counsel is appointed.

MR. SAFRON: Under the Criminal Justice Act.

QUESTION: And if he -- if the petition is denied,

counsel stays in the case or is reappointed in the Court of Appeals?

MR. SAFRON: My experience, Your Honor, in several hundred cases in the Fourth Circuit, has been that counsel is only appointed upon the issuance of a certificate of probable cause --

QUESTION: Right.

MR. SAFRON: -- by the Circuit Court.

QUESTION: All right. I agree with that, because that's the only time there will be an appeal.

MR. SAFRON: Counsel is not appointed to seek the appeal to the Circuit Court.

QUESTION: But he doesn't stay in? He doesn't stay in the case?

MR. SAFRON: Rarely. It's been my experience that most certificates of probable cause are granted through --

QUESTION: All right, but now -- now let's assume the Court of Appeals decides the case after having appointed counsel, and then the prisoner wants to, or the defendant wants to seek a petition for certiorari here. Does the Court of Appeals for the Fourth Circuit's rule, court rule, say that counsel should stay in the case until, for the purposes of the petition?

MR. SAFRON: Your Honor, the Criminal Justice Act is --

QUESTION: I know about the Criminal Justice Act, but that doesn't reach this.

MR. SAFRON: I don't believe it reaches this, and I'd like to point this one --

QUESTION: But some of the court rules, themselves, have not only reflected the Criminal Justice Act's requirement on direct appeal, but in connection with collateral proceedings to have counsel stay in to --

MR. SAFRON: The Fourth Circuit, in the Moffitt case, made it perfectly clear that the rule announced in Moffitt has no application to collateral attack.

QUESTION: I see, I see. Okay.

QUESTION: Mr. Safron, is there more than one Court of Appeals?

MR. SAFRON: In North Carolina, Your Honor?

QUESTION: Yes.

MR. SAFRON: One Court with three panels.

QUESTION: One Court with three panels.

QUESTION: Now, three or four counties, experimentally, have provided counsel, haven't they?

MR. SAFRON: Although the General Assembly has established a Public Defender system, experimentally, in three counties at the present time; each time the General Assembly meets, they keep adding a county, and no doubt within several years the entire State, except for some purely

rural areas, which could not really support it, will probably have Public Defender systems.

QUESTION: So that, at least from these three counties, the -- and at least to the State Supreme Court, apart from --

MR. SAFRON: Yes, Your Honor.

QUESTION: -- apart from petition for certiorari to this Court, the State is now providing what the Court of Appeals for the Fourth Circuit said they must provide --

MR. SAFRON: Let me just say this. I received a phone call from one of our Public Defenders about two weeks ago, an order had been entered requiring him to petition this Court, and he said, "What am I supposed to do? There are no constitutional issues involved, but an order has been entered."

QUESTION: By --?

MR. SAFRON: By a State superior court judge from a reading of our statute, and I said, "Read Anders vs. California."

But it's very difficult. If it's a constitutional right, then counsel cannot disregard the right; and if he disregards -- and if he makes his determination, he's in post-conviction as the defendant in the next case.

QUESTION: Unh-hunh.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Safron.

MR. SAFRON: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Anderson, you appeared in this case by our appointment and at our request, and on behalf of the Court I want to thank you for your assistance to the Court and to your client, of course.

MR. ANDERSON: It's been an honor. Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:17 o'clock, p.m., the case in the above-entitled matter was submitted.]

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