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Constitutional Law--Equal Protection--Appellate Review in Criminal Case Based on Ability to Pay

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CASE COMMENTS

CONSTITUTIONAL LAW—EQUAL PROTECTION—APPELLATE REVIEW IN CRIMINAL CASE BASED ON ABILITY TO PAY.—An Illinois statute provides that "Writs of error in all criminal cases are writs of right and shall be issued of course." ILL. REV. STAT. c. 38, § 769.1 (1955). Indigent defendants sentenced to death are provided with a free transcript at the expense of the county where convicted, if they desire a full appellate review, ILL. REV. STAT. c. 38, § 769a (1955); but there are no provisions for free transcripts in other criminal cases. Here, indigent *Ds*, convicted in a state court of armed robbery, a non-capital offense, were refused a free copy of the transcript of the record, which was needed for a full appellate review. The United States Supreme Court granted certiorari after the Illinois supreme court affirmed the trial court's dismissal of *Ds'* petition which charged that they were denied due process and equal protection. *Held,* (5-4) that the denial of full appellate review solely on the basis of *Ds'* inability to pay for a necessary transcript is a violation of the due process and equal protection clauses of the fourteenth amendment. Vacated and remanded. *Griffin v. Illinois,* 351 U. S. 12 (1956).

It is well settled that a state is not required by the Federal Constitution to provide appellate reviews. *Reetz v. Michigan,* 188 U.S. 505, 508 (1903); *Mallett v. North Carolina,* 181 U.S. 589, 598 (1901); *McKane v. Durston,* 153 U.S. 684, 687 (1894). However, a discriminatory denial of the statutory right of appeal is a violation of the equal protection clause. *Dowd v. Cook,* 340 U.S. 206, 208 (1951). The primary question in the principal case is whether a denial of appellate review solely because of *Ds'* poverty violates the equal protection clause. There has not been much litigation in the past concerning discrimination in criminal cases on the basis of ability to pay. In *Carr v. Lanagan,* 50 F. Supp. 41 (D. Mass. 1943), it was held that a statute which required payment of a filing fee as a prerequisite to the filing of a petition for a writ of error did not deprive one of the equal protection of the laws. *Cf. Mason v. Cranor,* 42 Wn. 2d 610, 257 P.2d 211, *cert. denied,* 346 U.S. 901 (1953); *Winegard v. Warden,* 194 Md. 699, 69 A.2d 685 (1949), *cert. denied,* 339 U.S. 938 (1950). In at least one prior case, however, there was an expression of doubt as to whether appeals could be withheld solely on the ground of a defendant's poverty. *Boykin v. Huff,* 121 F.2d 865 (D.C. Cir. 1941). But there is no prior case in accord with the principal case. It therefore establishes a new principle of law.

As a result of the principal case, the concept of equal justice for all comes closer to reality. How can it be said that justice is done to one convicted of a crime if he is to be refused an appellate review because he has no funds with which to prosecute an appeal? The primary purpose of allowing an appeal is to insure justice to the appellant. ORFIELD, CRIMINAL APPEALS IN AMERICA 32 (1939). This purpose would be thwarted by refusing one an appeal because he has no money. Borchard's work reminds us that in the past innocent persons have been convicted of crimes. BORCHARD, CONVICTING THE INNOCENT (1927). Furnishing free transcripts to indigent defendants will be a further safeguard against punishment of an innocent person. "There is perhaps no more touching situation in the study of criminal appeals than that of a defendant without adequate means to take an appeal though he has grounds to take one." ORFIELD, *op. cit. supra* at 176.

Although the new rule may be desirable, its administration will be accompanied by many practical problems. Justice Frankfurter, concurring, warned that the new rule announced should be given prospective effect only. However, the majority opinion did not restrict its decision to the future. Presumably it applies to the past as well. It is conceivable that many indigent prisoners will now contend that they were denied their constitutional rights, since they were not provided with free transcripts to enable them to appeal, and will now seek release from custody. The handling of these claims will present many problems.

Another probable outcome of the principal case is that the dockets of the appellate courts will become crowded, as paupers now will invariably seek to appeal a conviction. As a result not all cases will receive the attention which they deserve.

Another problem will be that of determining who will pay the cost of the transcripts if they are to be furnished to an indigent defendant. Presumably public funds will have to be used. But in some states a court may be without authority to authorize an expenditure of public funds in such a situation. See, *e.g.*, *State ex rel. Langhorne v. Superior Court*, 32 Wash. 80, 72 Pac. 1027 (1903).

A situation could arise where (1) there are no provisions for free transcripts, (2) there are no means of taking an appeal without having a transcript, and (3) there are no provisions giving the court authority to order an expenditure of public funds. In this

situation how can an indigent defendant be granted an appellate review? Will the court have to adopt new methods of procedure, or will this be a situation where the rule of the principal case will not apply? The language of the principal case seems broad enough to require a state to change its appellate procedure: "Destitute defendants *must* be afforded as adequate appellate review as defendants who have money enough to buy transcripts." However, subsequent interpretation of the principal case may impose certain limitations on its application.

The principal case has been followed in *People v. Jackson,* 152 N.Y.S.2d 893 (1956), upon a similar set of facts. In *Barber v. Gladden,* 288 P.2d 986 (Ore. 1956), a statute requiring an appeal bond as a condition to a right of appeal was held unconstitutional under the equal protection clause, as applied to a prisoner who sought to appeal a dismissal of his habeas corpus action. The decision was based on the authority of the principal case. The Oregon court, however, expressly limited the application of the decision to the specific facts of the case, and made it plain that the decision was not the result of their own reasoning, but resulted from the necessary implications of the principal case. *Id.* at 990. This is indicative of the potential unpopularity of the principal case, and of the efforts which will be made in the future to narrow its application.

The principal case establishes a new rule of law which represents another step toward the realization of equal justice for all. However, the administration of the rule will involve a multitude of problems, and may necessitate substantial changes in appellate procedure in some states. As a result, the principal case will probably prove to be an unpopular decision.

R. M.

CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS—EXCLUSION FROM PUBLIC EMPLOYMENT FOR INVOKING THE FIFTH AMENDMENT.—Appellant was summarily discharged from his position as professor at Brooklyn College, under the New York City charter, for exercising the privilege against self-incrimination by refusing to answer authorized inquiries as to his Communist Party membership, when appearing before a congressional committee investigating matters of national security. Upon review by the highest state court, the proceedings were upheld. *Held,* (5-4) that the summary dismissal