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Constitutional Law-Equal Protection-Failure to Appoint Counsel on Discretionary Appeals Held Not Violative of Fourteenth Amendment

Constitutional Law—Equal Protection—FAILURE TO APPOINT COUNSEL ON DISCRETIONARY APPEALS HELD NOT VIOLATIVE OF FOURTEENTH AMENDMENT— *Ross v. Moffitt*, 94 S. Ct. 2437 (1974).

An indigent defendant in a state criminal prosecution is guaranteed the right to appointed counsel.[1] The boundaries of this right, however, have yet to be fully developed.[2] For instance, the right to counsel on appeal has developed in stages. Initially, the indigent criminal defendant successfully attacked state statutes establishing filing fees or other financial prerequisites which denied him access to the appellate level.[3] Soon the Supreme Court clarified its position on such discriminatory statutes by specifically

1. In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. U.S. CONST. amend. VI.

This right to counsel provision was applied to the states through the use of the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 335 (1963). The Court stated that in many of its decisions the principle had developed that the right to counsel is fundamental to ordered justice and therefore obligatory upon the states. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

All states have within their own constitutions today, a right to counsel provision. In Virginia, no person shall be ". . . deprived of life or liberty, except by the law of the land . . . ." VA. CONST. art. 1, § 8. This clause has been held to confer the right to counsel. Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948).

2. In determining the scope of this right the Supreme Court has generally been asked either to extend it to a certain type of criminal defendant or to declare an allegedly critical stage of the proceeding within the purview of the amendment. For the development of the right to counsel with respect to the particular type of defendant, *see* Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanants); *In re* Gault, 387 U.S. 1 (1967) (juvenile delinquents); Gideon v. Wainwright, 372 U.S. 335 (1963) (felons); Powell v. Alabama, 287 U.S. 45 (1932) (capital offenders).

The Court has decided that a suspect has the right to counsel as early as the custodial interrogation stage. Miranda v. Arizona, 384 U.S. 436 (1966). *See also* Stovall v. Denno, 388 U.S. 293 (1967); United States v. Wade, 388 U.S. 218 (1967). The convicted criminal defendant enjoys the right to appointed counsel on some appeals and post-conviction proceedings. Mempa v. Rhay, 389 U.S. 128 (1967) (revocation of probation and imposition of deferred sentencing); Douglas v. California, 372 U.S. 353 (1963) (appeals of right). *Cf.* Abraham v. Wainwright, 407 F.2d 826 (5th Cir. 1969) (not extended to appeals from denial of motion to vacate judgment). Many cases have declared in general terms that the right to counsel on appeal extends to every stage of the proceeding. *See, e.g.*, Ellis v. United States, 356 U.S. 674 (1958); Johnson v. United States, 352 U.S. 565 (1957).

3. Griffin v. Illinois, 351 U.S. 12 (1956). The Court held that when appeals are made available, all defendants must have an adequate opportunity to present their claims of error. An adequate opportunity meant at least the opportunity to file claims of error despite an inability to pay certain fees. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

extending the right to proceed *in forma pauperis* to discretionary appeals.[4] The indigent attempted to extend the Court's reasoning in the filing fee cases to establish the right of counsel on appeal, contending that the mere elimination of filing fees did not provide meaningful access to the courts. When the Supreme Court decided that meaningful access did include the right to counsel on an indigent's first appeal as a matter of right,[5] it became obvious that whether the state also had a duty to appoint counsel on the discretionary appellate level would also be tested.

In *Ross v. Moffitt*,[6] the Supreme Court was asked to take the final step and to impose such a duty upon the states. The case was a consolidation of two criminal convictions.[7] On separate appeals of right,[8] Moffitt, an indigent represented by court-appointed counsel, had received affirmances of his convictions. Following the affirmance of one conviction Moffitt was denied the aid of appointed counsel in perfecting an appeal to the North Carolina Supreme Court, which had the power of discretionary review.[9] Moffitt was, however, granted counsel to prepare his petition for certiorari to the North Carolina Supreme Court following his second conviction, but

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4. The Court in Burns v. Ohio, 360 U.S. 252, 257 (1959), said:

> This principle [of giving the indigent an adequate opportunity to appeal] is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.

Accord, Douglas v. Green, 363 U.S. 192 (1960) (per curiam). The federal courts and most state courts now have the authority by statute to grant appeals *in forma pauperis* upon the indigent's filing of an affidavit. 28 U.S.C. § 1915 (1970). *See, e.g.*, VA. CODE ANN. § 17-30.2 (Cum. Supp. 1974).

5. In Douglas v. California, 372 U.S. 353 (1963), the defendants had been denied counsel to prosecute their first appeal of right from thirteen felony convictions because the court of appeals believed it would not be to their advantage to have such assistance. The Supreme Court of the United States held, however, that an appeal as a matter of right is meaningless when a defendant is forced to show the merit of his appeal without the benefit of counsel. The presence of counsel was essential to any meaningful access to the appellate courts, so that any statute which made the appointment of counsel discretionary was unconstitutional.

6. 94 S. Ct. 2437 (1974).

7. Moffitt was charged in both instances with the felony of forgery and uttering forged instruments; he pleaded not guilty.

8. In all criminal cases except those involving a sentence of death or life imprisonment, an appeal as a matter of right lies first to the North Carolina Court of Appeals. N.C. GEN. STAT. § 7A-27 (Cum. Supp. 1973). A defendant has another appeal of right to the North Carolina Supreme Court if the case involves a constitutional question, or if there is a dissent in the court below. N.C. GEN. STAT. § 7A-30 (1969).

9. Except for appeals falling under N.C. GEN. STAT. § 7A-27 (Cum. Supp. 1973), and N.C. GEN. STAT. § 7A-30 (1969), the review of the supreme court is on a discretionary basis. The method used in seeking such an appeal is a petition for certiorari. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968).

the court denied certiorari.[10] This denial prompted a petition by Moffitt for court-appointed counsel to prepare a writ of certiorari to the United States Supreme Court. Again, Moffitt was denied assistance from the state.[11]

The Court of Appeals for the Fourth Circuit granted Moffitt habeas corpus relief, holding that the fourteenth amendment requires the state to provide counsel for an indigent defendant who seeks discretionary review by the state supreme court, and also when an indigent petitions the United States Supreme Court for a writ of certiorari.[12] On appeal the Supreme Court reversed[13] and separately disposed of the respondent's equal protection and due process arguments.[14]

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10. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 247 (1971). In cases which do not qualify for mandatory appointment of counsel under N.C. GEN STAT. § 7A-451(b)(6) (Cum. Supp. 1973), the court may appoint counsel in its own discretion.

11. 94 S. Ct. at 2441.

12. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973). The court stated that a reasonable interpretation of North Carolina's statutory provision at N.C. GEN. STAT. § 7A-451(b)(6) (Cum. Supp. 1973), would provide the indigent with counsel on any appeal. However, since the state interpreted the statute narrowly, Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972), the Fourth Circuit in its habeas jurisdiction found that the failure to appoint counsel on discretionary appeals violated the Federal Constitution. The court stated that "[t]he same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." 483 F.2d at 655. The court found that the failure to appoint counsel on discretionary appeals, denied the indigent meaningful access because the quality of justice had been substantially impaired. 483 F.2d at 653.

13. By reversing *Ross* the Supreme Court overruled sub silentio a decision of the Court of Appeals for the Sixth Circuit. In Mitchell v. Johnson, 488 F.2d 349 (6th Cir. 1973), the court held that although an indigent defendant who had been denied counsel had not been barred from prosecuting a discretionary appeal to the Michigan Supreme Court, as in the filing fee cases, he was so seriously disadvantaged in comparison to a wealthy defendant with retained counsel that his right to fair procedure and equal protection had been violated. The court considered the factors stated in *Douglas* and determined that the benefit of an attorney's examination into the record, research of the law, and marshalling of the arguments on his client's behalf was too necessary to a meaningful appeal to be a function of the defendant's financial status.

One of the government's primary arguments in the case was that providing counsel on the first appeal is all that is required by the fourteenth amendment. The court in *Mitchell* responded by citing Burns v. Ohio, 360 U.S. 252 (1959), wherein the Supreme Court refused the same argument made in an attempt to justify a filing fee requirement in order to appeal. The court in *Mitchell* also dismissed the state's contention that practical considerations and institutional limitations compelled a finding against the indigent. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Mempa v. Rhay, 389 U.S. 128 (1967). *Cf.* Brief for Virginia as Amicus Curiae, Ross v. Moffitt, 94 S. Ct. 2437 (1974).

14. The Supreme Court found the same reasons for denying relief that the Seventh Circuit had in Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). In *Pennington*, the court also noted that the factors considered in granting or denying certior-

Justice Rehnquist, writing for the majority, noted that despite the Court's decisions invalidating financial barriers[15] and demanding competent representation[16] in the appellate process, the due process clause is not violated by the denial of counsel on appeal because the state need not provide any appeal at all.[17] He concluded that if appeals are made available and counsel denied, the issue of constitutionality is better framed in an equal protection context.[18] The Court pointed out, however, that the equal protection clause does not demand perfect equality of treatment,[19] and that alternate methods which are not discriminatory may be applied to criminal defendants.[20] Only when the indigent defendant is denied *meaningful* access to the appellate system has his right to equal protection been violated.[21]

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ari to the Illinois Supreme Court are much like those considered by the United States Supreme Court. *See* ILL. SUP. CT. R. 315. The court attempted to justify its decision by confessing an inability to require the state to appoint counsel on discretionary appeals when the highest court in the nation does not appoint counsel for defendants appealing from its courts of appeals. *But cf.* Criminal Justice Act of 1964, 18 U.S.C. § 3006A(b) (1970); FED. R. CRIM. P. 44(a). In Doherty v. United States, 404 U.S. 28, 36 (1971) (Douglas, J., concurring), it was stated that under this Act, the federal courts of appeal must appoint counsel for federal indigent defendants seeking a writ of certiorari to the United States Supreme Court.

15. *See* notes 3-4 *supra*. *See also* Cruz v. Hauck, 404 U.S. 59 (1971) (per curiam); Draper v. Washington, 372 U.S. 487 (1963).

16. *See, e.g.*, Entsminger v. Iowa, 386 U.S. 748 (1967); Anders v. California, 386 U.S. 738 (1967); Swenson v. Bosler, 386 U.S. 258 (1967).

17. McKane v. Durston, 153 U.S. 684 (1894).

18. 94 S. Ct. at 2444.

19. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Griffin v. Illinois, 351 U.S. 12 (1956). In *Rodriguez*, the Court stated that ". . . at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." 411 U.S. at 24.

20. *See, e.g.*, Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963).

21. In *Douglas*, the Court found that an indigent did not have meaningful access when on his first appeal of right, he was denied counsel. *See* note 5 *supra*. *See also* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961). Based on information gathered from judges, court officials, and colleagues at the bar, Mr. Boskey concluded that assistance of counsel was particularly essential to meaningful access to the appellate process when the review was on a discretionary basis.

> [I]dentifying the appellate issues in a criminal case and presenting them to the court of appeals clearly requires the professional talents of a lawyer. In certain respects this is even more true in connection with preparing a petition for certiorari, the aim of which is to persuade the Supreme Court to exercise its discretionary jurisdiction. *Id.* at 797.

But see Comment, *Post-Conviction Due Process*, 55 MICH. L. REV. 413, 420 (1957). "[T]he presence of counsel is not a *sine qua non* to access to the courts, as was the availability of the transcript in the *Griffin* case."

In assessing the substance of a discretionary appeal without counsel, the Court observed that an indigent defendant in states having an intermediate court of appeals has already been represented by counsel on his appeal as a matter of right.[22] The indigent seeking discretionary review was said to have the benefit of ". . . at the very least, a transcript or other record of the trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case."[23] Thus, the Court concluded that a defendant denied counsel on a discretionary appeal is far less handicapped than the defendant denied counsel on his appeal of right.[24] The test in *Ross* required only that the state's refusal to appoint counsel must not constitute a denial of *meaningful* access to the courts, and the Court concluded that North Carolina's appellate procedure satisfied this test.[25]

The Court attempted to bolster its decision by further relying on the procedural characteristics of the North Carolina appellate process. In making the determination whether to grant or deny certiorari, the Supreme Court of North Carolina weighs such factors as the degree of public interest in the subject matter, whether there are legal principles involved of major significance to the state, and whether the lower appellate court's decision appears to be in conflict with a prior decision of the supreme court.[26] The Court considered the handicap of petitioning without counsel less pronounced when the state supreme court's determination is based on these grounds, rather than the correctness of the lower court's holding.[27]

The respondent's contention that counsel must be appointed to prepare a petition for certiorari to the United States Supreme Court was also struck down.[28] The Court supplemented its reasons for denying counsel on state discretionary appeals by noting that Congress has enacted statutes which provide for discretionary review by the United States Supreme Court.[29] It would therefore be less reasonable for the state to be required to appoint counsel for a defendant seeking an appeal created by federal statute, than

22. *See* N.C. GEN. STAT. § 7A-451(b)(6) (Cum. Supp. 1973).

23. 94 S. Ct. at 2446.

24. *See* note 5 *supra*.

25. 94 S. Ct. at 2447.

26. *See* N.C. GEN. STAT. § 7A-31 (1969). As evidenced by the granting of certiorari after the Mecklenburg conviction in *Ross* and the denial of certiorari after the Guilford conviction, the grant or denial of a writ of certiorari imports no expression of opinion upon the merits of the case. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973). Denial of the writ means only that in the opinion of the supreme court the case does not require further review under the statutory provision.

27. 94 S. Ct. at 2446.

28. *Id.* at 2447.

29. *See* 28 U.S.C. § 1254 (1970).

it would be for the United States Supreme Court to make such an appointment.[30] The Court has consistently refused the latter proposal.[31]

It is submitted that the Court in *Ross* failed to adequately explain why the concepts of fairness and equality, which demand appointed counsel on appeals of right, do not require counsel on subsequent discretionary appeals.[32] The Court discounted the importance on any appeal of having a skilled advocate who can present the issues clearly and persuasively to the court.[33] Without defining the term, the Court concluded that *meaningful* access to the state supreme courts is achieved by the mere existence of the barren testimony and briefs from the court below.[34] Although the Court was on firm ground in refusing to apply an extremely exacting test,[35] it is questionable how, in light of the cases declaring the importance of the right to counsel,[36] the Court could dismiss this right as an inconsequential advantage when sought on discretionary appeals.

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30. 94 S. Ct. at 2447. *See* Peters v. Cox, 341 F.2d 575 (10th Cir.), *cert. denied*, 382 U.S. 863 (1965).

31. *See, e.g.*, Oppenheimer v. California, 374 U.S. 819 (1963); Mooney v. New York, 373 U.S. 947 (1963).

32. The Court in *Douglas* failed to reach the issue of whether a defendant who is refused counsel on a discretionary appeal was denied meaningful access, but the Sixth Circuit, when faced with this issue, determined that the permissiveness of the appeal had no effect on counsel's impact towards gaining meaningful access to the court. *See* note 13 *supra*. This decision by the Sixth Circuit was not even referred to in the Court's opinion in *Ross*. The Court in *Ross* failed to consider, as did the Sixth Circuit, one of the main factors which influenced the decision in *Douglas, i.e.*, that when the indigent appeals without counsel, and " . . . the record is unclear or the errors are hidden, [he] has only the right to a meaningless ritual, while the rich man has a meaningful appeal." 372 U.S. at 357-58. This element of inequality is present on any appeal.

33. *See* note 21 *supra*.

34. 94 S. Ct. at 2446.

35. Since there was neither a fundamental right nor suspect classification involved, the strict scrutiny test did not apply. Wealth was specifically denied recognition as a suspect classification in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Under the strict scrutiny test the state must show a compelling interest in maintaining its practice and that there is no less harmful alternative available. Dunn v. Blumstein, 405 U.S. 330 (1972). The Court in *Ross* did have the opportunity to review the state's practice with a high degree of sensitivity, since there was a wealth classification and the right to counsel is at least a very important right. *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model of a New Equal Protection*, 86 HARV. L. REV. 1 (1972). For a case which arguably applies this level of scrutiny see Frontiero v. Richardson, 411 U.S. 677 (1973). The Court in *Ross*, however, reviewed the case under a test of minimum rationality, which requires only that there be a reasonable relationship between the state's means and the ends sought. The Court by using this test, found it reasonable for the state to deny Moffitt's request for counsel on discretionary appeal. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Rinaldi v. Yaeger, 384 U.S. 305 (1966); Lane v. Brown, 372 U.S. 481 (1963).

36. *See* notes 2, 4, 5 *supra*.

The *Ross* opinion presents another question. By exclusively assessing the disadvantages of discretionary appeal without counsel under a state appellate structure having an intermediate court of appeals, and by relying on the North Carolina standard for discretionary review, the Supreme Court arguably left open the question of whether the fourteenth amendment is violated when the only appeal an indigent has is discretionary,[37] and counsel is denied. Virginia is one of the majority of states which has no intermediate appellate court,[38] but only Virginia and West Virginia fail to provide an appeal of right to the state supreme court in felony cases.[39] The procedure in Virginia is similar to North Carolina in that most appellate review in the supreme court is discretionary.[40] Virginia has, however, by statute provided counsel at least for a felon who seeks discretionary review in the supreme court,[41] and the Virginia Supreme Court has held this statutory requirement to be demanded by the fourteenth amendment.[42] *Ross* would seem to invalidate Virginia's interpretation of the fourteenth amendment's demands, unless the unique nature of discretionary review in Virginia makes the *Ross* decision inapplicable.[43] Since the Virginia Supreme Court

37. *See* VA. CODE ANN. §§ 17-123 (Cum. Supp. 1974), 19.1-282 (1960), wherein the circuit courts are given original jurisdiction over felonies with a writ of error lying from the circuit courts to the supreme court.

38. Brief for Respondent at 9 n.5, Ross v. Moffitt, 94 S. Ct. 2437 (1974).

39. Breen, *Solutions for Appellate Court Congestion*, 47 J. AM. JUD. SOC'Y 228, 233 (1964).

40. For the only occasions in which there is an appeal of right to the Virginia Supreme Court, *see* VA. CODE ANN. § 12.1-39 (1973) (decisions of the State Corporation Commission); *Id.* at § 54-74(5) (Cum. Supp. 1974) (disbarment proceedings).

41. It is unclear which section of the Code embodies the right of the indigent felon to representation by counsel on his appeal to the Virginia Supreme Court. In VA. CODE ANN. § 19.1-241.1 (Cum. Supp. 1974), the indigent is granted counsel to assist at ". . . every stage of the legal proceeding against him." The Virginia Supreme Court in Cabaniss v. Cunningham, 206 Va. 330, 143 S.E.2d 911 (1965), implied that the predecessor to the clause above included both appeals of right and discretionary appeals. Yet, the indigent felon is specifically granted assistance of counsel on petition for writ of error to the Virginia Supreme Court by VA. CODE ANN. § 17-30.2 (Cum. Supp. 1974). *See* VA. CODE ANN. § 19.1-241.8 (Cum. Supp. 1974), where the provision for counsel for the misdemeanant is phrased only in the general language quoted above. The question arises whether the absence of a specific section of the Code regarding counsel for indigent misdemeanants on discretionary appeals, while making such a provision for felons, discloses an unequal treatment which is constitutionally impermissible. *See* Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974).

42. Cabaniss v. Cunningham, 206 Va. 330, 143 S.E.2d 911 (1965) (defendant was a felon seeking discretionary review). The court said:

> It is well settled that the failure to appoint counsel to assist an indigent defendant in making an appeal from a conviction is a denial of equal protection and due process guaranteed him under the Federal Constitution and the Virginia Bill of Rights. *Id.* at 333, 143 S.E.2d at 913.

Accord, Smith v. Peyton, 207 Va. 515, 151 S.E.2d 382 (1966) (per curiam); Thacker v. Peyton, 206 Va. 771, 146 S.E.2d 176 (1966).

43. It is true that the factors considered in granting and denying review vary greatly in the

has stated unequivocally that the decision to grant or deny a writ of error is based solely on the case's merits,[44] it seems quite possible that the denial of a writ of error, in fact is an affirmance of the decision below.[45] The denial of a writ of certiorari, on the other hand, may reflect merely the social importance of the case.[46] The Court in *Ross* gave no indication whether, by holding that counsel may be denied on discretionary appeals, this was meant to include a state like Virginia in which a defendant has had no previous appeal and the determination to grant or deny review is based solely on the merits.

G.W.P.

North Carolina Supreme Court and the Virginia Supreme Court. In North Carolina, review is by writ of certiorari as in the United States Supreme Court, while in Virginia review is by writ of error. *Compare* Brown v. Allen, 344 U.S. 443, 497 (1953) (concurring opinion), wherein Mr. Justice Frankfurter stated that ". . . our denial of certiorari in the ordinary run of cases can be [for] any number of things other than a decision on the merits . . ." *with* Saunders v. Reynolds, 214 Va. 697, 703, 204 S.E.2d 421, 425 (1974), wherein the Virginia Supreme Court stated that ". . . error is granted or refused is determined by . . . the merit or lack of merit of the particular case." *Id.* at 913.

44. Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974). In this case the petitioner contended that the court's decision to grant or deny certiorari had shifted from a determination on the merits to one based upon social importance and thereby resulted in unequal treatment of defendants who were similarly situated. The court answered by stating unequivocally that the determination was based solely on the merits of the case, and that when doubt exists as to the propriety of the decision below, the court must grant the writ of error. *Accord*, McCue v. Commonwealth, 193 Va. 870, 49 S.E. 623 (1905).

45. *See* BURKS PLEADING & PRACTICE § 435 (4th ed. 1952); Lilly & Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 14 (1971). Denial of a writ of certiorari is not, however, necessarily an affirmance of the decision below. *See also* note 42 *supra*.

46. *See* note 43 *supra*.