

**STATE V. CASTILLO: THE LOUISIANA  
SUPREME COURT'S DENIAL OF AN  
INDIGENT DEFENDANT'S RIGHT TO  
APPOINTED COUNSEL IN A FIRST-TIER  
DISCRETIONARY REVIEW**

**I. INTRODUCTION**

On January 28, 2011, the Louisiana Supreme Court addressed the issue of whether an indigent defendant convicted of misdemeanor traffic offenses, for which he was sentenced to jail time, could have state-appointed counsel assist him in the preparation of an application for discretionary review of his convictions.<sup>1</sup> The court's holding in *State v. Castillo* reversed the appellate court's decision and denied the defendant the opportunity to have a lawyer assist him to prepare a brief that would present his claims to the court of appeal in the correct manner. The court of appeal decides whether to grant or deny the application based on the merits presented in the brief.

An indigent defendant who is denied assistance of appointed counsel during the application stage of a discretionary review is unlikely to compose a logical and comprehensive application for discretionary review. Without the assistance of counsel, an indigent defendant is denied his fundamental right of due process of law. Section II of this Note reviews the facts of the case and the lower court's holding. Section III differentiates between a defendant's right of appeal and discretionary review, sets forth a defendant's right to counsel under the federal and state constitutions, explains the appellate court's inherent power to appoint counsel, and addresses policy issues addressed by the court. Section IV sets forth the Louisiana Supreme Court's holding and reasoning for its decision. Lastly, Section V critically analyzes the court's decision and addresses the ramifications the decision may have on future cases involving indigent defendants convicted of a misdemeanor.

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1. *State v. Castillo*, 2009-KK-1358, p. 11 (La. 1/28/11); 57 So. 3d 1012, 1018-19.

## II. FACTS AND HOLDING

Vincent M. Castillo (the defendant) was charged with various misdemeanor traffic violations, including speeding,<sup>2</sup> driving with a suspended driver's license,<sup>3</sup> and driving with an expired license.<sup>4</sup> On January 4, 2008, the First Parish Court of Jefferson Parish found the defendant guilty of these violations. At trial, the Jefferson Parish Indigent Defender Board (Board) represented the defendant.<sup>5</sup> As a result of his conviction, the defendant was fined \$275.00, sentenced to thirty days in the parish prison, and ordered to serve six months of inactive probation.<sup>6</sup>

Acting *pro se*, the defendant requested that the parish court appoint him counsel to assist in preparing his application for appellate review of his conviction.<sup>7</sup> After the parish court denied the defendant's motions, he applied directly to the fifth circuit court of appeal for review of the parish court's judgment.<sup>8</sup> The appellate court granted the defendant's writ and remanded the case ordering the parish court to appoint an attorney to assist the defendant in preparing his application for review, contingent on a showing that the defendant was indigent.<sup>9</sup> The court of appeal relied on the holdings of *Williams v. Oklahoma*<sup>10</sup> and *Mayer v. Chicago*,<sup>11</sup> as well as the Equal Protection Clause of the

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2. In violation of LA. REV. STAT. ANN. § 32:63(A) (2011).

3. In violation of LA. REV. STAT. ANN. § 32:415 (2011).

4. In violation of LA. REV. STAT. ANN. § 32:412 (2011); see *Castillo*, 57 So. 3d at 1013.

5. *Castillo*, 57 So. 3d at 1013; see also Louisiana Appellate Project, <http://www.appellateproject.org> (last visited Apr. 4, 2012).

6. *Castillo*, 57 So. 3d at 1013.

7. *Id.*

8. *Id.* The court does not state the reasoning given by the parish court for its denial of the defendant's motions.

9. *Castillo*, 57 So. 3d at 1013 (citing *State v. Castillo*, 2008-KH-1172 (La. App. 5 Cir. 01/28/09) (unpub.)).

10. *Williams v. Oklahoma*, 395 U.S. 458 (1969) (per curiam) (holding that the lower court's decision to deny an indigent defendant, convicted of violating municipal ordinances, access to the transcript of his trial proceedings in order to prepare an appeal was forbidden by the Fourteenth Amendment because it denied the right of appeal to an indigent defendant yet granted the same right to someone who could pay for the preparations necessary for an appeal).

11. *Mayer v. Chicago*, 404 U.S. 189, 198 (1971) (holding that an indigent appellant is afforded the right to a "record of sufficient completeness" to permit proper consideration of his claims").

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Constitution in its order to the parish court.<sup>12</sup> The fifth circuit interpreted these two cases in conjunction with Article I, § 13 of the Louisiana constitution,<sup>13</sup> ultimately finding that an application for appellate review, where an indigent defendant was convicted of an offense that is punishable by imprisonment, is a “critical stage in the proceedings,” and therefore, the defendant has a right to appointed counsel.<sup>14</sup>

On remand, the parish court appointed Richard Tompson, on behalf of the Board, to assist the defendant with his application for appellate review.<sup>15</sup> The Board objected and applied to the court of appeal for supervisory writ arguing “that there is no legislative or constitutional mandate requiring appointment of counsel from a conviction where a discretionary application for writ review is the only avenue for relief.”<sup>16</sup> On May 29, 2009, the fifth circuit denied the Board’s application, finding no reason to depart from its previous order.<sup>17</sup> Subsequently, the Board sought supervisory writ from the Louisiana Supreme Court, which was granted on November 6, 2009.<sup>18</sup> The Louisiana Supreme Court appointed the Law Clinic at Louisiana State University Law Center to represent the defendant.<sup>19</sup> The defendant, however, refused the Law Clinic’s representation.<sup>20</sup> The Law Clinic then filed an amicus curiae brief with the Louisiana Supreme Court requesting that the court affirm the court of appeal’s order contending that Article V, § 10 of the Louisiana Constitution provides an appellate court with the “supervisory jurisdiction over cases which arise within its circuit,” and, therefore, the

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12. *State v. Castillo*, 57 So. 3d 1012, 1013 (citing *State v. Castillo*, 2008-KH-1172 (La. App. 5 Cir. 1/28/09) (unpub.)).

13. See *infra* Section II.C.2 for a more detailed discussion.

14. Relator’s Original Brief on the Merits at 7, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 12/15/09), 2009 WL 6352157, at \*7.

15. *Id.* at 2.

16. *Castillo*, 57 So. 3d at 1013.

17. Original Brief of Respondent Vincent M. Castillo as Amici Curiae Supporting Respondent at 1, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477654, at \*1. The fifth circuit denied the application and rejected the Board’s “analogy to post-conviction relief saying: ‘[the defendant’s] application for review is not an application for post-conviction relief, but is his first avenue of review of the trial court’s action.’” *Id.*

18. *Id.*

19. *Castillo*, 57 So. 3d at 1013.

20. *Id.* The opinion does not state the reason that the defendant refused the Law Clinic’s representation. Presumably it was because he wanted assistance from a certified member of the legal profession, not from law students.

court's order was a "sound exercise of its supervisory jurisdiction."<sup>21</sup> The Louisiana Supreme Court reversed the fifth circuit's order, thereby denying the indigent defendant counsel to help him prepare an application for review of his conviction for traffic violations.<sup>22</sup> The court held that the defendant was not entitled to "appointment of counsel in a case involving discretionary review of petty misdemeanor traffic offenses" because "no mandate in the Louisiana or United States Constitutions [requires] the State to provide counsel in these cases."<sup>23</sup>

### III. BACKGROUND

This Section provides the legal basis for this case and the law in which the court relied on in its opinion. The United States Constitution guarantees the right to the assistance of counsel during the trial stage of a criminal proceeding.<sup>24</sup> In addition, individual state constitutions may provide stipulations that guarantee the right to counsel.<sup>25</sup> However, in an appeal, the right to counsel depends on whether the appeal is direct or discretionary.<sup>26</sup> The Louisiana constitution specifically provides state appellate courts with supervisory jurisdiction.<sup>27</sup> Lastly, this Section discusses the policy concerns the court considers when deciding whether or not to appoint counsel to an indigent defendant.

#### A. A DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL

Both the United States Constitution and the Louisiana

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21. Original Brief of Respondent Vincent M. Castillo as Amici Curiae Supporting Respondent at 5, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477654, at \*5 (citing *Halbert v. Michigan*, 542 U.S. 605 (2005)). Furthermore, the Law Clinic argued the following:

When made in the interests of justice and judicial efficiency, the exercise of supervisory jurisdiction is proper. Because [the defendant] would otherwise be pursuing his writ of review *pro se*, the assistance of counsel will promote both justice and judicial efficiency. He is homeless and does not have formal legal training. A lawyer's brief will frame the legal issues, cite applicable law and authorities, point out relevant facts from the record, and advocate for [the defendant]. All of this will help the Court of Appeal reach a just result.

*Id.*

22. *Castillo*, 57 So. 3d at 1018.

23. *Id.*

24. U.S. CONST. amend. VI.

25. LA. CONST. art. I, § 13.

26. LA. CONST. art. V, § 10.

27. LA. CONST. art. V, § 10.

constitution guarantee that an indigent defendant will be represented by appointed counsel during the pre-trial and trial proceedings; however, neither constitution exclusively mandates that a defendant be appointed counsel during a first-tier discretionary review.<sup>28</sup>

### 1. PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Sixth Amendment of the United States Constitution provides that a criminal defendant has the right to be represented by adequate counsel during the trial stage of a criminal proceeding.<sup>29</sup> The Supreme Court, in *Maine v. Moulton*, stated, “The right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice.”<sup>30</sup> This is consistent with the Equal Protection Clause of the Fourteenth Amendment and guarantees that an indigent defendant has an opportunity to fairly present his claim within the “adversarial system of criminal justice.”<sup>31</sup>

### 2. PURSUANT TO § 13 OF THE LOUISIANA CONSTITUTION

The Louisiana constitution provides that “at every stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.”<sup>32</sup> Because it is not clear whether an indigent defendant’s right to counsel continues after trial, the Louisiana legislature passed Article I, § 19, which broadly guarantees a defendant the right to “judicial review based upon a complete record of all evidence upon which

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28. *State v. Castillo*, 57 So. 3d 1012, 1018-19 (“We find no mandate in the Louisiana or United States Constitutions requiring the State to provide counsel in these cases.”).

29. Specifically, the Sixth Amendment provides the following:

In all criminal prosecutions, the accused shall enjoy the right to a 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 defense.

U.S. CONST. amend. VI.

30. *Maine v. Moulton*, 474 U.S. 159, 168-69 (1985).

31. *Id.*

32. LA. CONST. art. I, § 13.

the judgment is based.”<sup>33</sup> The language of § 19 is compared to § 13, which specifies the right of counsel at “each stage of the proceedings,” which seemingly provides a right to counsel only to the pre-trial and trial stages of a criminal proceeding, rather than to post-conviction proceedings.<sup>34</sup>

Based on the language of both the United States Constitution and the Louisiana constitution, an indigent defendant is guaranteed the right to be represented by appointed counsel “at each stage of the proceedings”; however, neither constitution exclusively mandates that a defendant be appointed counsel during judicial review.<sup>35</sup>

### B. RIGHT TO COUNSEL IN A DIRECT APPEAL

In Louisiana, if a case is triable by a jury, a criminal defendant has the right of direct appeal from a conviction.<sup>36</sup> A case is triable by a jury if the defendant is convicted of a misdemeanor<sup>37</sup> and the fine exceeds \$1000 or results in imprisonment for more than six months.<sup>38</sup> If the defendant is charged with a misdemeanor, but the sentence does not fall within the statutory restrictions, the case will not be heard by a jury.<sup>39</sup>

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33. LA. CONST. art. I, § 19 provides the following:

No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

34. *State v. Castillo*, 2009-KK-1358, p. 6 (La. 1/28/2011); 57 So. 3d 1012, 1016 (citing Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 60-61 (1974)).

35. *Castillo*, 57 So. 3d at 1018-19 (“We find no mandate in the Louisiana or United States Constitutions requiring the State to provide counsel in these cases.”).

36. The Louisiana constitution provides, in pertinent part: “Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of . . . (3) *all criminal cases triable by a jury*, except as provided in Section 5, Paragraph (D)(2) of this Article. It has supervisory jurisdiction over cases which arise within its circuit.” LA. CONST. art. V, § 10 (emphasis added).

37. A “misdemeanor” is defined as “any crime other than a felony.” LA. REV. STAT. ANN. § 14:2(6) (2011). A “felony” is defined as “any crime for which an offender may be sentenced to death or imprisonment at hard labor.” LA. REV. STAT. ANN. § 14:2(4) (2011).

38. LA. CODE CRIM. PROC. ANN. art. 779(A) (2011) (“A defendant charged with a misdemeanor in which the punishment, as set forth in the statute defining the offense, may be a fine in excess of one thousand dollars or imprisonment for more than six months shall be tried by a jury of six jurors, all of whom must concur to render a verdict.”).

39. LA. CODE CRIM. PROC. ANN. art. 779(B) (2011) (“The defendant charged with

Classifying charges into separate categories, such as misdemeanor, petty offense, and felony, originated from English common law and was used to determine whether a case should be tried with or without a jury.<sup>40</sup> The Louisiana legislature has not defined the term “petty offenses.”<sup>41</sup> Therefore, courts rely on “past and contemporary standards,” which have objectively been set at a fine in excess of \$500 or imprisonment for more than six months, to assist states in determining whether or not the crime is serious enough to have the case tried by a jury.<sup>42</sup> For a defendant to have the right to a direct appeal of his conviction, the case must be triable by a jury.<sup>43</sup> In all other cases, the defendant may submit an application to the appellate court for review of his conviction; the appellate court has the discretion whether to hear the case based on the merits presented in an applicant’s writ.<sup>44</sup>

### C. RIGHT TO COUNSEL IN A FIRST-TIER DISCRETIONARY REVIEW

In cases that do not provide a defendant with the right to a direct appeal, the defendant may submit a supervisory writ to the appellate court requesting discretionary review.<sup>45</sup> A first-tier

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any other misdemeanor shall be tried by the court without a jury.”).

40. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). The Court in *Duncan* explained:

So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.

*Duncan*, 391 U.S. at 160.

41. See LA. REV. STAT. ANN. § 14:2 (2011).

42. *Duncan*, 391 U.S. at 161 (citing *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937)). Specifically, the Court stated the following:

Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts. . . . In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans*, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a \$500 fine.

*Id.*

43. LA. CONST. art. V, § 10.

44. LA. CODE CIV. PROC. ANN. art. 2201 (2011).

45. LA. CODE CIV. PROC. ANN. art. 2201 (2011) (“Supervisory writs may be applied

discretionary review is the defendant's first opportunity to apply to an appellate court for a review of the conviction and sentence.<sup>46</sup> In *Douglas v. California*, the United States Supreme Court held that an indigent defendant seeking review for the first time should be afforded counsel to assist in the preparation of his brief. Doing so allows the appellate court to determine whether to grant or deny writs based on the merits of the case, rather than make the determination to deny review simply because the claims and legal issues were poorly presented in the brief.<sup>47</sup>

Subsequently, the Supreme Court distinguished the rights of indigent defendants seeking discretionary review at the intermediate appellate court level for the first time from a second-tier discretionary review in which the defendant applies for review from the state's highest court or from the United States Supreme Court.<sup>48</sup> In *Ross v. Moffitt*, the defendant was represented at trial by appointed counsel and was convicted of forgery.<sup>49</sup> After the defendant was convicted, he sought appellate review from the court of appeal for the fourth circuit in North Carolina and was again represented by court-appointed counsel.<sup>50</sup> The court of appeal held that the "appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications for review."<sup>51</sup> After his convictions were affirmed, the defendant informed his appointed counsel that he would be seeking discretionary review for the second time from the North Carolina Supreme Court.<sup>52</sup>

When the issue eventually reached the United States Supreme Court, the Court acknowledged that an indigent defendant seeking discretionary review was "somewhat

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for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.").

46. *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants seeking access to first-tier review in the court of appeal).

47. *Douglas*, 372 U.S. at 357.

48. *Ross v. Moffitt*, 417 U.S. 600 (1974).

49. *Id.* at 602.

50. *Id.*

51. *Id.* at 602-03.

52. *Id.* at 603-04 (holding that the defendant was entitled to state-appointed counsel in a first appeal as well as in all subsequent discretionary appeals and therefore ordered he be appointed counsel).

handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding.”<sup>53</sup> However, the Court reversed the court’s extension of appointing counsel, finding that the defendant was already equipped with an appellate brief as a result of his first-tier discretionary review at the intermediate appellate level, making “this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right.”<sup>54</sup> The Court found that an indigent defendant has the right to counsel at the trial stage of a criminal proceeding and during a first-tier discretionary review, but in subsequent proceedings, the State is no longer required to appoint counsel.<sup>55</sup>

In *Halbert v. Michigan*, a Supreme Court case involving counsel in an appellate review, the Court held that pursuant to the Due Process and Equal Protection Clauses of the United States Constitution, a convicted defendant seeking discretionary review for the first time is entitled to the appointment of counsel.<sup>56</sup> The defendant in *Halbert* was convicted on a plea of *nolo contendere*<sup>57</sup> and sought appointment of counsel to apply for leave to appeal.<sup>58</sup> The defendant asserted that his application for leave to appeal was equivalent to a first-tier discretionary review, which, under the holding of *Douglas*, meant he was entitled to appointed counsel.<sup>59</sup> The Court held that the defendant was entitled to appointed counsel for a first-tier appeal because an appellate court decides whether to grant or deny review based on the merits of the case and an indigent defendant, denied the benefit of counsel, is at a significant disadvantage because he lacks knowledge of the law to submit an application presenting

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53. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

54. *Ross*, 417 U.S. at 616. The Court reasoned as follows:

The fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process.

*Ross*, 417 U.S. at 616.

55. *Id.*

56. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (“Accordingly, we hold that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review.”).

57. *Id.* at 609. *Nolo contendere* means a plea of guilty, guilty but mentally ill. *Id.*

58. *Id.*

59. *Id.*

the claims and the law governing his case.<sup>60</sup> The Court concluded that a leave to appeal application for a plea-based conviction is still categorized as a first-tier discretionary review because it “provides the first, and likely the only, direct review the defendant’s conviction and sentence will receive.”<sup>61</sup>

The Supreme Court emphasized that an indigent defendant forced to prepare an application for a first-tier discretionary review without the assistance of counsel is at a grave disadvantage.<sup>62</sup> The Court noted that many indigent defendants have learning disabilities, mental impairments, and are at the lowest levels of literacy, “marked by an inability to do such basic tasks,” such as writing a letter.<sup>63</sup> The United States Supreme Court has held that an indigent defendant should be appointed counsel during a first-tier discretionary review for reasons consistent with the Equal Protection Clause, because “navigating the appellate process without a lawyer’s assistance is a perilous endeavor for a lay person, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments.”<sup>64</sup>

#### D. APPELLATE COURT’S SUPERVISORY JURISDICTION

##### 1. INHERENT POWER TO GRANT DISCRETIONARY REVIEW

A majority of the states’ appellate systems provide an intermediate appellate court “to absorb a substantial share of the caseload previously burdening the Supreme Court.”<sup>65</sup> Courts “have the power (other than those powers expressly enumerated in the constitution and the statutes) to do all things reasonably necessary for the exercise of their functions as courts.”<sup>66</sup> This

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60. *Halbert v. Michigan*, 545 U.S. 605, 617 (2005) (“First, in determining how to dispose of an application for leave to appeal, Michigan’s intermediate appellate court looks to the merits of the claims made in the application. Second, indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves.”).

61. *Halbert*, 545 U.S. at 619. A Michigan Court of Appeals considers an application for leave to appeal based on the merits of the particular defendant’s claims rather than by the issues presented, therefore an application for review must present the merits of the case in a comprehensive manner. *Id.*

62. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (internal citations omitted).

63. *Id.*

64. *Id.*

65. *Ross v. Moffitt*, 417 U.S. 600, 613 (1974).

66. *Konrad v. Jefferson Parish Council*, 520 So. 2d 393, 397 (1988) (citing *United*

doctrine of inherent power is consistent with Article V, § 10 of the Louisiana constitution, providing that the state's appellate courts have "supervisory jurisdiction over cases which arise within its circuit."<sup>67</sup> It is further consistent with Article I, § 19, which guarantees a defendant the right to judicial review if the defendant is not entitled to a direct appeal.<sup>68</sup>

## 2. INHERENT POWER TO APPOINT COUNSEL IN A FIRST-TIER DISCRETIONARY REVIEW

The courts should exercise their inherent power "sparingly and only to the extent necessary to insure judicial independence and integrity."<sup>69</sup> In Louisiana, courts have exercised their inherent power in requiring an attorney to represent an indigent defendant.<sup>70</sup> While whether to mandate appointment of counsel during a first-tier discretionary review is a "legislative choice," an appellate court may nevertheless exercise its inherent supervisory jurisdiction in deciding to provide counsel to a convicted indigent defendant seeking discretionary review from its court.<sup>71</sup>

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*States v. Hudson*, 11 U.S. 32 (1812); *McCulloch v. Maryland*, 17 U.S. 316 (1819) ("The doctrine [of inherent power] is a corollary of the concepts of separation of powers and of judicial independence, in that other branches of government cannot, by denying resources or authority to the court, prevent the courts from carrying out their constitutional responsibilities as an independent branch of government.").

67. LA. CONST. art. V, § 10.

68. LA. CONST. art. I, § 19.

69. *Konrad*, 520 So. 2d at 397 (citing *Imbornone v. Early*, 401 So. 2d 953 (La. 1981)).

70. *Id.* at 398 (citing *State v. Campbell*, 324 So. 2d 395 (La. 1975)) ("The court has the inherent power to appoint lawyers to represent indigents, and the duty of the lawyer to serve is both traditional and specific.").

71. *Ross v. Moffitt*, 417 U.S. 600, 619 (1974). Specifically, the Supreme Court stated the following:

We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review. Some States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time. North Carolina, for example, while it does not provide counsel to indigent defendants seeking discretionary review on appeal, does provide counsel for indigent prisoners in several situations where such appointments are not required by any constitutional decision of this Court. Our reading of the Fourteenth Amendment leaves these choices to the State, and respondent was denied no right secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review.

*Ross v. Moffitt*, 417 U.S. 600, 619 (1974).

An indigent may not be constitutionally entitled to counsel on application for review of a conviction of a misdemeanor. Yet the Fourteenth Amendment, read in conjunction with Article V, § 10 and Article I, § 19 of the Louisiana constitution, provides that it is within an appellate court's supervisory jurisdiction whether or not to appoint counsel.<sup>72</sup>

#### E. POLICY CONCERNS A COURT MAY CONSIDER WHEN DECIDING WHETHER TO APPOINT COUNSEL

Providing indigent defendants with public defenders to assist in an application for review promotes judicial efficiency because “a lawyer’s brief will frame the legal issues, cite applicable law and authorities, point out relevant facts from the record, and advocate for [the defendant].”<sup>73</sup> A brief containing the claims of the case in a logical manner helps the court of appeal decide whether to grant review based on the merits presented.<sup>74</sup> Even for an intelligent and educated layperson, “navigating the appellate process without a lawyer’s assistance is a perilous endeavor.”<sup>75</sup> Without the assistance of counsel in the preparation of a writ for review, a defendant runs the risk of having his application for review denied simply because the application was incomprehensible.<sup>76</sup>

On the other hand, “the State has a legitimate interest in reducing the workload of its judiciary”<sup>77</sup> and in “limiting the burden imposed on taxpayers.”<sup>78</sup> In *People v. Wong*, an indigent defendant was convicted of a nonmoving misdemeanor traffic offense.<sup>79</sup> The California superior court denied the defendant’s request for appointment of counsel to appeal the fine.<sup>80</sup> The court in *Wong* made its decision based on a concern for “insuring a

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72. *Ross v. Moffitt*, 417 U.S. 600, 619 (1974).

73. Original Brief of Respondent Vincent M. Castillo as Amici Curiae Supporting Respondent at 5, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/2/10), 2010 WL 1477654, at \*5.

74. *Id.*

75. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (“The services of a lawyer will for virtually ever layman be necessary to present an appeal in a form suitable for appellate consideration on the merits.”) (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963)).

76. *Id.*

77. *Id.* at 623.

78. *State v. Castillo*, 2009-KK-1358, p. 11 (La. 1/28/2011); 57 So. 3d 1012, 1018.

79. *People v. Wong*, 93 Cal. App. 3d 151 (Cal. Ct. App. 1979).

80. *Id.* at 153.

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speedy and reasoned determination of appeals . . . .”<sup>81</sup> Additionally, the court stated that providing state-funded counsel in every case of indigence would ultimately increase the workload of the judiciary because in the case of an indigent, there is no financial incentive not to appeal.<sup>82</sup> The court distinguished between a non-indigent defendant, who may not wish to incur court costs involved in an appeal of a nonmoving traffic violation, whereas an indigent defendant will appeal because there is no cost to him, thereby increasing the number of appeals of minor traffic convictions.<sup>83</sup>

The concurring opinion in *Wong* discussed the economic cost involved in appointed counsel for indigent defendants as a factor to consider when denying a defendant counsel:

The fee of a privately employed attorney to prosecute an appeal in the simplest criminal case would be several hundred dollars. The cost of personnel and overhead of the tax-supported agencies—i.e., the trial court which prepares the record, the prosecutor and staff, the public defender and staff, and the three-judge court with its staff—comes to thousands of dollars per appeal.<sup>84</sup>

Although providing an indigent defendant counsel would yield comprehensible applications, thereby allowing the appellate court to make a determination of whether to grant the request based on the merits of the case, the court must also “consider the impact on the justice system if [it] were to require appointed counsel in discretionary review of all misdemeanor convictions.”<sup>85</sup>

#### IV. THE LOUISIANA SUPREME COURT’S DECISION

The Louisiana Supreme Court justified its reversal of the court of appeal’s ruling on four bases and ultimately held that the State was not required to appoint counsel to an indigent defendant seeking assistance to prepare an application for a first-tier discretionary review after being convicted of misdemeanors and sentenced to imprisonment.<sup>86</sup> First, the court disagreed with

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81. *People v. Wong*, 93 Cal. App. 3d 151, 155 (Cal. Ct. App. 1979).

82. *Wong*, 93 Cal. App. 3d at 155.

83. *Id.*

84. *Id.*

85. *State v. Castillo*, 2009-KK-1358, p. 10 (La. 1/28/2011); 57 So. 3d 1012, 1018.

86. *State v. Castillo*, 2009-KK-1358, p. 10 (La. 1/28/2011); 57 So. 3d 1012, 1018.

the case law relied upon by the fifth circuit court of appeal.<sup>87</sup> Second, the court examined the relevant statutes and found that the Louisiana and federal Constitutions do not mandate appointed counsel.<sup>88</sup> Third, the court distinguished the facts of the present case from the facts of *Halbert*.<sup>89</sup> Fourth, the court briefly discussed policy reasons to deny a defendant state-appointed counsel based on an interest in maximizing judicial efficiency and limiting financial burdens.<sup>90</sup>

#### A. CASES RELIED UPON BY THE COURT OF APPEAL

The court disagreed with the court of appeal's reliance on the holdings set forth in *Williams* and *Mayer*, finding that the cases were factually irrelevant to the present case at hand.<sup>91</sup> The court found that the reliance on these two cases was misplaced because they addressed whether a defendant should be provided with transcripts of the trial proceedings rather than addressing the issue of a post-verdict request for appointed counsel.<sup>92</sup>

#### B. COURT'S INTERPRETATION OF RELEVANT STATUTES

The court concluded that neither the Louisiana constitution nor the federal Constitution mandate that the state appoint counsel to an indigent defendant seeking assistance to prepare an application for his first-tier discretionary review.<sup>93</sup> First, the court determined that a criminal defendant is afforded direct appeal only if his case is triable by a jury,<sup>94</sup> and a misdemeanor is triable by jury only if it is "punishable by more than six months."<sup>95</sup> Because the defendant in this case was charged with a misdemeanor and sentenced to imprisonment for less than six months, his case was not triable by jury, and, therefore, he was not entitled to a right of direct appeal.<sup>96</sup>

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87. *State v. Castillo*, 2009-KK-1358, p. 10 (La. 1/28/2011); 57 So. 3d 1013.

88. *Castillo*, 57 So. 3d at 1019.

89. *Id.* at 1016.

90. *Id.* at 1018.

91. *Id.* at 1013.

92. *Id.* The court does not provide further reasoning for why these two cases were misapplied. *Id.*

93. *Castillo*, 57 So. 3d at 1018-19 ("We find no mandate in Louisiana or United States Constitutions requiring the State to provide counsel in these cases.").

94. *Castillo*, 57 So. 3d at 1014 (citing LA. CONST. art V §, 10); *see also* LA. CODE. CRIM. PROC. ANN. art. 912.1(B)(1).

95. *Castillo*, 57 So. 3d at 1014 (citing LA. CODE. CRIM. PROC. ANN. art 779).

96. *Castillo*, 57 So. 3d at 1014.

The court rationalized that § 13 of the Louisiana constitution provides for pre-trial and trial proceedings, but not for post-conviction proceedings, as was the issue in the present case.<sup>97</sup> The court concluded that since the rights of the convicted appear sequentially after § 13, a defendant during post-conviction proceedings is not afforded the right to counsel.<sup>98</sup> The court acknowledged that the defendant was entitled to the right of judicial review of his convictions, yet the court held that he was not entitled to be represented by counsel in pursuit of the judicial review, based on the sequence of § 13 and § 19 of the Louisiana constitution.<sup>99</sup>

### C. REVIEW OF FEDERAL CASE LAW

Since the court found that the Louisiana constitution did not provide the defendant with the relief he sought, it analyzed relevant case law regarding an indigent defendant's discretionary review, specifically the holdings and rules set forth in *Halbert*, *Ross*, and *Douglas*.<sup>100</sup> First, the court addressed the holding of *Douglas*, stating that it was a "landmark decision [that] limit[ed] a state's discretion as to when state-provided counsel is required."<sup>101</sup> Although the court restated the holding in *Douglas*, that an indigent defendant is entitled to appointment of counsel in a first-tier appeal, the court interpreted the acknowledgement in *Douglas* of a state's discretion to appoint counsel as discretion not to appoint counsel as well.<sup>102</sup> The court quoted *Douglas*, "absolute equality is not required; lines can be and are drawn and we often sustain them," as a reason to limit a state's discretion as to the appointment of counsel on appeal.<sup>103</sup>

Regarding *Ross*, the court did not provide any additional

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97. *State v. Castillo*, 57 So. 3d 1012, 1016 (citing Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 60-61 (1974)).

98. *Id.*

99. *Id.* at 1014. Because right of counsel is addressed in § 13 and not in § 19, the court did not find the need to extend that right to judicial review. *Id.*

100. *Id.* at 1016-18; see *supra* Section II.B for the specific holdings of these cases.

101. *Castillo*, 57 So. 3d at 1016-18.

102. *Id.*

103. *Id.* (citing *Douglas v. California*, 372 U.S. 353, 356-57 (1963)). The court's reasoning here does not seem to be consistent with the holding of *Douglas*, as the Supreme Court in that case ruled that an indigent defendant was entitled to appointment of counsel as a right because the denial of counsel was unconstitutional. *Douglas*, 372 U.S. at 357. The court's interpretation of *Douglas* seems to be arbitrary.

analysis of the case; instead, it re-stated the holding by relying specifically on the Supreme Court's interpretation that the "Fourteenth Amendment 'does not require absolute equality or precisely equal advantages.'"<sup>104</sup> The court, however, disregarded the major distinction between the present case and *Ross*, that *Ross* involved a second-tier discretionary review whereas the case before them involved a first-tier discretionary review.<sup>105</sup>

Next, the court distinguished the facts and issues of the instant case from *Halbert*, the most recent of the three pertinent cases, for three reasons.<sup>106</sup> First, the court found that since the defendant in *Halbert* was convicted of a felony, there was "no compelling reason to extend the holding of *Halbert* to [the defendant's] discretionary review of his petty misdemeanor traffic convictions."<sup>107</sup> Next, the Court was unconvinced that the defendant appealing his misdemeanor traffic convictions was at a significant disadvantage to act as a self-representative because the arguments on appeal would not be as "factually and legally complex" as those presented in *Halbert*.<sup>108</sup> Lastly, the court concluded that the outcome of *Halbert* should not be applied in every case where an indigent defendant seeks discretionary review.<sup>109</sup> The court reasoned that the outcome should not be applied to an indigent defendant seeking post-conviction relief.<sup>110</sup>

#### D. STATE'S INTEREST IN LIMITING A POTENTIAL FINANCIAL BURDEN

In its conclusion, the court considered the state's interest in

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104. *State v. Castillo*, 2009-KK-1358, p. 10 (La. 1/28/2011); 57 So. 3d 1012, 1016 (citing *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974)).

105. *Id.* at 1016-17.

106. *Id.* at 1017.

107. *Id.*

108. *Id.* ("In this case . . . there is no evidence that Castillo or other indigent defendants convicted of petty misdemeanor offenses particularly traffic offenses, are similarly situated. There is no reason to assume that such offenders are incarcerated, illiterate, or otherwise disabled, and such serious underlying concerns seem misplaced when addressing traffic offenses.")

109. *Castillo*, 57 So. 3d. at 1018 ("*Halbert* should not be applied by courts to expand the scope of the right to court appointed counsel to *all* discretionary review."). The court discussed certain situations in which court-appointed counsel is inapplicable, such as frivolous appeals (*Smith v. Robbins*, 528 U.S. 259, 278 (2000)) and appeals seeking post-conviction collateral relief (*Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

110. *Castillo*, 57 So. 3d. at 1017 ("Even after *Halbert*, courts have not interpreted the *Halbert* decision to require counsel be appointed for an indigent defendant who seeks post-conviction collateral relief.")

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limiting the potential economic burden that taxpayers would endure.<sup>111</sup> The increased cost of reviewing applications for minor traffic convictions, as well as the “concern with ensuring a speedy and reasoned determination of appeals,” provided the court with what it believed was a legitimate reason to limit appointment of state-appointed counsel in cases involving review of petty misdemeanor traffic offenses.<sup>112</sup>

## V. CRITICAL ANALYSIS OF THE LOUISIANA SUPREME COURT’S DECISION

Despite acknowledging that the defendant was entitled to judicial review of his convictions, the Louisiana Supreme Court did not find that the defendant would be disadvantaged by having to present his claims without the guidance of counsel. The court came to this conclusion after an incorrect interpretation of the law set forth in controlling cases, ignoring the appellate court’s inherent supervisory jurisdiction to order the appointment of counsel, and putting financial liability before the defendant’s constitutional rights. The result-oriented opinion is the court’s attempt to minimize the caseload on the courts and limit the amount of money needed to fund programs that provide state-appointed counsel.

### A. MISAPPLIED CASE LAW

In an attempt to distinguish *Halbert*, the court focused on the fact that the defendant in *Halbert* was convicted of a felony rather than a misdemeanor like the defendant in the present case.<sup>113</sup> The Louisiana constitution makes no distinction between a felony and a misdemeanor when it guarantees the right to judicial review; thus, the fact that the defendant in *Halbert* was convicted of a felony is not dispositive of the issue.<sup>114</sup>

The Board contended that pursuant to § 13 of the Louisiana

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111. *State v. Castillo*, 57 So. 3d 1012, 1017. (“We find that Louisiana’s interest in limiting the burden imposed on taxpayers by state-paid counsel provides a rational basis for limiting access to state-provided counsel in discretionary review of traffic and petty misdemeanor convictions.”).

112. *Id.* (citing *People v. Wong*, 93 Cal.App.3d 151, 155 (1979)).

113. *Castillo*, 57 So. 3d. at 1017.

114. LA. CODE. CRIM. PROC. ANN. art. 912.1(C)(1) (2011), which governs a defendant’s right of appeal and application for review, provides, in pertinent part the following: “In all other cases not otherwise provided by law, the defendant has the right of judicial review by application to the court of appeal for a writ of review.”

constitution, a defendant sentenced to less than six months imprisonment is only afforded the opportunity to apply for discretionary review pursuant to Article I, § 19.<sup>115</sup> However, § 19 of the Louisiana constitution makes no explicit distinction between misdemeanors and felonies or between direct appeal of right and supervisory discretionary review when guaranteeing a defendant the right to judicial review.<sup>116</sup> Because there is no distinction between a felony and misdemeanor when providing a defendant with the right to judicial review, the court's attempt to distinguish the defendant's case from *Halbert* is erroneous. Regardless of whether an indigent defendant is charged with a misdemeanor or felony, the assistance of counsel in preparing a brief to the appellate court is invaluable because the brief will "define the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript."<sup>117</sup> Additionally, this benefit cannot be denied simply because a defendant is incapable of paying a private attorney for legal services.<sup>118</sup>

The second reason the court distinguished *Halbert* was based on an assumption that the defendant in the present case understood the legal issues involved in his claims.<sup>119</sup> The court acknowledged that the Supreme Court in *Halbert* was concerned that "appeals can involve complex and technical legal issues, and persons in Halbert's position (i.e. indigent defendants pursuing first-tier review) were 'particularly handicapped as self-representatives' due to incarceration, lack of education, learning disability or mental impairments,"<sup>120</sup> yet the Louisiana Supreme Court was unwilling to extend this reasoning to the defendant.<sup>121</sup> The court reasoned that there was no reason to assume that someone in the defendant's position would be "handicapped" because the "contentions and arguments on appeal [would] presumably be less factually and legally complex."<sup>122</sup>

The court's reasoning is flawed for two reasons. First, the court described the "position" that made the defendant in *Halbert*

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115. *State v. Castillo*, 57 So. 3d 1012, 1015.

116. LA. CONST. art. I, § 19.

117. *Swenson v. Bosler*, 386 U.S. 258, 259 (1967).

118. *Id.*

119. *Castillo*, 57 So. 3d at 1017.

120. *Id.* (citing *Halbert v. Michigan*, 545 U.S. 605, 620 (2005)).

121. *Castillo*, 57 So. 3d. at 1017.

122. *Id.*

“handicapped” as a self-representative as being an “indigent defendant pursuing first tier review,” which is precisely the position the defendant in the present case was situated in.<sup>123</sup> Although the court previously distinguished *Halbert* from the present case based on the type of conviction (misdemeanor or felony), this is not the reason the court provided as to why the defendant would be in a better position for self-representation.

Next, the court made a bold assumption that the “contentions and arguments” on appeal would be “less factually and legally complex” simply because the defendant was convicted of a misdemeanor rather than a felony.<sup>124</sup> The court’s holding implies that an indigent defendant convicted of a misdemeanor has a better comprehension of legal principles than an indigent defendant convicted of a felony. A majority of indigent defendants, regardless of whether they were convicted of a misdemeanor or a felony, fall within the lowest levels of literacy, and most have not completed high school, making the task of understanding the judicial system far more daunting.<sup>125</sup> The *pro se* appellate brief the defendant submitted is an example of the defendant’s lack of legal understanding, especially when compared to the amicus curiae brief submitted by the Law Clinic or the Board’s brief.<sup>126</sup> The defendant’s *pro se* brief consists of a restatement of the Sixth Amendment of the United States Constitution, a short argument section (containing no legal reasoning), and a short conclusion.<sup>127</sup> Whereas the Law Clinic’s brief, written only by law students, contains a detailed argument outlining the defendant’s constitutional right to counsel as well as the appellate court’s exercise of its supervisory jurisdiction.<sup>128</sup> This vast difference between the qualities of the two briefs

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123. *State v. Castillo*, 57 So. 3d 1012, 1017.

124. *Id.*

125. *Halbert*, 545 U.S. at 620-21 (internal citation omitted).

126. See Original Brief of Respondent Vincent Mark Castillo, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477656; see also Relator’s Original Brief on the Merits, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 12/15/09), 2009 WL 6352157 and Original Brief of Respondent Vincent M. Castillo as Amici Curiae Supporting Respondent, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477654.

127. See Original Brief of Respondent Vincent Mark Castillo, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477656.

128. Original Brief of Respondent Vincent M. Castillo as Amici Curiae Supporting Respondent, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477654.

indicates that the defendant lacked ordinary education and understanding of legal principles to prepare a brief that would properly present the merits of his claim.<sup>129</sup>

### B. INCONSISTENT APPLICATION OF THE APPELLATE COURT'S SUPERVISORY AUTHORITY TO ORDER APPOINTMENT OF COUNSEL

The court briefly mentioned that the appointment of counsel “is an exercise of legislative choice”<sup>130</sup> of the court of appeal, yet it ultimately reversed the court of appeal’s decision.<sup>131</sup> The court’s acknowledgment of the court of appeal’s supervisory discretion is inconsistent with the ultimate holding given by the court. Finding that the court of appeal was authorized under the Louisiana constitution to order the parish court to provide the defendant with counsel would have been the logical way of handling the issue, especially since the court acknowledged the supervisory jurisdiction. However, the omission of this logical conclusion furthers the argument that the opinion was result-oriented. The court’s reasoning is inconsistent with its holding, as it conceded the fact that the appellate court has the discretion to appoint counsel for an indigent defendant and acknowledged case law that recognizes that denying an indigent defendant counsel in a first-tier discretionary review is unconstitutional.

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129. For example, the defendant’s pro se brief quotes the Sixth Amendment of the Constitution of the United States in his summary of the argument section. This is compared to the amici curiae brief, which sets forth three reasons why the defendant requires assistance of counsel: First, the fifth circuit has the inherent power to appoint appellate counsel; second, the defendant is constitutionally entitled to counsel; and third, the fifth circuit’s order is a legitimate exercise of its supervisory jurisdiction. The argument section of the amici curiae brief continues with headings and subheadings setting forth these three arguments, which are supported by case law. The law student’s clear and logical argument section is compared to the defendant’s argument section, which states, “In the Relator’s attempts to show that Castillo is not entitled to counsel for review of misdemeanor convictions, it is argued that it is thusly because it is a petty matter that doesn’t warrant a jury trial.” See Original Brief of Respondent Vincent Mark Castillo, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477656; see also, Original Brief of Respondent Vincent M. Castillo as Amici Curiae Supporting Respondent, *State v. Castillo*, No. 09-KH-291 (La. App. 5 Cir. 2/4/10), 2010 WL 1477654.

130. This means the individual states may provide for appointment of counsel at the appellate level in the state constitution. *State v. Castillo*, 2009-KK-1358, p. 11 (La. 1/28/2011); 57 So. 3d 1012, 1018 (“Louisiana’s statutory scheme, which does not provide for court-appointed counsel in review of petty misdemeanor offenses, is an exercise of legislative choice based on difficult policy considerations and the allocation of scarce financial resources.”).

131. *Id.*

Ultimately, however, the court rationalized that denying an indigent defendant counsel for the application of a first-tier discretionary review is proper when doing so is in the interest of judicial efficiency and financial resources.<sup>132</sup>

### C. INTERESTS IN MAXIMIZING EFFICIENCY AND LIMITING FINANCIAL BURDENS

In finding that the state's "interest in limiting the burden imposed on taxpayers by state-paid counsel provides a rational basis for limited access to state-provided counsel in discretionary review of traffic and petty misdemeanor conviction[s]," the court relied on a decision coming from a California appellate court,<sup>133</sup> which is not binding in Louisiana. The court in *People v. Wong* denied the defendant's application for appointment of counsel for an appellate review of his fine because of the potential increase in applications for appeals regarding nonmoving traffic violations.<sup>134</sup>

The Louisiana Supreme Court relied on this decision's reasoning in concluding that it is a legitimate concern to ensure "speedy and reasoned determination of appeals."<sup>135</sup> The court also relied on the concurring opinion in *Wong* in assessing the economic cost of appointing state-paid counsel.<sup>136</sup> The concurring opinion noted that limiting the burden that would be imposed on Louisiana taxpayers and the "allocation of scarce financial resources" was a significant factor that should be considered when deciding whether to appoint counsel to an indigent defendant.<sup>137</sup>

The court's conclusion is misguided, as the law relied on is

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132. *State v. Castillo*, 57 So. 3d 1012, 1018.

133. *See People v. Wong*, 93 Cal. App. 3d 151, 155 (Cal. Ct. App. 1979) (holding that an indigent defendant convicted of nonmoving misdemeanor traffic violations is not constitutionally entitled to counsel at public expense on his appeal from the fine).

134. *Id.* The court held the following:

In the case of a nonindigent defendant, faced with a fine of the amount herein involved imposed for this kind of nonmoving traffic violation, there exists a strong incentive not to appeal unless the case involves some personal reason that makes the defendant willing to undergo the substantial expense of appeal for that highly personal reason. But in the case of an indigent defendant, that limiting incentive will be nonexistent if his appeal may be prosecuted without expense to him. The result, if human nature repeats itself, will be a major increase in the appeals, worthy or not, of minor traffic convictions.

*Id.*

135. *Castillo*, 57 So. 3d at 1018 (citing *Wong*, 93 Cal. App. 3d 151).

136. *Castillo*, 57 So. 3d. at 1018.

137. *Castillo*, 57 So. 3d. at 1018.

merely persuasive and not binding in Louisiana; moreover, the facts of the case are distinguishable because the defendant in that case was appealing the amount of a fine, rather than seeking to appeal his conviction and prison sentence.<sup>138</sup> Furthermore, the court incorrectly relied on *Wong* because California's indigent defense services are entirely funded at the county level, whereas Louisiana's funding comes from a combination of court costs and state funding.<sup>139</sup> Because California's funding is entirely based on local revenue, it was logical for the court in *Wong* to be concerned with limiting the burden on local taxpayers. That, however, is not entirely the case in Louisiana,<sup>140</sup> and, therefore, the weight given to this argument should be much less.

#### D. "NO SOUP (OR LAWYER) FOR YOU"<sup>141</sup>

An indigent defendant seeking discretionary review from an appellate court, without the assistance of counsel, is at a severe disadvantage because his application may be denied simply because he lacks the necessary legal understanding<sup>142</sup> to present the merits of his case in a manner suitable for the court of appeal to consider. Where the decision of the appellate court to grant discretionary review is based on the merits presented, and an indigent defendant is "without benefit of counsel, . . . an unconstitutional line has been drawn between rich and poor."<sup>143</sup>

The court should reassess its holding in this case because of the potential ramifications. An indigent defendant forced to submit an application for review without the assistance of counsel runs the risk of having his appeal denied based on presentation alone. This will likely lead to an increase in the number of prison inmates because when defendants are denied the right to effective counsel, it is the defendant who ultimately suffers.<sup>144</sup>

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138. *People v. Wong*, 93 Cal. App. 3d 151 (Cal. Ct. App. 1979)

139. National Committee on the Right to Counsel, *Facts and Figures*, NAT'L LEGAL AID & DEFENDER ASSOC., [http://www.nlada.org/Defender/Defender\\_Kit/facts](http://www.nlada.org/Defender/Defender_Kit/facts) (last visited Apr. 3, 2012).

140. See *infra* Section V.D.

141. Ben Cohen, *No Soup (Or Lawyer) For You*, SECOND CLASS JUSTICE (Feb. 11, 2011), <http://www.secondclassjustice.com/?p=240>. Cohen is currently of counsel for The Capital Appeals Project in Louisiana.

142. *Halbert v. Michigan*, 545 U.S. 605, 620-21 (2005) (internal citations omitted).

143. *Douglas v. California*, 372 U.S. 353, 357 (1963).

144. *Understand the Causes: Bad Lawyering*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Bad-Lawyering.php> (last visited May 24, 2012).

Louisiana is already in custody of 39,635 prison inmates, and this number is only on the rise.<sup>145</sup> Counsel for indigent defendants are appointed by the Louisiana Public Defender Board, which is a state agency within the office of the governor for the purpose of advocating for clients and providing “equal justice for all.”<sup>146</sup> Louisiana is the only state that receives funding for public defenders through a combination of state funding as well as local revenue,<sup>147</sup> making the program heavily dependent on taxpayers for funding.<sup>148</sup>

The Louisiana legislature should consider following Alabama and join the majority of states in implementing a state-administered right to counsel system. Alabama used to receive funding from both the state and the individual districts or counties; however, Alabama’s legislature recently voted to reconstruct the indigent defense system in “an attempt to provide accountability to the taxpayers of Alabama, while preserving the fairness of criminal proceedings in a way consistent with many of the American Bar Association’s *Ten Principles of a Public Delivery System*.”<sup>149</sup> State public defender programs function under the control of a central office rather than being administered at a local level and are funded by the state rather than through a combination of local and state funds.<sup>150</sup> This may

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145. State Briefing Book, LA. STATE DEPT. OF SAFETY & CORR., <http://www.corrections.state.la.us/quicklinks/statistics/statistics-briefing-book> (last visited Apr. 3, 2012).

146. *Louisiana Public Defender Act*, LA. PUB. DEFENDERS BD., <http://pdb.la.gov/Serving%20The%20Public/Legislation/Louisiana%20Public%20Defender%20Act.php> (last visited Apr. 3, 2012).

147. Louisiana is the only state that heavily relies on local revenue for its funding to supplement state funding; Alabama relied on similar funding in the past. *Gideon Reviewed: The State of the Nation 40 Years Later*, NAT’L LEGAL AID & DEFENDER ASSOC., [http://www.nlada.org/Defender/Defender\\_Gideon/Gideon\\_Reviewed](http://www.nlada.org/Defender/Defender_Gideon/Gideon_Reviewed) (last visited Apr. 3, 2012). Alabama’s Legislature has recently created a state-administered indigent defense system where additional revenue will no longer need to be funded by individual districts. David Carroll, *Gideon Alert: Alabama creates statewide indigent defense system*, NAT’L LEGAL AID & DEFENDER ASSOC. (June 9, 2011, 9:00 AM), <http://www.nlada.net/jsери/blog/gideon-alert-alabama-creates-statewide-indigent-defense-system>.

148. *Gideon Reviewed*, *supra* note 147 (“Local funding, which is primarily derived from property taxes, tends to constrict in inverse proportion to the demand for indigent defense services.”).

149. Carroll, *supra* note 147.

150. Lynn Langton & Donald Farole, Jr., Ph.D., *State Public Defender Programs*, BUREAU OF JUSTICE STATISTICS, p.1 (Sept. 16, 2010) <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>.

be an attempt to solve the court's concern by limiting the financial burden on Louisiana's taxpayers.

Alternatively, Louisiana could implement a statutory scheme that provides the right to counsel to an indigent defendant in a first-tier discretionary review or to at least provide appointment of counsel to assist an indigent defendant in preparing his application for review. This scheme would allow the appellate court to consider whether to grant or deny review based on merit, thus, avoiding the issue of unconstitutionality.<sup>151</sup> Furthermore, providing counsel to assist an indigent defendant seeking his first-tier discretionary review promotes a "speedy and reasoned determination of appeals" because the appellate courts will not have to spend as much time and money trying to interpret a poorly presented application for review.

## VI. CONCLUSION

In deciding this case, the Louisiana Supreme Court denied assistance of appointed counsel during the application stage of a discretionary review to an indigent defendant. The outcome of the decision, however, is inconsistent with the reasoning the court provides throughout the opinion; the court acknowledges but ultimately disregards the court of appeal's supervisory jurisdiction to appoint counsel. The fifth circuit court of appeal's order to the parish court was within its supervisory jurisdiction, yet the Louisiana Supreme Court adamantly reversed the order to achieve a financially prudent result. The court misapplied relevant case law, ignored the court of appeal's supervisory authority, and applied irrelevant and non-binding law in determining that the defendant should be denied his fundamental rights of Due Process and Equal Protection.

Skylar Barbosa

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151. While there are no states that appoint counsel for the assistance in preparing an application for appellate review, Ohio is an example of a state that appoints counsel to help indigents draft, research, and file an application for reopening a capital case. *State v. Lang*, 129 Ohio St. 3d 1493, No. 2007-1741, 954 N.E.2d 664 (granting appellant's motion for appointment of counsel to assist with the application to reopen the capital case); *see also* OHIO SUP. CT. PRAC. R. 19.3 (2010), providing "[i]f a capital appellant is unrepresented and is indigent, the Supreme Court will appoint the Ohio Public Defender or other counsel qualified pursuant to the Rules of Superintendence to represent the appellant."