1961

The Right to Counsel in Appellate Proceedings

Bennett Boskey

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/889

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The Right to Counsel  
In Appellate Proceedings  
Bennett Boskey*  

INTRODUCTION  
The phase of this Symposium allotted to me concerns the nature, scope and consequences of the indigent's right to counsel at appellate stages of criminal proceedings. After pronouncement of sentence, what further assistance of counsel is the indigent defendant entitled to? What repercussions does this have on the indigent's position, on the role of his counsel, on the actions of the courts? What problems and obligations does this impose upon the bar? And with the law's development in this area, what responsibilities fall upon the judiciary or upon the legislature for new measures to improve the administration of justice?  
The discussion of appellate proceedings will concentrate primarily on federal criminal cases, not state criminal cases. An extensive survey of the prevailing state practices, however useful this might be, is beyond the scope of the present undertaking. Statistically, of course, the aggregate of state criminal cases far exceeds the federal. But much is to be learned from the federal experience.¹  
Within the federal court system, which is at work throughout the entire country, there is a thrust toward national uniformity on the essentials with due allowance for local variation on the details. Certainly the federal experience amply illustrates the range of complex and challenging problems encountered. Moreover, in developing safeguards to protect the indigent's right to counsel, the  

*Member of the District of Columbia and New York Bars.  
The author has had the benefit of considerable information furnished to him by judges, court officials, colleagues at the bar, and others who have practical experience with, and an interest in, the subject matter. All this is gratefully acknowledged. At the same time it should be stressed that the uses to which such information has here been put, and the opinions and conclusions expressed, are solely the author's responsibility.  
¹ During the fiscal years 1959 and 1960 (ending June 30th of the respective calendar years), the number of defendants involved in the total criminal cases terminated in all federal district courts was about 34,000 per year. Of these, about 25% were indigent defendants represented by appointed counsel. The district court for the District of Columbia during these two fiscal years had about 1,500 defendants per year in its total criminal cases terminated, of whom about 45% were indigents represented by appointed counsel.
federal courts exercise a role of leadership which is effecting considerable reform in state court practices not merely through constitutional compulsion but also through the contagiousness of good example.

A word of explanation may also be in order concerning the District of Columbia's relative prominence in this discussion. It is not solely a consequence of propinquity. For among the federal judicial circuits, the District of Columbia, despite its small geographical area, has an abundance of experience with in forma pauperis appeals. This is primarily because of the double jurisdiction, federal and local, vested in federal courts in the District of Columbia; the Court of Appeals for the District of Columbia receives appeals involving not only federal crimes but also crimes which in other metropolitan areas would come within the state's exclusive jurisdiction.

Preceding contributions to this Symposium have described the developments in the direction of giving a meaningful assurance that defendants will not be prevented by indigence from receiving adequate assistance of counsel. The constitutional requirements, the statutory guides, and the applicable policy considerations—all of these have been discussed in the context of the recent awakening of the law throughout this area.

This process of growth, if it is to be orderly and effective, calls for continuing reappraisal of our systems of justice. Criminal jus-

2. During the fiscal year 1960 the Court of Appeals for the District of Columbia had a total of about 240 in forma pauperis appeals coming before it for consideration, of which about 180 arose on petitions for leave to appeal in forma pauperis after such leave had been denied by the district court (see note 26 infra) and about 60 were cases where such leave had been granted by the district court. Statistics for the Court of Appeals for the District of Columbia include occasional cases which come to that court for further review after decision in the municipal court of appeals, which has jurisdiction over appeals involving the relatively less serious offenses prosecuted in the municipal court. Compare Wildeblood v. United States, 284 F.2d 592 (D.C. Cir. 1960). Recent estimates have indicated that at least 6,000 of the defendants prosecuted annually in the "U.S. Branch" of the municipal court are indigents.

3. The Court of Appeals for the Ninth Circuit, which serves an extensive and populous area—an area which also includes the federal prisons at McNeil Island, Alcatraz and Terminal Island—likewise has a rather heavy load of in forma pauperis appellate matters. During the calendar year 1960, for example, about 150 petitions for leave to appeal in forma pauperis were received by the Court of Appeals for the Ninth Circuit in criminal matters (including habeas corpus), of which about two-thirds came from federal prisoners. The Second Circuit is another which has a large number of cases. The Fifth Circuit's appellate in forma pauperis business, though less voluminous, is nevertheless substantial; during fiscal 1960 it had 34 applications for leave to appeal in forma pauperis, plus 33 cases where such leave had been granted by the district court. The Sixth, Eighth, and Tenth Circuits had a roughly comparable volume; and the Fourth Circuit somewhat less. In contrast, the First and Third Circuits have a relatively small amount of in forma pauperis appellate business.
tice provides one of the tests by which a society is measured. Here
must be made many of the accommodations between the needs
and the power of society as a whole, on the one hand, and the
rights, the liberties and the privileges of its individual members,
on the other. Here must be hammered out the practical applica-
tions of some of the majestic concepts of human rights which are
at the core of our democratic ideal. And here too—by compari-
sion of the treatment accorded respectively to the rich and to the
poor—may be gauged the real extent of a society's commitment
to the principles of "equal justice under law."

I. THE NEED FOR APPELLATE COUNSEL

Since Johnson v. Zerbst it has been recognized that an indigent
defendant in the federal courts possesses an absolute right un-
der the sixth amendment to have counsel assigned to assist in his
defense. Unless such right has been intelligently and competently
waived, a federal trial or guilty plea which was not accompanied
by the assistance of counsel will be set aside as unlawful. In state
court trials—at least in a minority of the states—the rule has been
somewhat more flexible. The flexibility derives in part from Betts
v. Brady, where a divided Supreme Court held that the fourteenth
amendment does not require a state to assign counsel to an indigent
defendant in a non-capital felony case unless the surround-
ing circumstances show that absence of counsel resulted in sub-
stantial unfairness.

However, the scope of Betts v. Brady has been sharply curtailed
by a host of subsequent Supreme Court decisions, each finding
(in the particular circumstances) that absence of counsel did re-
sult in fundamental unfairness requiring the state conviction to be
set aside under the fourteenth amendment. A recent case indicates that the Supreme Court may now be prepared to recon-
sider Betts v. Brady itself, should occasion arise. The present pos-
ture of the law thus puts the state courts on notice: if they wish
any assurance that their judgments will be sustained against at-
tack, then the prudent course—for those states which have not
already done so—would be to adopt a practice coinciding with
the federal rule, and to appoint counsel for every indigent defend-
ant in the absence of intelligent waiver.

What has just been said is a distillation of decisions involving,
primarily, proceedings at the trial court stage. But these same de-
cisions have also furnished powerful impetus for a more careful

4. 304 U.S. 458 (1938).
scrutiny of the process of representation of indigents at the appellate level.

Once the trial has been concluded and sentence imposed, what need does the indigent have for additional help from counsel?

The answer is clear. Analyzing and presenting a case from an appellate standpoint normally calls particularly for the professional judgment of a lawyer, not merely a layman—even a layman having far better education and learning than most indigent defendants. Whether the judge's rulings on the admissibility of evidence were erroneous; whether the prosecutor's tactics were unfair; whether the judge's charge was incorrect or inadequate; whether the evidence was insufficient to support the verdict; whether errors which occurred were sufficiently important to be prejudicial; whether the trial was affected by some "plain error" which should be noticed on appeal even though no objection was made at the trial; whether an effort should be made to have some previous decision modified or overruled—these and other appellate issues are normally beyond the reach of whatever analytical skills an indigent defendant should be expected or presumed to possess.

The indigent is badly in need of counsel's help—first, in deciding whether the case contains something warranting an appeal, and then (assuming an appeal is lodged) in making a sufficient and professional appellate presentation of the issues. Though his case may be saturated with reversible error, this fact would often be of little avail to an indigent defendant if he were deprived of the assistance of counsel in connection with the appeal. Moreover, refusal to furnish counsel to indigent defendants at this critical stage of the proceedings would be countenancing serious discrimination between the rich and the poor when liberty is at stake.

II. DIRECT APPELLATE REVIEW

For federal trials, the indigent's right to assistance of counsel in connection with the presentation of his direct appeal to the court of appeals has been fully confirmed in principle. However, implementation may still be somewhat incomplete. And in any event, the present procedures are encumbered by some undesirable features which call for considerable improvement.

The principle was settled in 1957 by a short *per curiam* decision of the Supreme Court. This decision held that "a Court of Appeals must, under *Johnson v. Zerbst*, 304 U.S. 458, afford one

---

7. Rule 52(b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

who challenges that certification the aid of counsel unless he insists on being his own.' Whatever may have been the previous practice, the 1957 decision establishes—not merely as a matter of policy but as a constitutional command of the sixth amendment—that an indigent must be furnished counsel in connection with his presentation of a direct appeal from a federal criminal conviction.

Whether a similar constitutional obligation would be held imposed upon the states by the fourteenth amendment remains an open question. But in view of the shaky status of Betts v. Brady—even in the area to which it has now been restricted—and in view of Supreme Court decisions protecting indigents from other types of discriminatory action in connection with direct appeals from state court convictions, here again it would be prudent for the states (to the extent they may not already have done so) to adopt a practice which follows the federal rule.

On the understanding, then, that—at least in the federal courts—the indigent is entitled to the assistance of counsel in connection with the presentation of his direct appeal, will this be the same counsel who by assignment represented him at the trial? Here, variations in practice will be encountered.

In the District of Columbia, under prevailing usages in non-capital cases, the counsel whom the court assigned for the trial

9. This refers to a trial judge’s certification that the appeal is not taken in good faith. See note 22 infra and accompanying text.
11. It will be recalled that the Federal Rules of Criminal Procedure provide:

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

FED. R. CRIM. P. 44. (Emphasis added.)
12. Some indication of the Supreme Court’s views might have been forthcoming in Newsom v. Smyth, 365 U.S. 604 (1961); but after the oral argument a majority of the Justices held that the record did not properly present the federal question and hence that the writ of certiorari should be dismissed as improvidently granted.
13. See text accompanying notes 5 & 6 supra.
15. For prior rulings in some of the states, see Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS 128 (1955). For recent state court decisions sustaining the indigent’s right to be furnished the assistance of counsel on a direct appeal, see Petition of Carvelo, 352 P.2d 616 (Hawaii 1959); Petition of Scott, 352 P.2d 629 (Hawaii 1959); State ex rel. Grecco v. Allen Circuit Court, 238 Ind. 571, 153 N.E.2d 914 (1958); People v. Pitts, 6 N.Y.2d 288, 160 N.E.2d 523 (1959); People v. Kalan, 2 N.Y.2d 278, 140 N.E.2d 357 (1957); Hendrix v. Rhay, 156 Wash. 435, 353 P.2d 878 (1960).
ordinarily will not be the one to represent the indigent on the appeal, although there are exceptions. The assigned trial counsel usually is deemed to have completed his stint of public service when the defendant has been either acquitted or sentenced.\textsuperscript{16}

In other words, in the District of Columbia, although the assigned trial counsel would not be prevented or discouraged from continuing with the case if he were so disposed, acceptance of assignment as trial counsel normally is not considered to carry with it an obligation, express or implied, to take any steps in connection with the prosecution of an appeal—apart from the possible obligation to inform the defendant of the existence of his right of appeal.\textsuperscript{17} For non-capital cases this seems to be generally true throughout the country, both in federal and in state courts, in localities where the assigned counsel system is utilized; if there is an appeal, new counsel often (perhaps usually) is assigned.\textsuperscript{18} On the other hand, in localities where voluntary defender, public defender, or other types of defender systems are in operation, the defender's office is likely to continue its representation of the indigent through the appellate stage, at least if in the opinion of the

---

\textsuperscript{16} The Legal Aid Agency, created in 1960 by the District of Columbia Legal Aid Act, P.L. 86-531, 74 Stat. 229 (1960), is instructed by its statutory charter to provide legal representation for indigents in criminal proceedings, but not above the trial court level. See also S. Rep. No. 1517, 86th Cong., 2d Sess. 4 (1960). Accordingly, as this agency begins to fulfill the duties contemplated by the statute, its activities probably should not be expected to cause substantial changes in practices relating to representation at appellate stages.


\textsuperscript{18} \textit{SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, EQUAL JUSTICE FOR THE ACCUSED} 49, 50, 67 (1959). The Sixth Circuit almost invariably appoints different counsel, drawing them on a voluntary basis from the membership of the Cincinnati Bar Association. The Tenth Circuit usually appoints different counsel, and so does the Fourth Circuit in a majority of cases. The Fifth Circuit first makes inquiry of trial counsel as to whether he is in a position to continue his representation. The Ninth Circuit generally makes an attempt to appoint the same counsel who represented the appellant in the district court, but experience has indicated that the appointed trial counsel usually asks to be excused from serving on the appeal. The First Circuit prefers to appoint the same counsel if practicable. For purposes of prosecuting the applications for leave to appeal in forma pauperis, the Court of Appeals for the Eighth Circuit seeks to appoint the same counsel who represented the indigent in the trial court. See, e.g., \textit{Brown v. United States}, 277 F.2d 201, 202 (8th Cir. 1960); \textit{Warren v. United States}, 263 F.2d 263 (8th Cir. 1959); \textit{Weber v. United States}, 254 F.2d 713, 715 (8th Cir. 1958). If the indigent objects to this procedure, however, the court usually will appoint another attorney to assist the one who represented him at the trial. If leave to appeal in forma pauperis is then granted, the Eighth Circuit's practice is to appoint a new attorney unless the original attorney is willing to continue the representation, and experience has shown that the attorney who acted as assigned counsel at the trial ordinarily wishes to be relieved of further responsibility.
defender the available grounds for appeal will, or might reasonably be expected to, result in reversal or modification of the judgment.\textsuperscript{19} This of course still does not solve the problem of the cases in which the defender's opinion is that no appeal should be taken but the indigent nevertheless insists that he wishes to appeal.

During the period immediately after sentencing, opportunity arises for an unintended hiatus in furnishing effective assistance of counsel. The Federal Rules provide a 10-day period for filing notice of appeal.\textsuperscript{20} The notice of appeal is supposed to be accompanied by payment of a five-dollar fee to the district court\textsuperscript{21} unless, as will be the case with indigent defendants, a petition for leave to appeal in forma pauperis is filed. Such a petition in the first instance is passed upon by the trial judge. If he allows the appeal in forma pauperis, then normally a trial transcript can be obtained at government expense and the appeal will proceed to be heard and determined on the merits in the court of appeals without payment of costs and in a fashion not substantively different from a non-indigent's appeal in a comparable case. If, however, the trial judge denies leave to proceed in forma pauperis—either with or without making an express finding that the appeal is not taken in good faith or is frivolous—then his determination is subject to review in the appellate court.\textsuperscript{22}

In the District of Columbia a very large proportion of petitions to appeal in forma pauperis are presented to the trial judge by the defendant \textit{pro se}—ostensibly, and probably in fact, prepared without assistance of counsel. In other words, at this point the defendant's assigned trial counsel frequently has bowed out of the case, but no successor has been appointed to assist the defendant.


\textsuperscript{20} \textit{Fed. R. Crim. P.} 37. The 10-day requirement is mandatory and may not be waived. \textit{United States v. Robinson,} 361 U.S. 220 (1960). However, where the defendant is incarcerated, his delivery of the appeal papers to jail officials within the 10-day period may be deemed sufficient compliance, even though the jail officials who process the papers do not get them into the hands of the court until after the 10-day period has ended. Compare \textit{Hill v. United States,} 256 F.2d 957 (6th Cir. 1958); \textit{Blunt v. United States,} 244 F.2d 355 (D.C. Cir. 1957) and cases cited in note 14 supra.


\textsuperscript{22} \textit{Farley v. United States,} 354 U.S. 521 (1957); \textit{Johnson v. United States,} 352 U.S. 565 (1957); \textit{Wells v. United States,} 318 U.S. 257, 259–60 (1943). In other words, conclusive effect cannot be given to the trial court's adverse action even though the statute says that "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." \textit{28 U.S.C. § 1915(a)} (1958).
in connection with steps to effect an appeal. A sampling of experience in other federal districts indicates that this is by no means confined to the District of Columbia although the propriety of the hiatus thus created is questionable.

The Supreme Court has sought to make it abundantly clear that an indigent defendant is entitled to proceed on appeal in forma pauperis if he presents for consideration any issue which is "not plainly frivolous." As the matter was put in *Ellis v. United States*:

> The only statutory requirement for the allowance of an indigent's appeal is the applicant's "good faith." 28 U.S.C. § 1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Farley v. United States*, 354 U.S. 521. The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed.

The District of Columbia produces a rather large crop of cases in which the district judge denies leave to appeal in forma pauperis, the opposite result is later obtained in the court of appeals, and the appeal is accordingly heard and determined on the merits in forma pauperis. The need for so frequently overruling the trial judges may be attributable partly to the ineffectiveness of submissions made to them (especially by indigents acting *pro se*) of questions claimed worthy of appellate review. But the situation seems to reflect also a certain abiding resistance on the part of at least some trial judges against wholeheartedly implementing the Supreme Court's decisions—decisions which enunciate the rule that any "not plainly frivolous" issue entitles the indigent to proceed on appeal in forma pauperis without having to make "a preliminary showing of any particular degree of merit." Plainly the *Ellis* standard is taking a long time to obtain full acceptance from some

---


26. About 180 petitions for leave to appeal in forma pauperis in criminal matters (including habeas corpus) were filed in the Court of Appeals for the District of Columbia during the fiscal year 1960 after such leave had previously been denied by the district court. In 24 of these, the court of appeals granted leave; and 13 of the 24 petitions involved direct appeals from judgments of conviction. During the same period the Court of Appeals for the Fifth Circuit granted leave in seven cases (one direct appeal; six state court convictions) after denial by the district court, and the Court of Appeals for the Eighth Circuit granted leave in four cases after denial by the district court.
trial judges, and meanwhile the administration of justice suffers from considerable unnecessary delay and wasted effort. Responsibility for this difficulty must be shared by the Court of Appeals for the District of Columbia, which itself has departed from Ellis often enough to have precipitated repeated and unanimous per curiam summary reversals by the Supreme Court.27

In any event, let us assume that the indigent defendant, having been rebuffed by the trial judge, files with the court of appeals another pro se petition, requesting that his direct appeal from the judgment of conviction be allowed to proceed in forma pauperis.28 In the District of Columbia it has now become the uniform practice of the court of appeals in such cases to appoint counsel to represent the indigent, and to afford counsel the necessary time to prepare and file a memorandum in support of the petition.29 Comparable practices now prevail in the other federal circuits.30

The burden which this imposes upon the bar to render exten-


It is not intended to suggest that the Court of Appeals for the District of Columbia is the only circuit that has been experiencing some difficulty in adjusting itself to the Ellis standards. But the District of Columbia Circuit's failures to do so have been especially conspicuous—perhaps in part because of the heavy volume of cases there and partly because of the relative tenacity shown by District of Columbia appointed counsel in seeking Supreme Court review when the Court of Appeals has denied leave to appeal in forma pauperis.

28. By its rule 41(b), adopted October 15, 1959, the Court of Appeals for the District of Columbia has specified that applications for leave to appeal in forma pauperis "may be made to this Court within thirty days after the denial" by the district court. Other circuits do not appear to have adopted any rules seeking to control this time period.

29. See Willis v. United States, 362 U.S. 216 (1960). This practice has been instituted as a consequence of Johnson v. United States, 352 U.S. 565 (1957); see notes 8-11 supra and accompanying text, and Ellis v. United States, 356 U.S. 674 (1958). The Ellis case also states: "Normally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel." Id. at 675.

30. A variation sometimes followed in the Second Circuit is for the court of appeals to dismiss the motion for leave to proceed in forma pauperis with leave to renew in the appropriate district court, the district court being instructed thereupon to assign counsel and to furnish necessary portions of the trial transcript.

Some differences in practice exist between the circuits on whether the court of appeals takes the initiative in appointing counsel (assuming the indigent has not affirmatively indicated he wishes to act pro se) or instead waits until the indigent by letter or motion requests that counsel be appointed.
sive services without compensation will be indicated by the fact that during the fiscal years 1959 and 1960 the Court of Appeals for the District of Columbia issued orders appointing counsel in about 140 separate cases per year.\(^{31}\) Faced with a problem of this magnitude, the Court of Appeals for the District of Columbia nevertheless makes painstaking efforts to assure that the representation afforded will be able and effective; and it is evident that this requires considerable cooperation from the bar. The consensus is that during recent years the quality of the representation by assigned counsel in court of appeals cases in the District of Columbia has been, on the whole, exceptionally good. Reports from the other federal circuits indicate that, fortunately, a similar situation prevails in federal appellate proceedings elsewhere.

What are the principal problems confronting new counsel who by assignment from the court of appeals enters the case at this stage?

Under Ellis, counsel must ascertain whether the appeal involves issues "not plainly frivolous"; and "representation in the role of an advocate [not an amicus curiae] is required."\(^3\) But the new counsel is operating under serious handicaps. Normally he has no prior acquaintance with the trial proceedings and no personal knowledge of the case which would form a basis for sound judgment. Normally no transcript is in existence at this stage, so he cannot make his own independent analysis of the trial proceedings.

In order to investigate whether the appeal involves one or more "not plainly frivolous" issues, counsel may examine the formal documents on record in the trial court; he may interview his client; he may discuss the case with defendant's trial counsel and with the prosecutor; he may try to work out with the prosecutor an "agreed statement" of the case,\(^{33}\) despite the fact that he lacks

\(^{31}\) This figure includes not only direct appeals but also appeals in collateral attack and miscellaneous proceedings. However, it does not include those cases where counsel who represented the indigent in the court of appeals had been appointed by the district court. During the calendar year 1960 the Court of Appeals for the Tenth Circuit appointed counsel in about 35 cases. During the fiscal year 1960 the Court of Appeals for the Second Circuit appointed counsel in 22 cases, all but one coming through Legal Aid; the Court of Appeals for the Fourth Circuit appointed counsel in 27 cases; the Court of Appeals for the Fifth Circuit, in 12 cases; the Court of Appeals for the Sixth Circuit, in 18 cases; and the Court of Appeals for the Eighth Circuit, in six cases. It should also be noted that in an occasional case a person who qualifies as a pauper and hence is proceeding in forma pauperis will nevertheless appear in the court of appeals through retained counsel.


\(^{33}\) In the Ninth Circuit, after counsel has been appointed to prepare a statement of the anticipated grounds of the appeal, an attempt is always made to have counsel for both the appellant and the Government prepare a statement of the case; but if this cannot be done and the transcript is necessary, then it is ordered at government expense.
the information necessary to assure himself that the agreed state-
ment would be an accurate one; he may ask the official court re-
porter as a courtesy to read back certain limited portions of the re-
porter's shorthand notes (or all of them, if the trial was a short
one); and it has been suggested—though perhaps without too
much regard for the practicalities of some situations—that he may
even interview the trial judge and seek to inspect any notes which
the trial judge kept of the trial proceedings. Such efforts are apt
to be incredibly time-consuming and frustrating, and sometimes
may arouse in counsel a feeling that he would be well advised to
avoid future assignments of appellate in forma pauperis work.
But worse than that, in many instances these efforts will be wholly
unsatisfactory as a means of safeguarding the defendant's rights.

Recollections and notes of trial counsel and of others are apt
to be faulty and incomplete. Frequently, issues simply cannot even
be seen—let alone assessed—without reading an accurate tran-
script. Particularly is this true of questions relating to evidence or
to the judge's charge; and it may also apply to many other types of
questions. Moreover, the actual record (if appellate counsel could
have it to inspect) might disclose issues substantial enough to con-
stitute probable or possible "plain error," even though trial coun-
sel was not aware of their existence; and the indigent should have
the same opportunity as the wealthy to urge that plain error should
be noticed on appeal. In short, a conscientious counsel freshly en-
tering the case at the appellate stage normally is likely to conclude
that a full or partial transcript of the trial proceedings will be in-
dispensable if the requisite "dependable record" is to be ob-
tained as a basis for evaluating the case.

If this is counsel's conclusion in a District of Columbia case,
then his struggle is on to obtain the transcript at government ex-
 pense. In his memorandum in support of the petition for leave to
proceed in forma pauperis, counsel will state what he thinks the
"not plainly frivolous" issues are, and also what he thinks they
might turn out to be if he could check them against the still non-
existent transcript. He will be well advised also to set forth his
grounds for concluding that, without an opportunity to inspect a
transcript, he cannot make a complete or even an adequate pro-
 fessional identification, evaluation and presentation of all the pos-
sible appellate issues in the case. He will be well advised also to set forth his
grounds for concluding that, without an opportunity to inspect a
transcript, he cannot make a complete or even an adequate pro-
 fessional identification, evaluation and presentation of all the pos-
sible appellate issues in the case. This, he would urge, is what the
indigent should be entitled to—it being exactly what a non-indi-
gent in a comparable case would be able to obtain by advancing
the funds necessary to pay for typing up the transcript.

After receiving the government's response and any subse-

35. In far too many cases the United States Attorney's Office in the
quent reply from the indigent's counsel, the court of appeals may
decide that the appeal does involve issues not plainly frivolous and
hence that leave should be granted to proceed on appeal in forma
pauperis. This means that, apart from some further problems of
delay and loss of time which seem almost inescapably inherent in
the procedure governing in forma pauperis proceedings, the case
will proceed to be heard and determined on the merits in a fashion
not substantively different from a non-indigent's criminal appeal.
On the other hand the court of appeals may decide to deny leave
to appeal in forma pauperis, without having even ordered that a
complete or partial transcript be furnished; in this event the possi-
bility remains of seeking Supreme Court review by certiorari. Or
the court of appeals may take an intermediate position, ordering
the transcript furnished at government expense but holding in
abeyance, until after the transcript becomes available, the question
of allowing the appeal to proceed in forma pauperis. One con-
sequence of following this last alternative is to stimulate yet an-
other round of legal memoranda after the transcript is typed up,
at a stage when the argument still will be addressed not to hearing
and determining the appeal on the merits but rather to the pre-
liminary question whether the appeal should be allowed to be
heard and determined on the merits.

A word should also be said about cases where appointed coun-
sel concludes that the appeal raises no issue which he can con-
scientiously argue to be "not plainly frivolous." If he comes to this
conclusion—which of course he should not do lightly—then

District of Columbia has opposed the allowance of leave to appeal in forma
pauperis even when the existence of one or more "not plainly frivolous" issues would appear to be clear beyond debate. Compare Jones v. United
States, 266 F.2d 924, 926 (D.C. Cir. 1959). The fair administration of just-

ice would be well served if this attitude were to change. The United States
is a sovereignty whose interest in a criminal prosecution "is not that it shall
win a case, but that justice shall be done." Berger v. United States, 295
U.S. 78, 88 (1935). The Government should show some enthusiasm for
safeguarding, rather than frustrating, the rights of indigent defendants to
obtain the same appellate review on the merits that nonindigent appellants
would be able to obtain.

37. Compare Brown v. United States, 277 F.2d 201 (8th Cir. 1960). If
the issues sought to be raised in the court of appeals go well beyond those
which were presented to the district court at the time the district court
denied leave to appeal in forma pauperis, a further alternative is for
the court of appeals to remand the matter for a fresh consideration by
the district court as to whether the appeal in forma pauperis should be
allowed. See Gilbert v. United States, 278 F.2d 61 (9th Cir. 1960). Whate-
ever its theoretical attractiveness, this alternative opens up the possibilities
of additional delay and waste motion of considerable magnitude.
38. At the court's direction the clerk of the Court of Appeals for the
District of Columbia currently furnishes to appointed counsel a statement
which includes the following admonition: "Counsel should not take a firm
position that the appeal is without merit until he has made a careful ex-
ploration of both the facts and the law of the matter."
counsel may request leave of the court of appeals to withdraw. Although appointed to serve in the role of an advocate, he is not required to put himself in the position of supporting the substantiality of some issue which he believes to be wholly frivolous.

When such a request to withdraw is made in the District of Columbia, normally counsel will be permitted to withdraw, after making a showing to the court of appeals concerning his diligence in the matter. Moreover, with rare exceptions, the court of appeals will decline to appoint further counsel for the defendant, taking the practical view that the duty to furnish effective assistance of counsel in connection with the appeal has been adequately fulfilled when one capable member of the bar has made a conscientious examination into the possible appellate merits of the case; neither the sixth amendment nor pertinent policy considerations would require the appointment of successor counsel in such

39. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied.


40. In the District of Columbia this is done by way of a motion by counsel, which, prior to being accepted for filing, is examined by the chief judge to ascertain that it contains no matter "adverse to the appellant's interests." During the fiscal years 1959 and 1960 there were about 30 withdrawals per year in cases where appointed counsel came to a belief that the appeal was frivolous.

41. Two instances of the rare exceptions may be illustrative:

(1) In Williams v. United States, 283 F.2d 382 (D.C. Cir. 1960), the court of appeals appointed successor counsel because unusual circumstances recited in the accompanying opinion left the court "without sufficient assurance" that the first counsel it appointed had been sufficiently diligent in studying or investigating the case. Compare Evans v. United States, 277 F.2d 354 n.1 (D.C. Cir. 1960).

(2) In Kelley v. United States, 221 F.2d 822 (D.C. Cir. 1954), the trial judge had actually granted leave to appeal in forma pauperis and had appointed new counsel (other than the trial counsel) to represent the defendant on appeal. Such new counsel did not take steps to have a transcript prepared, but he nevertheless sought leave from the court of appeals to withdraw, stating that after consideration of all the facts in the case he saw no ground on which the judgment could be reversed on appeal. The court of appeals allowed him to withdraw but appointed successor counsel. A transcript was then obtained by successor counsel at government expense, the appeal was briefed and argued, and the conviction was reversed. Indeed, the defendant's subsequent conviction at a second trial was likewise reversed, on an important question of evidence which the transcript showed had initially arisen at the first trial; having been disclosed by the transcript, the question had been briefed and argued on the first appeal, although it was left undecided by the court of appeals at that time. See Kelley v. United States, 236 F.2d 746, 748 (D.C. Cir. 1956). Thus the case provides a practical demonstration of how important it may be to get the transcript.
circumstances. But the withdrawal of counsel does not relieve the court of appeals of responsibility to make its own independent examination of the case in the light of whatever contentions the indigent himself may choose to advance. 42

In two types of situations consideration must be given to the possibility of seeking Supreme Court review. One is where the appeal has been allowed in forma pauperis, and the court of appeals has heard and determined the appeal on the merits but with a result adverse to the indigent's contentions. The other is where the court of appeals, after whatever intermediate steps may have occurred in the particular case, simply denies leave to appeal in forma pauperis, and thus refuses to permit the appeal to be heard and determined on the merits. In both situations certiorari is an available remedy within the Supreme Court's discretion, and the question naturally arises as to the indigent's right to counsel at this stage.

The usage which prevails in the District of Columbia, at least in non-capital cases, is that appointed counsel is under no obligation, express or implied, to continue to represent the indigent after final action has been taken in the case by the court of appeals. In the other federal circuits the custom appears to be similar. There may be occasional cases where, for special reasons, a court of appeals will appoint counsel for the purpose of preparing and filing a petition for certiorari, or will encourage previously appointed counsel to seek to carry the case up to the Supreme Court. 43 But normally no obligation is deemed to rest upon counsel to do so; he is free to follow his own inclination in the matter.

Counsel's inclination to prepare a petition for certiorari may sometimes be fortified if he personally feels that the case does involve some important question of principle which the Supreme Court ought to review. In a significant number of cases the fact is that the counsel who represents the indigent in the court of appeals will continue with the case and file a petition for certiorari. But this still leaves a large percentage of indigent appellants—probably the bulk of them 44—without the assistance of counsel

42. See, e.g., United States v. Pravato, 282 F.2d 587, 591 (2d Cir. 1960); Porter v. United States, 272 F.2d 695 (5th Cir. 1959). In the District of Columbia, when the court of appeals permits appointed counsel to withdraw, the indigent is allowed 30 days to file his own brief; he is notified by the clerk that it is not the practice of the court, in the circumstances, to appoint successive counsel and that he may either prepare his own brief or retain counsel to prepare it.


44. Mr. Justice Stewart has stated that “in less than 15% of the in forma pauperis cases are the petitioners represented by counsel at the time the Court decides whether to review their cases.” Stewart, The Indigent
in deciding whether to file a petition for certiorari and in preparing the petition for certiorari if decision is reached to file one.

Here is a problem—and one with important constitutional and policy implications—which thus far has suffered from woeful lack of attention. As already noted, identifying 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.

Certiorari practice constitutes a highly specialized aspect of appellate work. The factors which the Supreme Court deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge and experience of an indigent appellant, unassisted by counsel. Whether there is a conflict of decisions between the different federal circuits; whether the court of appeals has departed from prior decisions of the Supreme Court; whether there is involved an important question of law which has not been but ought to be settled by the Supreme Court; whether the court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court’s supervisory authority—these are questions on which the need for assistance of counsel is especially acute. The point is not that every indigent ought necessarily to have a petition for certiorari filed on his behalf as a part of the process of direct review of his conviction. But indigence should not deprive him of the assistance of counsel, either in determining whether there is justification for filing a petition for certiorari or in preparing any requisite submissions to the Supreme Court.

Yet this is exactly the stage in the direct appellate review of a federal criminal proceeding where the largest counsel gap now exists. After certiorari is granted the situation is different; the Supreme Court’s practice has long been to appoint counsel for otherwise unrepresented indigents whose cases are to be briefed and argued orally before the Court. But no instance has been found where the Supreme Court appointed counsel before the grant or denial of certiorari, so as to afford the unrepresented indigent effective assistance of counsel in the preparation of either the petition for certiorari itself or a memorandum to support it.

As has been shown, the Supreme Court’s rulings establish

---

Defendant and the Supreme Court of the United States, 58 Legal Aid Rev. 3, 7 (Spring 1960). This figure includes cases coming from state as well as federal courts, and cases involving collateral attack as well as direct review.

45. See text accompanying note 7 supra.
unequivocally that the sixth amendment requires the courts of appeals to furnish the aid of counsel to an indigent, "unless he insists on being his own," in connection with the presentation of his direct appeal from a federal conviction; and this must be done prior to an adverse decision by a court of appeals denying leave to appeal in forma pauperis. The whole force of such rulings seems equally applicable to the question whether the Supreme Court itself has a comparable obligation to furnish counsel prior to denying certiorari in any case in which an indigent unrepresented by counsel is seeking direct review of a federal conviction.

Thus it is fair to ask whether the Supreme Court—which has been so diligent in formulating the high standards to be applied by the federal district courts and courts of appeals—has not overlooked the necessity of modifying its own practice to bring it into conformity with the standards enunciated. What the sixth amendment requires of the courts of appeals, it should likewise require of the Supreme Court. The fact that, without ever adjudicating the matter, the Supreme Court has been following an opposite practice does not make that practice correct or even constitutional.

Perhaps reform could be considered along two lines with respect to cases involving direct review of federal convictions. First, it might be well to encourage in the different federal circuits the development of a new tradition—so that, at least in the direct appeal cases, counsel appointed to represent an indigent in the court of appeals would be deemed under an obligation to advise the indigent with respect to the merits of filing a petition for certiorari. If such counsel were unwilling to continue with the case at that stage he might be required to so inform the court of appeals promptly, and the court of appeals could then consider whether to appoint new counsel for the purpose. Second—and in any event—the Supreme Court could modify its own practices in cases in which direct review of a federal criminal conviction is sought on certiorari. The Supreme Court could institute the practice of normally appointing counsel whenever an unrepresented indigent files a petition for certiorari or requests the Supreme Court to furnish him counsel in connection with preparing a petition for certiorari. If the indigent is to have the full benefit of the guiding hand of counsel, such appointment must be made before the petition for certiorari is acted upon by the Supreme Court.48 The

47. See notes 8–11, 25–27 supra and accompanying text.
48. Some practical problems as to time arise in this connection. The Federal Rules of Criminal Procedure provide that petition for certiorari "may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the [Supreme] Court or a justice thereof for cause shown may fix within the 30-day period following judgment." Fed. R. Crim. P. 37(b)(2). It seems unlikely that new counsel, if
appointed counsel would not be helpless if he concluded—as might often be the case—that no tenable ground existed for seeking certiorari. Using the analogy of the practice which now prevails in the court of appeals, counsel in that event could seek leave to withdraw.

III. COLLATERAL ATTACK PROCEEDINGS

So far this Article has dealt primarily with the direct appellate review of criminal convictions. Collateral attack proceedings which involve the post-conviction remedies—whether under title 28, section 2255 of the United States Code, by habeas corpus, or by writ of error coram nobis—are affected by additional considerations.

In a system of justice which is meticulous in affording effective assistance of counsel to indigents not only at the trial stage but also continuously up through the entire appellate process on direct review, perhaps at least some reasonable degree of selectivity should be exercised by the courts in deciding whether counsel ought to be appointed in collateral attack proceedings. To date the decisions have not imposed upon the federal district courts an absolute duty to appoint counsel whenever an indigent files papers collaterally attacking a federal conviction. Available information indicates a tendency on the part of federal district judges to look for the existence of at least some glimmer of a substantial question, or for a question which might possibly warrant a hearing, before appointing counsel to represent indigents in collateral attack proceedings. In other words, if on the face of the papers

appointed by the Supreme Court, would ordinarily be appointed much before the end of the initial 30-day period. Various ways of dealing with this problem could be considered, including: automatically granting a 30-day extension in cases where the Supreme Court appointed new counsel; allowing a comprehensive memorandum in support of the petition for certiorari to be submitted by new counsel subsequent to the actual filing of the petition for certiorari; modifying Rule 37(b)(2) to meet the practicalities of the situation.

49. See Douglas, The Supreme Court and Its Case Load, 45 CORNELL L.Q. 401, 406–08 (1960), stating that although the claims made by in forma pauperis petitions for certiorari “are often fantastic” and “are for the most part frivolous,” nevertheless a number of significant criminal cases have reached the Supreme Court by this route; and that over a 21-year period (1938–1958) less than 4% of the petitions for certiorari in forma pauperis have been granted. This figure includes collateral attack as well as direct review cases, and state as well as federal convictions.

50. See notes 38–42 supra and accompanying text.

51. See, e.g., United States v. Keller, 284 F.2d 800, 801 (3d Cir. 1960); Clatterbuck v. United States, 266 F.2d 893 (D.C. Cir. 1958); Vinson v. United States, 235 F.2d 120 (6th Cir. 1956); Richardson v. United States, 199 F.2d 333 (10th Cir. 1952); Hodge v. Huff, 140 F.2d 686 (D.C. Cir. 1944).
the district judge thinks the collateral attack is utterly and hopelessly frivolous—a conclusion which often will be wholly justified—then he probably will not appoint counsel to represent the indigent.\textsuperscript{52}

It would exceed the limits of this undertaking to canvass here the full group of subjects open to inquiry in collateral attack proceedings challenging the validity of federal convictions. But one subject is especially germane. Is collateral attack available to an indigent if he shows that, although at the trial stage he was represented by counsel, he was denied the assistance of counsel in connection with a direct appeal? \textit{Johnson v. Zerbst}, of course, established that deprivation of counsel at the trial court level made a federal conviction voidable in a collateral attack proceeding.\textsuperscript{53} There is a parallel necessity for allowing some form of collateral attack when denial of assistance of counsel has occurred in connection with the appellate stage of a federal conviction.\textsuperscript{54} In view of the failure to afford the indigent the kind of direct appellate review that the Constitution entitled him to, the appellate merits of his case should not be foreclosed from further examination. The appropriate remedy is not necessarily to set aside the conviction but, where possible, to have some kind of a belated appeal docketed and heard after the indigent has obtained the benefit of effective assistance of counsel in connection with the appeal.\textsuperscript{55}

When an appeal is sought to be taken in a proceeding involving collateral attack on a federal conviction, there are the further questions whether counsel should be, and will be, furnished by the court of appeals to unrepresented indigents. As yet no ruling has come from the Supreme Court on this matter,\textsuperscript{56} and the various circuits have been developing their own practices in a pragmatic fashion. None of the circuits appears to regard the appointment of counsel as mandatory in such cases. In the District of Columbia

\textsuperscript{52} On the other hand, the test stated in DeMaris v. United States, 187 F. Supp. 273, 275 (S.D. Ind. 1960)—that in a habeas corpus proceeding challenging a federal conviction there must be a "showing of compelling and meritorious grounds for the appointment of counsel"—seems somewhat too rigorous, and in any event probably is not typical of the practice prevailing in many federal districts.

\textsuperscript{53} See text accompanying note 4 supra.

\textsuperscript{54} The contrary intimation in Simmons v. United States, 230 F.2d 73 (10th Cir. 1956), \textit{cert. denied}, 351 U.S. 927 (1956), probably has no continuing vitality, since it antedates the ruling in \textit{Johnson v. United States}, 352 U.S. 565 (1957) that an indigent has a constitutional right to assistance of counsel in connection with the presentation of a direct appeal from a federal conviction. See notes 8–11 supra and accompanying text.

\textsuperscript{55} The procedure for a belated appeal might be somewhat akin to that adopted by Illinois following the decision in Griffin v. Illinois, 351 U.S. 12 (1956).

\textsuperscript{56} Analysis of the record in Smith v. United States, 361 U.S. 13 (1959), leaves that decision inconclusive on this point.
the court of appeals has been following a policy of appointing
counsel for collateral attack appeals only in rare instances, ap-
parently requiring first that there be a rather heavy showing of
substantiality. In some circuits the proportion of cases in which
counsel is appointed may tend to run considerably higher. In
general, the practice of most of the courts of appeals appears to
remain fairly flexible, depending on the particular circumstances
of the case.

CONCLUDING RECOMMENDATIONS

Notable progress has been achieved during the past few years
toward assuring that indigents receive more effective assistance of
counsel in appellate proceedings. Our institutions will be strength-
ened if such progress can continue, not only in the federal courts
but throughout the state courts as well.

Several recommendations are offered in the hope of accelerat-
ing the process.

1. The entire subject would benefit from more extensive at-
tention and more direct discussion in the context of the wide-
spread efforts being made to improve the administration of jus-
tice. The Judicial Conference of the United States, the judicial
conferences of the respective circuits, and also the circuit judicial
councils, provide some of the useful opportunities for this within
the federal court system; and it is already planned that certain

57. For example, during the fiscal year 1960 there were 75 unrepresent-
ed indigents who filed applications in the Court of Appeals for the District
of Columbia for leave to appeal in forma pauperis in § 2255 proceedings;
for these, the Court of Appeals appointed counsel in only seven cases. Com-
pare Antipas v. United States, 289 F.2d 884 (D.C. Cir. 1961). During the
calendar year 1960, the Court of Appeals for the Ninth Circuit had 53 pe-
titions for leave to appeal in forma pauperis in 28 U.S.C. § 2255 (and coram
nobis) cases; about 80% were accompanied by requests for counsel; coun-
sel was appointed by the Court of Appeals in only six of the section 2255
cases. The Court of Appeals for the Fifth Circuit usually has its clerk in-
form indigents that the court does not require appointment of counsel in
such cases. The Court of Appeals for the Eighth Circuit appoints counsel in
such cases only where the court deems this necessary.

58. The Fourth, Sixth and Tenth Circuits seem to follow about the same
practice in the collateral attack cases as they do on direct appeal. See, e.g.,
Martin v. United States, 273 F.2d 775 (10th Cir. 1960).

59. Compare Davis v. United States, 214 F.2d 594, 596 (7th Cir. 1954)
with United States v. Davis, 233 F.2d 646, 647 (7th Cir. 1956). See also
United States v. Valentino, 283 F.2d 634 (2d Cir. 1960); United States v.
Visconti, 261 F.2d 215 (2d Cir. 1958).

In federal habeas corpus proceedings involving collateral attack on state
convictions, the Fourth Circuit recently has stated that if no certificate of
probable cause has been granted, the court of appeals does not intend to
appoint an attorney where the papers "show no shred of merit." Burgess
v. Warden, 284 F.2d 486 (4th Cir. 1960). Compare Schlette v. Califor-
nia, 284 F.2d 827, 836 (9th Cir. 1960); Armstrong v. Bannan, 272 F.2d
577 (6th Cir. 1959); Williams v. Heinze, 271 F.2d 308 (9th Cir. 1959).
aspects of the subject will be considered by the Advisory Com-
mittee on Appellate Rules. Comparable machinery is available in a
number of the states. Moreover, many of these matters are more
amenable to wise solutions if they are examined as general prob-
lems of practice rather than as an offshoot of one or two highly
particularized cases.

2. Fresh consideration should be given to affording to indi-
gents an automatic right of appeal on direct review of a criminal
conviction. The present procedure in the federal courts is degener-
ating into an excessively time-consuming, inefficient and fragment-
ed appellate process. It wastes much valuable time of the judges
and other court officials; it clogs up the judicial process; and it
puts in forma pauperis proceedings through a tortuous sort of ob-
stacle course which, in the end, leaves many lingering doubts as
to whether justice has actually been done in particular cases. In
return for the relatively small amount of money this saves the
government by avoiding the need to pay for transcripts on truly
frivolous direct appeals, it must be exacting a terrible toll of other
costs.

3. Special efforts should promptly be made to close the ex-
isting counsel gaps in proceedings involving direct review. In the
federal courts these now seem to be principally two. The first is
after sentence has been imposed and before any appeal papers
have been docketed with the court of appeals. Often, as has been
noted, the indigent defendant is at this point left to his own de-
vices, unassisted by counsel, to prepare his own petition to the
trial judge for leave to appeal in forma pauperis. So long as the
system requires that leave to appeal be granted to an indigent
before he may obtain a direct appellate review of the merits of his
conviction, he should be furnished the assistance of counsel in
each of the steps by which such leave is to be sought. The adverse
consequences of this first gap are at least partially offset by what
has now become the virtually universal practice in the courts of
appeals, on direct appeals, of furnishing counsel to those unrep-
resented indigents who renew in the court of appeals their appli-
cations for leave to appeal in forma pauperis. However, no com-
parable offsetting factors minimize the unfortunate consequences
of the second counsel gap, which occurs in relation to the problem
of petitioning for certiorari to the Supreme Court. Here the de-
sirable reforms can be accomplished either by a change in the Su-
preme Court’s own practice, or by some co-operative action be-
tween the Supreme Court and the courts of appeals, or by both.
The objective to be assured is that on direct review the indigent
defendant will not by his poverty be deprived of assistance of
counsel in connection with petitioning for certiorari.