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Constitutional Law: Right to Counsel on Collateral Attack

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quirements. It remains to be seen whether the states will be able to draft statutes which will comply with the safeguards the Court sets forth.

Constitutional Law: Right to Counsel on Collateral Attack

Defendant, one year after being sentenced to prison for embezzlement, collaterally attacked his conviction on the ground that his plea of guilty had been illegally coerced. Annexed to his motion to vacate sentence was a statement of his indigency, and a request to be provided counsel at the hearing on his motion. The lower court denied both a hearing on the motion to vacate and the request for counsel. On appeal the Supreme Court of Alaska reversed and remanded, *holding* that an indigent has the constitutional right to counsel at a hearing on his collateral attack motion. *Nichols v. State*, 425 P.2d 247 (Alas. 1967).

Although the Constitution guarantees every individual accused of a crime the right to a fair trial, it has been held that this guarantee does not afford a convicted person the right to appellate review.[1] However, in the Anglo-American legal system, direct appellate review of criminal convictions has traditionally been recognized and provided by both the states and the federal courts.[2] Furthermore, the Supreme Court has held that when the state provides such an appellate review procedure, the state must also furnish counsel for any indigent on direct appeal.[3] On such direct appeal any error in the trial record may be raised.

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1. District of Columbia v. Clawans, 300 U.S. 617 (1937); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) (no constitutional right to appellate review if due process provided at trial); *Ex parte* Abdu, 247 U.S. 27 (1918) (appellate review not a necessary part of a legal system); Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1936); United States v. Marrone, 172 F. Supp. 368 (D. Alas. 1959).

2. John v. Paullin, 231 U.S. 583 (1913). The power rests with each state to prescribe the jurisdiction of its appellate courts. State *ex rel.* Cartmel v. Aetna Cas. & Sur. Co., 84 Fla. 123, 92 So. 871 (1922) (a state may make its own rules of criminal procedure); People v. Dunn, 157 N.Y. 528, 52 N.E. 572 (1899); Sullivan v. Haug, 82 Mich. 548, 46 N.W. 795 (1890). *See also* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

3. Douglas v. California, 372 U.S. 353 (1963). The federal courts have made appointment of counsel on appeal mandatory for some time. Johnson v. United States, 352 U.S. 565 (1957). *Accord*, Ridge, *The Indigent Defendant*, 24 F.R.D. 241 (1960). *See also* ATT'Y GEN., REPORT ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963) (known as the Allen Committee Report); Criminal Justice Act, 18 U.S.C. § 3006A (1964).

The major limitation of direct appeal is that the right is lost shortly after conviction.[4]

A second avenue through which the convicted may have certain issues reviewed is by collateral attack of the conviction. Under this procedure the highest order of remedy available is the writ of habeas corpus.[5] A habeas corpus petition may inquire as to the jurisdiction of the court, issues outside the record, and other major issues under the Constitution or laws of the United States to determine whether a person has been illegally deprived of his liberty.[6] Since it is a collateral attack remedy, the granting of relief is at the discretion of the court[7] and, because it is a summary proceeding to examine the validity of a conviction, it is not available until all other direct and collateral remedies have been exhausted.[8]

Other collateral attack procedures of a lower order than habeas corpus utilized by the states and the federal courts vary from the common law writ of *coram nobis*[9] to post-conviction

4. FED. R. CRIM. P. 37 (Appeal must be taken within ten days); ALASKA R. CRIM. P. 33 (motion for a new trial must be made within five days).

5. The Constitution guarantees the common law right of habeas corpus. *See* U.S. CONST. art. I, § 9. Similarly, it is a right every state must grant its citizens. *See, e.g.*, Commonwealth *ex rel.* Levine v. Fair, 186 Pa. Super. 299, 144 A.2d 395 (1958).

6. *Ex parte* Connor, 16 Cal. 2d 701, 108 P.2d 10 (1940), *cert. denied sub nom.* Connor v. California, 313 U.S. 542 (1941).

7. Goto v. Lane, 265 U.S. 393 (1924) (habeas corpus is a collateral rather than appellate remedy); *see also* 28 U.S.C. § 2241 (1964).

8. Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840). Recently the Supreme Court held that a collateral attack motion in a federal court would not be reviewed until all remedies still available in the state courts had been exhausted. Fay v. Noia, 372 U.S. 391 (1963). This corrected the situation in which a defendant, having failed to appeal and precluded from it by lapse of time, did not have the right to make a habeas corpus motion because he had failed to exhaust all possible state court remedies, notwithstanding the fact that they were no longer available.

9. *Coram nobis* is a writ to correct a judgment in the same court in which it was rendered, on the ground of error in fact. Following the habeas corpus procedures in the federal court, *see* 28 U.S.C. § 2255 (1964), the states have always had some kind of procedure for relief on collateral attack. These systems called for appointment of counsel at a collateral attack hearing at the court's discretion.

Alaska is not the first state to require counsel to be appointed at such hearings. California, Maine, and New York have all held that an indigent petitioner has the constitutional right to counsel at a collateral attack hearing. *See* People v. Shipman, 62 Cal. 2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965); Duncan v. Robbins, 159 Me. 339, 193 A.2d 362 (1963); People v. Monahan, 17 N.Y.2d 310, 217 N.E.2d 664, 270 N.Y.S.2d 613 (1966); People v. Hughes, 15 N.Y.2d 172, 204 N.E.2d 849, 256 N.Y.S.

remedies acts.[10] These procedures allow consideration of errors other than those reviewable under habeas corpus, yet they are not nearly as broad as direct appeal.[11] Like habeas corpus there is no time limit and although res judicata may apply to issues previously decided, successive motions may be brought.[12]

2d 803 (1965). *But see* Brine v. State, 205 A.2d 12 (Me. 1964).

The following state cases have recently reaffirmed retention of the discretionary system. Woodward v. State, 42 Ala. App. 551, 171 So. 2d 462 (1965); State v. Weeks, 166 So. 2d 892 (Fla. 1964); Austin v. State, 422 P.2d 71 (Idaho 1966); State v. Pelke, 143 Mont. 262, 389 P.2d 164 (1964); State v. Randolph, 32 Wis. 2d 1, 144 N.W.2d 441 (1966). This conforms to the prevailing federal court policy. *See* Brown v. Cameron, 353 F.2d 835 (D.C. Cir. 1965); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404 (2d Cir. 1964); United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir. 1960).

For recent discussions in the area *see also* Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962); *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961).

10. Most of these statutes are modeled on the Uniform Post-Conviction Procedure Act, 9B UNIFORM LAWS ANN. § 352 (1957). *See, e.g.*, ALASKA R. CRIM. P. 35(b) (1963); Illinois Post-Conviction Hearing Act, ILL. REV. STAT. ch. 38, § 122 (1964); Maryland Post-Conviction Procedure Act, MD. ANN. CODE art. 27, §§ 645A-J (1967); Minnesota Post-Conviction Remedy, Minn. Sess. Laws ch. 336, §§ 590.01-.06 (1967); N.Y. CONST. art. I, § 4; N.Y. CIV. PRAC. §§ 7001-12 (McKinney 1963); North Carolina Post-Conviction Hearing Act, N.C. GEN. STAT. §§ 15-217-22 (Supp. 1965); Oregon Post-Conviction Hearing Act, ORE. REV. STAT. §§ 138.510-.680, 34.330 (1965); 28 U.S.C. § 2255 (1964); Uniform Post-Conviction Procedure Act, 9B UNIFORM LAWS ANN. § 550 (1955). Some states provide the right to counsel at a post-conviction hearing. *See, e.g.*, ILL. REV. STAT. ch. 38, § 122-4 (1965); Minn. Sess. Laws ch. 336, § 590.06 (1967); N.C. GEN. STAT. § 15-219 (1965); ORE. REV. STAT. § 138.590(3) (1965). *But see* MD. ANN. CODE art. 27, §§ 645A-J (1962). But these collateral remedies are not guaranteed by the Constitution. Hampson v. Smith, 153 F.2d 417 (9th Cir. 1946); People v. Liss, 14 N.Y.2d 570, 198 N.E.2d 45, 248 N.Y.S.2d 660 (1964). *But see* Johnson v. United States, 352 U.S. 565 (1957); Mooney v. Holohan, 294 U.S. 103, *rehearing denied*, 294 U.S. 732 (1934). *Accord*, Ridge, *The Indigent Defendant*, 24 F.R.D. 241 (1960). *See* Note, *State Post-Conviction Remedies*, 61 COLUM. L. REV. 681 (1961).

11. Jones v. Squier, 195 F.2d 179 (9th Cir. 1952); Haywood v. United States, 127 F. Supp. 485 (S.D.N.Y. 1954). *But see* Sander v. United States, 373 U.S. 1 (1964) (28 U.S.C. § 2255 (1964) has the same scope as habeas corpus). The proceeding need not take the form of a trial. Taylor v. Alabama, 335 U.S. 252 (1948); Hysler v. Florida, 315 U.S. 411 (1942). Issues decided on appeal cannot be raised in nonjurisdictional habeas corpus. Fernandey v. Culver, 98 So. 2d 487 (Fla. 1957), *cert. denied*, 356 U.S. 904 (1958).

12. *See* 28 U.S.C. § 2255 (1964); ALASKA R. CRIM. P. 35(b) & 32(d) (1963), for representative scope of collateral attack hearings. The Supreme Court's scope of review on habeas corpus tends to be broad enough to make up for any narrowness of state collateral attack hearings. *See* Meador, *Accommodating State Criminal Procedure and Federal Post-Conviction Review*, 50 A.B.A.J. 928 (1964). *See also* Case

Since collateral relief is discretionary, the court may or may not hold a hearing, and if it holds a hearing it is also within the court's discretion whether to provide an indigent with aid of counsel.[13] In the past, federal and several state courts have held that if a case is complex the court should appoint counsel for an indigent appellant.[14] Failure to appoint counsel in such a case may leave the conviction open to attack on the basis of denial of due process. But in the past this standard has been thought to be adequate, since collateral attack has traditionally been considered to be a civil proceeding in which no right to counsel exists at any stage.[15]

Prior to the instant case, the Alaska Supreme Court had held that under an Alaska statute an indigent defendant has the right to counsel at a probation revocation hearing.[16] However, the court left open the question of whether the right to counsel would exist at the hearing of a collateral attack motion. Furthermore, in *State v. Thompson*,[17] the court held that at a hearing on a collateral attack motion, if the petitioner sets out sufficient facts to indicate the trial court's decision may be erroneous, the court must then hold a full fact hearing and create a record which could later be reviewed.[18] *Nichols* then posed the issue whether the right to counsel should be extended one step further to include the hearing phase of the criminal judicial process.

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v. Nebraska, 381 U.S. 336, 337 (1965); Note, *State Post-Conviction Remedies*, 61 COLUM. L. REV. 681 (1961).

13. Brown v. Cameron, 353 F.2d 835 (D.C. Cir. 1965); United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404 (2d Cir. 1964). Recently the Supreme Court has denied certiorari on the issue of whether appellants have the constitutional right to counsel at a collateral attack hearing. Huizar v. United States, 339 F.2d 173 (5th Cir. 1964), *cert. denied*, 380 U.S. 959 (1965).

14. Fleming v. United States, 367 F.2d 555 (5th Cir. 1966); Mitchell v. United States, 359 F.2d 833 (7th Cir. 1966); Baker v. United States, 334 F.2d 444 (8th Cir. 1964); State v. Pelke, 143 Mont. 262, 389 P.2d 164 (1964).

15. Sanders v. United States, 373 U.S. 1 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Heflin v. United States, 358 U.S. 415 (1959); Juelich v. United States, 342 F.2d 29 (5th Cir. 1965) (petitioner has passed beyond the stage of an accused).

16. Hoffman v. State, 404 P.2d 644 (Alas. 1965). ALASKA STAT. § 12.55.110 (1963): "When sentence has been suspended, it shall not be revoked except for good cause shown. In all proceedings for the revocation of a suspended sentence, the defendant is entitled to reasonable notice and the *right to be represented by counsel.*" [Emphasis added].

17. 412 P.2d 628 (Alas. 1966).

18. *Id.* at 635-37. *See also* Shipman v. California, 62 Cal. 2d 226, 397 P.2d 993, 42 Cal. Rptr. 1 (1965).

The *Nichols* court found that under the equal protection clause of the Alaska Constitution, once petitioner had been granted a hearing, he had the right to have court appointed counsel represent him at that hearing. The court reviewed recent Supreme Court and state court decisions establishing the rights of indigent defendants in other phases of criminal procedure and concluded that the trend was toward the position that failure to provide counsel at such hearings would result in an invidious discrimination between the rich and the poor which would be unconstitutional.[19] In the court's opinion a rich man would undoubtedly be represented by counsel at such a hearing, and, therefore, if an indigent were denied counsel, it would be a discrimination against him.

The court reasoned that after petitioner gained the right to a hearing, the quality of the hearing would depend on whether he had the assistance of counsel. At the hearing the petitioner must present a prima facie case, including evidence which would have been sufficient, if presented at his trial, to have altered its outcome. In addition, he must show why he did not appeal or why this evidence was not presented upon direct appeal. If the petitioner has assistance of counsel, the record of the case can be examined, hidden merits in his motion found, points of law researched, witnesses examined, and arguments clearly and completely presented to the court.[20] An indigent defendant without counsel would not have these advantages; consequently, the hearing would be of significantly less value to him and, thus, would not comport with fair procedure. The court then concluded that the principle that all men are equal before the law is violated when the meaningfulness of a hearing depends on whether the petitioner has the means to retain counsel.

There are many practical reasons supporting the system of

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19. In this regard, Gideon v. Wainwright, 372 U.S. 335 (1963), held that, under the sixth and fourteenth amendments, a state must appoint counsel to a defendant charged with a felony. Obviously this left open the question whether indigents charged with misdemeanors and other offenses have the constitutional right to counsel.

But in Douglas v. California, 372 U.S. 353 (1963), decided only a few days later, it was held that on direct appeal *all* prisoners are entitled to the assistance of counsel—presumably misdemeanants included. This is a curious overlap that no doubt points to the day when all defendants will have the constitutional right to counsel on any offense. *Douglas* also left open the question whether an appellant would be entitled to counsel on successive appeals. *See also In re* Gault, 387 U.S. 1 (1967).

20. Douglas v. California, 372 U.S. 353, 357-58 (1963). *See also* Powell v. Alabama, 378 U.S. 45, 68-69 (1932).

discretionary appointment of counsel in collateral attack. Most such motions are made by prisoners in jail who simply write motion after motion expressing the desire to be freed without giving legal reasons.[21] Consequently, the vast majority of these petitions are found to be frivolous even after a hearing is granted.[22] For this reason the mandatory appointment of counsel is often viewed as a needless expense, especially since the petitioner has already had the right to a direct appeal with the aid of counsel.[23]

Furthermore, reforms in the area of aid to indigents must be made only after balancing the need for such aid in other areas of criminal procedure. Indigent defendants have not yet been afforded the consitutional right to counsel in misdemeanor cases, while at the collateral attack phase a petitioner may have had the aid of counsel at trial and on appeal. Therefore, it is reasonable to anticipate that some jurisdictions may be reluctant to provide this additional aid to indigents.

Additional standards for the appointment of counsel could be formulated which would improve the discretionary system without making the right to counsel a constitutional imperative. The nonconstitutional standard is now based on the complexity of the issues;[24] the additional rule that an appellant is guaranteed the aid of counsel if the issues of the case have never been litigated would retain the flexibility of the discretionary rule while assuring one hearing of every indigent's case in open court and with the aid of counsel. These criteria would cover confession and coerced plea cases. On an appeal in which there has been a trial, additional factors would be required before a court would exercise its discretion in granting the assistance of counsel. New laws altering the basis for petitioner's conviction

21. *Habeas Corpus and Post-Conviction Review*, 33 F.R.D. 363, 494 (1964). *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

22. *See* Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 406-08 (1960). Claims for certiorari "are often fantastic" and "are for the most part frivolous." *Accord*, Cerniglia v. United States, 230 F. Supp. 932 (N.D. Ill. 1964). However, the Court does review the handwritten motions to sift out those with merit. If it does grant a hearing it does so obviously because it sees the possible merit in the case. Therefore it may be expected to be understanding of petitioner's lack of expertise.

23. Douglas v. California, 372 U.S. 353 (1963). In this respect it should be noted that many collateral attack motions now before the Court probably are from cases decided before *Douglas* when there was no constitutional right to counsel on appeal.

24. See note 14 *supra* and accompanying text.

would be a compelling reason to reexamine the issues and would also strongly suggest that counsel be appointed. This appears to be a reasonable system that could be initiated without major alteration of the discretionary system. However, even this procedure does not alleviate discriminations among prisoners based on ability to pay. Therefore, this should be considered only a temporary measure while the constitutionally based *Nichols* rule should ultimately be accepted as the ideal system.

Although *Nichols* does not decide whether an indigent petitioner has the constitutional right to the assistance of counsel in preparing his motion for a hearing, this appears to be the next phase in post-conviction review at which counsel would be valuable.[25] Probably the most difficult hurdle to clear in gaining relief through collateral attack is persuading a court to grant a hearing originally. The petitioner has to present a legal argument in his motion and bear the burden of persuasion. It is obvious to those trained in the law that a layman cannot present as strong a case before a court as a lawyer. As a consequence it is unfair that an indigent must face the court without counsel, especially when representation of counsel before judicial tribunals is recognized as a basic right at prior stages in the criminal process.[26] However, if counsel is guaranteed at this later phase, it is feared that counsel may be required to assist prisoners in preparing endless collateral attack motions to present to the court.[27] This is objected to on the basis that it would degrade counsel and that the efforts of trained lawyers and the courts would be fruitlessly expended in repeatedly reviewing the allega-

25. This issue will be raised only in a case where petitioner's collateral attack motion and hearing are denied. The case must then be remanded, not to hold a hearing, but to grant petitioner the aid of counsel in preparing his motion.

26. *See* Douglas v. California, 372 U.S. 353 (1963); Hoffman v. State, 404 P.2d 644 (Alas. 1965). Recent Supreme Court decisions have extended the indigent's right to counsel both before and after conviction in all phases of criminal procedure. *In re* Gault, 387 U.S. 1 (1967); Long v. District Court of Iowa, 385 U.S. 192 (1966); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958); Ellis v. United States, 356 U.S. 674 (1958); Johnson v. United States, 352 U.S. 565 (1957); Griffin v. Illinois, 351 U.S. 12 (1956); Parnell v. Alabama, 287 U.S. 45 (1932). *See also* A. LEWIS, GIDEON'S TRUMPET (1964).

27. Maine has already decided that an indigent does not have the right to counsel in the preparation of a writ *coram nobis*. Brine v. State, 160 Me. 401, 205 A.2d 12 (1964).

tions of indigent prisoners. Such a process would be limited only by the whim of the prisoners, and much effort would no doubt be expended on reviewing the work of previous counsel. An unreasonable portion of the appellate court's time would be spent reviewing long and technical briefs of counsel in preparation for actions of questionable merit. But even judges who fear the burden of increased appeals and motions are quick to point out that the criminal law is to punish only the guilty and that no efforts should be spared to free the innocent from unjust imprisonment.[28] A collateral attack motion is the prisoner's only remaining route to freedom.

Even a system which allows indigents the constitutional right to the aid of counsel in preparing collateral attack motions may not be overly burdensome. The motions may be so limited that the danger of repetitive requests for counsel would not be a serious threat to the time of courts and attorneys. One review of an indigent's record by an attorney could be granted as of right if the prisoner asks for it and has established some basis to support his plea for release. This would provide a fair system of allocating legal aid for all prisoners who feel they have been convicted unjustly. After that perhaps a discretionary system of appointed counsel would be adequate in future phases, and then only after a strong showing by the prisoner that, only with the aid of counsel, could a substantial issue be prepared for review by the court at a hearing.[29] This would provide a reasonable standard for extending the benefit of counsel for indigents to the last phase in the criminal process, and would be a further step toward equal treatment of rich and poor.

Although the practical reasons for resistance to granting the right to counsel in all phases of collateral attack are substantial, they are not persuasive. Justice requires the equal treatment of rich and poor. If our legal system provides these remedies, they should be available to all. Although it has been declared after each decision extending the right to counsel that the courts will be deluged by petitions, thus tendering an overwhelming financial burden in supplying counsel, this has not been the case.[30] Notwithstanding the backlog of prisoners who have been

28. *Habeas Corpus and Post-Conviction Review*, 33 F.R.D. 363, 504 (1964).

29. See forms used by the United States District Court, Northern District of Illinois, 33 F.R.D. 391-408 (1964).

30. Justice Clark, dissenting in Douglas v. California, 372 U.S. 353, 359 (1963), said: "With this new fetish for indigency the Court piles an intolerable burden on the State's judicial machinery."