Criminal Procedure—Post-Conviction Right to Counsel

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CRIMINAL PROCEDURE—POST-CONVICTION
RIGHT TO COUNSEL

In recent years, the right to counsel in criminal proceedings has been broadened considerably to include the right not only in the trial stage but also in various pre-trial and post-conviction stages. The justifications given by the courts have varied among the sixth amendment, due process, or equal protection.

In order to understand the present status and the possible future trends of the right to counsel, it is necessary to review the general background and development of that right.

I. BACKGROUND

The sixth amendment provides that "[i]n all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." American courts originally interpreted this language to mean nothing more than the right of a defendant to retain counsel. In Powell v. Alabama, the Supreme Court for the first time extended its interpretation of the right to counsel to require that in certain "special circumstances" counsel must be appointed for the accused at trial because it is such a fundamental right that refusal to do so would amount to a denial of due process. In so holding, the Court reasoned that due process included "the right to be heard," and that in many cases the right would mean little if it did not encompass the right to be heard by counsel; the Court cited the lack of skill of even an educated layman—much less an ignorant and illiterate one—in the science of law. Despite the fact that Powell was limited to capital cases, the Court in subsequent decisions appeared to deem the

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1 U.S. CONST. amend. VI.
3 287 U.S. 45 (1932).
4 Id. at 71. The Court stated: [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .
5 Id. at 68-69.
6 "All that is necessary to decide, as we do decide, is that in a capital case . . .

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right to counsel so fundamental as to apply to the trial of non-capital crimes as well.\(^7\) However, any speculation to this effect was dispelled when *Betts v. Brady*\(^8\) was decided in 1942. In *Betts*, the Court declined to extend mandatory appointment of counsel beyond the trial of a capital offense. Instead, the Court left the matter of the right to counsel in non-capital cases to the discretion of the state trial judges to be applied when the circumstances dictated that counsel was necessary to insure fundamental fairness.\(^9\) The “special circumstances rule” outlined in *Betts* remained in force in the state courts for twenty-one years, until the Court decided in *Gideon v. Wainwright* that the due process “right to be heard” rationale mandated the appointment of counsel by state courts in prosecution for non-capital offenses.\(^10\) Although the language in *Gideon* seemed broad enough to extend the right to counsel to misdemeanors,\(^11\) the decision came to stand for the proposition that there is a right to counsel in all felony cases.\(^12\) Then, in *Argersinger v. Hamlin*, the Court held that a person may not be incarcerated for the conviction of any offense, regardless of its classification as a felony, misdemeanor, or petty offense, unless the accused was represented by counsel.\(^13\)

The right to counsel has also been extended to stages in criminal proceedings other than the trial. The greatest expansion has been in the area of pre-trial proceedings; for example, the right has been held to attach to certain preliminary hearings,\(^14\) arraign-
II. SENTENCING

At common law, just as a defendant had no right to the services of an attorney at trial, a convicted defendant was not entitled to have counsel present when he was sentenced. It was not until 1948, in *Townsend v. Burke*, that the Supreme Court recognized that, in certain circumstances, absence of counsel at sentencing could result in a violation of due process. In *Townsend*, the defendant pleaded guilty to two charges of robbery and two charges of burglary, after which he was sentenced; at no stage was he represented by counsel. The record indicated that before passing sentence, the court recited several charges appearing on the defendant's record without distinguishing among those for which he was found guilty, those for which he had been acquitted, and those which were dismissed without trial. Whether this indiscriminate recital was due to submission of misinformation to the court by the prosecution or due to misreading of the record by the judge, the court reasoned that it was possible that the error resulted in prejudice to the defendant that might have been avoided had counsel been present. Consequently, the court held that in circumstances where the defendant is disadvantaged by lack of counsel at sentencing, it is a violation of fair play and due process mandating reversal of the conviction. Since this case was decided during the reign of *Betts*, it is not surprising that the court seemed to limit its holding to a type of "special circumstances" rule.

Nevertheless, the decision in *Townsend* was soon interpreted by several of the courts of appeals to stand for the proposition that there is a constitutionally founded right to counsel during sentenc-

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19 334 U.S. 736 (1948).
20 Id. at 738.
21 Id. at 739-40.
22 Id. at 740-41.
23 Id.
24 See text accompanying notes 8 & 9 supra.
ing in federal cases. In *Martin v. United States,* the first court of appeals decision to recognize an unqualified right to counsel at sentencing articulated most convincingly some of the reasons for the necessity of counsel at that stage:

The very nature of the proceeding at the time of imposition of sentence makes the presence of defendant's counsel at that time necessary if the constitutional requirement is to be met. There is then a real need for counsel. The advisability of an appeal must, or shortly, be determined. Then is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and, in short, to appeal to the equity of the Court in its administration and enforcement of penal laws. Any judge with trial Court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension, of penalty. That it is also true that such discussion sometimes has a contrary result, does not detract from the fact that the nature and possibilities of this important stage of the proceedings are such as make the absence of counsel at this time presumably prejudicial.

Later, in *Mempa v. Rhay,* the Supreme Court seemed to support the conclusions of *Martin* and the other courts of appeals' decisions. Although *Mempa* was concerned primarily with the right to counsel at a probation revocation hearing, where under a Washington statute sentencing had been deferred during probation and then imposed at the revocation hearing, the Court cited *Townsend* as illustrating the critical nature of the sentencing stage of the criminal process and mentioned that it "might well be considered to support by itself a holding that the right to counsel applies at sentencing."
Any remaining doubts stirred by the hesitant language in *Mempa* concerning the right to counsel during sentencing were dispelled the following year when the Court, in *McConnell v. Rhay*, stated that the right to counsel definitely applied to sentencing. Most of the remaining circuits, that had not so held prior to *Mempa* and *McConnell*, soon fell into line in holding the right of counsel to apply to sentencing.

Although it is now settled that the right to counsel attaches at the sentencing hearing, there is a vital part of the sentencing process where the right to counsel has yet to be recognized. That is the presentence social interview. At that interview, the presentence investigators gather the material from the defendant that will serve as a basis for the presentence report; this is, in turn, the foundation for the judge’s imposition of sentence. The importance of the interview is readily apparent. Nevertheless, how many criminal defendants are typically uneducated, inarticulate, and highly suspicious of the criminal justice system? After being counseled up to the time of sentencing that it is better to say as little as possible, how simple will it be to coax the defendant to speak freely at the one time openness may be beneficial unless counsel is present at the interview to guide and encourage him? How many defendants will be able to clarify and emphasize any mitigating factors on their own, without the aid of counsel?

It is clear that if the constitutionally guaranteed right to counsel at sentencing is to have the intended effect of aiding the defendant and the court, that right must include the right to have counsel present at the presentence social interview. Although at present no judicial opinions or statutes have upheld such a right,

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31 393 U.S. 2 (1968).
32 Id. at 3-4. The Court stated:

This Court’s decisions on a criminal defendant’s right to counsel at trial . . . certain arraignments . . . and on appeal . . . have been applied retroactively. The right to counsel at sentencing is no different. . . . The right to counsel at sentencing must, therefore, be treated like the right to counsel at other stages of the adjudication.

33 McClain v. Swenson, 435 F.2d 327, 332 (8th Cir. 1970); Vellucchi v. United States, 430 F.2d 188, 189 (6th Cir. 1970); Hernandez v. Nelson, 411 F.2d 619 (9th Cir. 1969); Rini v. Katzenbach, 403 F.2d 697, 699-700 (7th Cir. 1968).
36 Kuh, *supra* note 34, at 1099.
37 Id.
it is certainly a logical and feasible area of expansion in light of the ever-expanding scope of the right to counsel.

III. Appeals

Beyond the sentencing stage, the appeal is probably the single most important post-conviction proceeding. At common law, an absolute right to counsel, either for preparing or arguing the appeal, was not recognized. Instead, the determination of the necessity for appointing counsel when the defendant could not afford one was left to the discretion of the appellate court. The court, after an examination of the record, decided whether the appeal had enough merit to warrant appointment of counsel.38

This practice was severely criticized because the professional services of an attorney, and not merely of a layman, were particularly needed at the appellate stage—first, to decide whether the case contained anything warranting an appeal, and, second, to present the issues in an adequate and professional manner. Even a well-educated layman could not ordinarily determine such issues as whether the judge's evidentiary rulings were erroneous, whether the prosecution employed unfair tactics, whether the charge to the jury was inadequate or incorrect, whether there was sufficient evidence to support the verdict, whether any errors that occurred were prejudicial, whether there was some "plain error" that, although not objected to at trial, should be noted on appeal, or whether an attempt should be made to overrule or modify some prior decision.39

Since 1957, the right to counsel for a direct appeal from a federal criminal conviction has been recognized as within the scope of the sixth amendment right to counsel.40 However, it was not until 1963 in Douglas v. California41 that the Supreme Court ruled that persons appealing from a state criminal conviction are also entitled to the benefits of counsel. In Douglas, the indigent defendant was denied appointed counsel to aid in the presentation of his appeal. Since a non-indigent could retain counsel to prepare a brief and present the issues to the appellate court, and the indigent was

required to do this for himself, the Court found a denial of equal protection and vacated the judgment. Even though the sixth amendment formed the basis for the decisions granting a right to counsel for appeals from federal criminal convictions, the court in *Douglas* employed an equal protection analysis without even mentioning the sixth amendment. The Court relied heavily on the equal protection concept expressed in the "right to transcript" cases that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" The Court in *Douglas* was very specific in pointing out that its holding was limited to the first appeal from a criminal conviction, "granted as a matter of right to rich and poor alike." The Supreme Court declined to decide whether the right to counsel should extend to discretionary appeals or to mandatory review beyond the first appellate decision. As a result the lower federal courts were left to decide the issue of the right to counsel in discretionary appeals without definitive guidelines from the Supreme Court. It is not surprising, therefore, that the results were conflicting.

The Tenth Circuit, in *Peters v. Cox*, was the first court of appeals to face the problem. However, instead of reviewing prior case law and its implications, the court held in a brief, per curiam opinion that since no authority had been cited, requiring, or even permitting, a state supreme court to appoint counsel to represent an indigent defendant on appeal to the United States Supreme Court, the right to counsel would not be extended. It was not until four years later, in 1969, that a federal court of appeals met the issue head on and proffered any in-depth reasons for its holding. In *United States ex rel. Pennington v. Pate*, an indigent defendant had appealed his conviction to the Illinois Appellate Court, an intermediate appellate court, where his conviction was affirmed. He then sought, but was denied, assistance of counsel to prepare a discretionary appeal to the Illinois Supreme Court. The

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42 Id. at 357-58.
43 See note 40, supra.
44 372 U.S. at 355-56.
45 Id. at 355. The Court was quoting from *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).
46 372 U.S. at 356.
47 Id.
48 341 F.2d 575 (10th Cir. 1965) (per curiam).
49 Id.
50 409 F.2d 757 (7th Cir. 1969).
Seventh Circuit\textsuperscript{52} upheld the failure to appoint counsel on the ground that such denial did not deprive the defendant of either equal protection or due process of law. The court's primary reason for this decision, in addition to practical manpower and budgetary problems and certain Illinois procedure, was its belief that the United States Supreme Court's explicit refusal to extend the right to counsel to the second appeal stage in \textit{Douglas} was tantamount to a \textit{holding} that no right to counsel exists at that stage.\textsuperscript{53} Despite the court's emphasis on \textit{Douglas} as the primary rationale for its holding in \textit{Pennington} and because of the tenuousness of that rationale, one is led to believe that the manpower and budgetary problems that the court envisioned as being involved in an extension of the right to counsel were the actual grounds for the decision. However, even these reasons are weak ones for refusing to extend the right. Not only would such an extension probably not impose an additional burden on the bar,\textsuperscript{54} but, as acknowledged in the concurring opinion in \textit{Pennington}, a major constitutional right should not be sacrificed solely because its implementation may be difficult and expensive.\textsuperscript{55}

In 1973, other circuits came to the opposite conclusion. The Fourth Circuit concluded in \textit{Moffitt v. Ross} that so far as the right to counsel is concerned, there is no basis for differentiation between appeals of right and subsequent permissive review proceedings.\textsuperscript{56} Therefore, the court held that an indigent defendant is entitled to have counsel appointed to assist him in preparing a writ of certiorari to either the state supreme court or the United States Supreme Court.\textsuperscript{57} Since discretionary review is effectively denied an indigent who cannot retain counsel, and for whom none is ap-

\begin{footnotesize}
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\item Under 28 U.S.C. § 2254 (1971), a federal court may entertain an application for a writ of habeas corpus from a person incarcerated pursuant to the judgment of a state court if the application is on the ground that he is in custody in violation of the Constitution, laws, or treaties of the United States.
\item 409 F.2d at 760.
\item Mitchell v. Johnson, 488 F.2d 349, 352 (6th Cir. 1973). The court cited \textit{Mempa v. Rhay}, 389 U.S. 128 (1967), where the Supreme Court observed "that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding." \textit{Id.} at 137. By analogy, the Sixth Circuit felt that counsel appointed for an appeal of right would not be unduly burdened if required to "follow through" and prepare an application for discretionary appeal to the state supreme court.
\item 409 F.2d at 762 (concurring opinion).
\item 483 F.2d 650, 651 (4th Cir. 1973).
\item \textit{Id.} at 656.
\end{itemize}
\end{footnotesize}
pointed, while other defendants may seek access to a higher court with the help of retained counsel, both due process and equal protection are violated. The court acknowledged that it was going beyond the holding in Douglas, but reasoned that if the denial of counsel to an indigent defendant for an appeal of right dilutes the quality of justice and violates equal protection, then denial of counsel for discretionary appeals is a similar dilution and violation.

The Moffitt court noted that the courts in Peters and Pennington had refused to extend the holding of Douglas, but it declined to take issue with those decisions. Instead, it merely suggested that what is constitutionally required now was not required at the time of those decisions because as available legal resources grow, so does the ability to implement notions of basic fairness.

Soon after the Fourth Circuit's decision in Moffitt, the Sixth Circuit, in Mitchell v. Johnson, held that an indigent petitioner has the right to have counsel appointed to assist him in preparing a writ of certiorari to a state supreme court. In a manner similar to that used in Moffitt, the court in Mitchell used an equal protection and due process analysis in reaching its decision, and added the element of the "spirit . . . of the Sixth Amendment."

Not long after the Mitchell decision, the United States Supreme Court granted certiorari to review Moffitt v. Ross. Then, in June, 1974, in Ross v. Moffitt, the Court reversed the Fourth Circuit, thus lending added support to the Peters and Pennington decisions, and silently overruling Mitchell. The Court held that neither due process nor equal protection were violated by denying an indigent defendant court-appointed counsel to assist him in preparing a writ of certiorari to either a state supreme court or the

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55 Id. at 655.
56 Id. at 653.
57 Id. at 654-55.
58 488 F.2d 349 (6th Cir. 1973). This holding is narrower than that of Moffitt because it concerns the aid of counsel in preparing a writ of certiorari to the state supreme court only, whereas Moffitt extended the right not only to those seeking writs of certiorari from the state supreme court but also to those seeking such writs from the United States Supreme Court.
59 Id. at 353.
60 Id. at 351.
61 Id. at 353.
Concerning preparation of a writ to a state supreme court, Justice Rehnquist, speaking for the majority, ruled that due process was not violated because of the differences in purpose between the trial and appellate stages and the role of counsel at each proceeding. At the trial stage, the Court reasoned, an accused defends himself against the efforts of the state prosecutor and attempts to preserve the presumption of innocence. The role of counsel, then, is to defend the accused. On appeal, however, the defendant has already been found guilty and initiates the appellate process himself, seeking to overturn the prior determination of guilt. Thus, the appeal takes the form of an offensive attack. The Court concluded that whereas due process mandates counsel for a defense, it does not require counsel to attack a conviction. In addition, the Court noted that a state need not even provide appellate review. Such review is a privilege, not a right, and hence, procedural safeguards are not necessary. The Court felt that unfairness results only when indigents are "singled out by the State and denied meaningful access to the appellate system because of their poverty," thus suggesting that an equal protection analysis would be more helpful in determining an indigent's rights on appeal.

The Ross Court reasoned that equal protection does not always require equal advantages or absolute equality. In the context of appellate review, it means only that an indigent defendant is not denied "meaningful access" to the state appellate system. The Court held that the defendant in the present case was not denied meaningful access because under a multi-tiered appellate system, such as that of North Carolina, by the time the defendant seeks review in the state supreme court, he will have a transcript of the trial proceedings, a brief that was submitted to the intermediate appellate court setting forth claims of error, and, quite often, an opinion by the intermediate court to aid the state supreme court in its determination of whether to hear the case.

The Supreme Court was also explicit in holding that there is

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7 Id. at 619.
8 Id. at 610-11.
9 Id. at 611.
10 Id.
11 Id. at 612.
12 Id. at 616.
13 Id. at 614-16.
no right to aid of counsel for preparation of a writ of certiorari to the United States Supreme Court.\textsuperscript{74} Again, the Court concluded that the trial transcript, appellate brief, and appellate opinion give the Court a sufficient understanding of the case to decide whether or not to grant certiorari, thus assuring the petitioner "meaningful access" to the Supreme Court.\textsuperscript{75} In addition, although \textit{Douglas} requires that where a state creates a right of appeal, all persons must be given an equal opportunity to enjoy the right, the source of the right to seek review of a state conviction in the United States Supreme Court is federal statutory law. Therefore, the \textit{Douglas} mandate is inapplicable because it pertains only to a state-created right of review.\textsuperscript{76} The final reason the Court cited for denying the aid of counsel in preparation of a writ of certiorari to the United States Supreme Court is the long tradition of such denial by the Court.\textsuperscript{77}

Although the opinion in \textit{Ross} appears to foreclose the possibility of a mandatory constitutional duty to appoint counsel to aid in preparing an application for discretionary review in a state supreme court, there is a situation that the Court has overlooked. In states such as West Virginia, which do not have a multi-tiered appellate system and where all criminal appeals to the highest court of the state are discretionary,\textsuperscript{78} the petitioner will not have an appellate brief or an appellate opinion to aid the supreme court in determining whether to grant review. This deficiency could well result in denial of the "meaningful access" to appellate review stressed in \textit{Ross} and a consequent denial of equal protection.

The growth of legal aid and public defender systems and the corresponding decrease in the burden to the bar, the existence of the equal protection argument the Supreme Court in \textit{Ross} overlooked, and the Court's emphasis that its opinion in \textit{Ross} is in no way meant to discourage legislative extension of the right to assistance of counsel to prepare discretionary writs\textsuperscript{79} indicate that the

\textsuperscript{74} Id. at 617-18.
\textsuperscript{75} Id. at 616-17.
\textsuperscript{76} Id. at 617.
\textsuperscript{77} Id. at 617-18.
\textsuperscript{78} In West Virginia, all appeals from criminal convictions are discretionary with the Supreme Court of Appeals. W. Va. Const. art. 8, § 6; State v. Legg, 151 W. Va. 401, 151 S.E.2d 215 (1966); State \textit{ex rel.} Wright v. Boles, 149 W. Va. 371, 141 S.E.2d 76 (1965); Linger v. Jennings, 143 W. Va. 57, 99 S.E.2d 740 (1957).
\textsuperscript{79} 417 U.S. at 618.
prospect of continued expansion of the right to counsel in the area of discretionary appeals remains favorable.

IV. PROBATION AND PAROLE REVOCATION PROCEEDINGS

It was traditionally recognized that a probationer or parolee was not entitled to be represented or assisted by counsel at a proceeding or hearing to revoke such conditional liberty. The federal courts were in accord with the rule expressed in Kelley v. United States:

Revocation of probation does not demand formal procedure. The question is simply whether or not there has been an abuse of discretion. . . . There is nothing here to indicate that there was any abuse of discretion in not appointing counsel at the hearing on revocation or probation.

In 1967, the Supreme Court decided Mempa v. Rhay, where it was held that a defendant has an unconditional right to counsel at a probation revocation proceeding when a deferred sentence is imposed. In Mempa, the defendant had been convicted of joyriding and placed on probation for two years. Imposition of sentence was deferred pursuant to a Washington statute. The Court held that counsel should have been appointed for the defendant at the hearing at which probation was revoked and sentence imposed. In its analysis, the Court relied on both sixth amendment and due process considerations. The Supreme Court traced the development of the right to counsel in various pretrial and post-trial proceedings which "substantial rights of a criminal accused may be affected," concluding that sentencing, either immediately upon conviction or at a revocation-deferred sentencing proceeding, falls into this category. In support of its conclusion, the Court cited two reasons:

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80 Probation and parole revocation hearings will be treated as identical for the purposes of this note in view of the fact that the Supreme Court has explicitly stated that its decisions regarding the right to counsel apply equally to both proceedings. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

81 See, e.g., Welsh v. United States, 348 F.2d 885 (6th Cir. 1965).


83 Id. at 130. See note 29 supra.

84 Id. at 137.

85 Id. at 134.

86 Id. at 134-35.
first, counsel's presence is necessary to marshal the facts, introduce evidence of mitigating circumstances, and in general to aid and assist the defendant in presenting his case as to sentence; and, second, certain legal rights may be lost if not exercised at this stage. Furthermore, when it is considered that imposition of sentence is often "based on the alleged commission of offenses for which the accused is never tried," the need for the presence of counsel to assure that the defendant is afforded due process becomes even more acute.

Despite the fact that the Mempa Court quite clearly limited its holding to mandating assistance of counsel at revocation hearings only where a sentence had not yet been imposed, some courts specifically refused to follow that limitation and extended the right to all such hearings, regardless of whether a sentence had already been imposed. Other jurisdictions have confined their extensions to the deferred sentencing type of proceeding.

Any expectations that the Supreme Court might extend further the right to counsel at revocation hearings were put to rest in 1973, when, in Gagnon v. Scarpelli, the Court refused to extend a per se right of counsel to all probation and parole revocation hearings. Instead, the Court confined the earlier holding in Mempa v. Rhay to its narrowest sense of being applicable only to revocation hearings where there is deferred sentencing. As to

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53 Id. at 135-36. One example of a situation where legal rights may be lost if counsel is not present can be found in Washington law. See State v. Farmer, 39 Wash. 2d 675, 237 P.2d 734 (1951). An appeal in a case involving a guilty plea and subsequent probation can only be taken after probation is revoked and sentence imposed. Therefore, if a defendant pleads guilty because he is offered probation, even though he may have had a valid defense, absence of counsel at the revocation hearing to advise him of his right to appeal may result in a loss of that right. Id.

50 389 U.S. at 137.

52 Id.


55 In an important footnote, the Court explains that the opinion would apply to both parole and probation revocation proceedings. Id. at 782n.3.

those hearings where sentence has previously been imposed, the Court adopted a "special circumstances" rule to govern appointment of counsel. The Court cited three primary reasons for its holding: first, the sixth amendment does not apply, because revocation hearings are not part of the "criminal prosecution" protected by the amendment; second, various collateral disadvantages; and, third, financial costs.

In deciding that the sixth amendment was not applicable, the Court cited *Morrissey v. Brewer* where it was decided that neither probation nor parole revocation proceedings were a part of the criminal prosecution. The sixth amendment approach, however, seems to have been the logical one for two reasons. First, probation should be seen as an alternate sentencing process that reflects the opinion of the judge that this result will best serve the individual and society. If that fails, then the ensuing revocation hearing should be viewed as a second sentencing, where the judge again determines whether a different sentence, that of incarceration, should be imposed. Even though the amount of the sentence may have been determined earlier, the hearing, nonetheless, is determinative of whether sentence will be applied. The second reason is that whenever a person's liberty is at stake, even though it be conditional liberty, all aspects of due process that attach to a criminal trial, including the sixth amendment right to counsel, should attach to that proceeding. Counsel should be present to ensure that the individual does not lose his liberty without due process of law.

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66 411 U.S. at 790. The test formulated by the Court is that counsel is necessary when the probationer-parolee makes a request to the court for counsel based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

67 Id. at 781-82.

68 Id. at 783-88.

69 Id. at 788.

70 408 U.S. 471 (1972).

71 411 U.S. at 781-82. In *Morrissey*, the Court reasoned that parole revocations deprive a person of only a conditional liberty, whereas the criminal prosecution is concerned with deprivation of absolute liberty to which every person is entitled. 408 U.S. at 480.


73 Id. at 155.
The second rationale the Court bases its holding on is that extending a per se right to counsel would impose various collateral disadvantages. More specifically, the Court expresses a fear that: (1) the nature of the revocation hearing will be drastically altered from a fact-finding and rehabilitative-oriented proceeding to a vigorous adversary confrontation akin to a trial; and (2) the role of the probation officer will be transformed from that of a rehabilitative officer to that of a prosecutor, thus destroying the probationer-probation officer relationship. Regarding the first fear of the Court, it would appear that the hearing is already adversary and adjudicative in nature. It involves receiving evidence, and the judge has the power to incarcerate the defendant and perform other trial-type duties. As to the second fear of the Court, it is obvious that such a view of the probation system as involving a visionary rehabilitative relation between probation officer and probationer is extremely idealistic. It ignores the heavy case loads, the attitude of many probation officers, and the unproven merits of the system. The Court's view loses much of its force when compared with reality. If the Court would look further into the probation system, "it is likely to find—as it did in Gault—that expectation far exceeds achievement and a benevolent purpose too often is a mask for arbitrary procedure."

The Court's third justification involves that practical aspect of the administration of justice that appears so often when the issue of the extension of the right to counsel is raised—financial burdens. It has been shown that fears concerning the cost of appointed counsel are groundless. Yet even if there were additional costs in extending the right, "neither the nature of the government function nor fear of disruption of that function can justify the denial of [due process]."

Any future extensions of the right to counsel in revocation

104 411 U.S. at 783-88.
105 Id. at 787-88.
106 Id. at 783-85.
107 Comment, supra note 102, at 166.
108 Id. at 158-59.
110 See, e.g., United States ex rel. Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969).
111 Comment, supra note 102, at 166.
112 Rose v. Haskins, 388 F.2d 91, 102 (6th Cir. 1968) (dissenting opinion).
proceedings beyond the holding in *Gagnon* could be grounded in due process or equal protection. The Supreme Court in *Gagnon* recognized that there can be due process and fair hearing problems in a revocation hearing.\(^{113}\) The court of appeals in the same case had recognized that many of the due process rights in a revocation hearing afforded by *Morrissey v. Brewer*\(^ {114}\) would be meaningless without the benefit of counsel.\(^ {115}\) It is obvious, then, that at this proceeding, where an individual's liberty is in the balance, counsel should be provided to insure that this liberty is not terminated arbitrarily and without regard to the mandates of due process.

Equal protection affords another possible route to extension of the right to counsel. Although the Court in *Gagnon* specifically reserved judgment on the question of whether there is a right to the presence of retained counsel at a revocation proceeding,\(^ {116}\) a majority of states allow retained counsel at such hearings.\(^ {117}\) Through application of the *Griffin-Douglas* equal protection principle that has found so much favor in recent years, one can see that such a practice discriminates in favor of the person who can afford to retain counsel. Unless the Supreme Court declares that retained counsel at a revocation hearing is unconstitutional, the equal protection argument for appointing counsel at a revocation hearing remains powerful.

V. Parole Release Hearings

Parole has been defined as "the release of an offender from a penal or correctional institution after he has served a portion of his sentence, under the continued custody of the state and under conditions that permit his reincarceration in the event of misbehavior."\(^ {118}\) The parole release hearing is a proceeding before the parole board where it is determined whether an eligible prisoner should

\(^{113}\) 411 U.S. at 786-87.

\(^{114}\) 408 U.S. 471 (1972).

\(^{115}\) Scarpelli v. Gagnon, 454 F.2d 416, 423 (7th Cir. 1971).

\(^{116}\) 411 U.S. at 783n.6.


be released on parole. The courts generally agree that there is no right to counsel at these proceedings.\textsuperscript{119}

Since the parole release hearing is clearly not a part of the criminal prosecution, the right to counsel as derived from the sixth amendment is not applicable. Therefore, most attempts to extend a right of counsel to such proceedings have centered around the theory that since personal liberty is at stake in the hearing, certain procedural due process requirements must be recognized, one of these being the presence of an attorney.

The Courts have met this contention with a variety of counter arguments. The argument that the courts advance most often is that parole is a privilege rather than a right, and, therefore, procedural due process is not required.\textsuperscript{120} However, this theory loses its force in light of Goldberg v. Kelly, where the Supreme Court stated that "[t]he constitutional challenge cannot be answered by an argument that [a party's interest is] a privilege and not a right. . . . The extent to which procedural due process must be afforded . . . depends upon whether the recipient's interest . . . outweighs the governmental interest in summary adjudication."\textsuperscript{121} Using the formula outlined in Kelly, the interests that must be weighed at a parole release hearing are, presumably, the interest that the parolee has in gaining his freedom versus any interests the state may have, such as avoiding increased administrative burdens. This balancing formula, and not a right-privilege distinction, must be a determinative factor.

A second rationale courts employ is refusing to recognize procedural due process and right to counsel is that the parole release hearing is a non-adversary proceeding in the sense that the parties have the same interest—a desire to release the prisoner.\textsuperscript{122} As a


\textsuperscript{121} 397 U.S. 254, 262-63 (1970).

\textsuperscript{122} Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), cert. denied sub nom., Thompson
result, procedural safeguards to protect adversary interests are unnecessary.\textsuperscript{123} However, looking at the realities of the hearing, it is obvious that the parties have different interests. The prisoner, interested in obtaining his freedom, must convince the board, acting in the public interest, that he should be freed. This situation creates a quasi-trial atmosphere—an adversary atmosphere—for which procedural safeguards should be afforded. Moreover, even assuming \textit{arguendo} that the proceeding is non-adversary, the need for counsel at many proceedings that are not traditionally adversary in nature has been recognized\textsuperscript{124} and by analogy should be recognized at a parole release hearing.

In addition to the procedural due process approach to extending the right to counsel, the theory has been advanced that the parole release hearing is a form of deferred sentencing, similar to that in \textit{Mempa v. Rhay} where the right to counsel was guaranteed.\textsuperscript{125} According to the theory, sentencing does not end with the trial court's sentencing hearing, since the parole board in effect has the power to lessen the time a person is incarcerated and thereby changing the sentence. This theory is particularly persuasive in light of the increasing use of the indeterminate sentence and consequent sharing of the sentencing responsibility between the trial judge and the parole board.\textsuperscript{126} In response, the courts contend that "the prisoner's sentence has already been finally decreed by the court and cannot be changed."\textsuperscript{127} This is a weak argument, considering the practical effects of the parole release hearing outlined above.

Some courts have refused to allow counsel on the grounds that the administrative burden would be prohibitive. In \textit{Menechino v. Oswald}, the court expressed a fear that should retained counsel be allowed, equal protection would mandate appointment of counsel

\textsuperscript{v. United States Bd. of Parole, 375 U.S. 957 (1963).}  
\textsuperscript{123} Menechino v. Oswald, 430 F.2d 403, 407 (2d Cir. 1970).  
\textsuperscript{125} 389 U.S. 128 (1967). See text accompanying notes 28-30 supra. The petitioner in \textit{Menechino v. Oswald} advanced this theory. 430 F.2d at 410.  
\textsuperscript{127} Menechino v. Oswald, 430 F.2d 403, 410 (2d Cir. 1970).
for indigents also, thus creating an enormous administrative burden on the state.\textsuperscript{128} However, this fear is largely unfounded in view of the Supreme Court's holding in \textit{Goldberg v. Kelly} that counsel need not always be appointed for indigents merely because procedural due process requires the right to retained counsel.\textsuperscript{129}

Finally, not to be overlooked are the advantageous services counsel could perform for the benefit of both the prisoner and the parole board, such as collecting needed data for the board concerning the environment into which the prisoner is to return, his family situation, and other factors that the board considers in arriving at its decision.\textsuperscript{130} After collecting such information, counsel can use his training to present it to the board in a clear and orderly manner, benefiting all parties involved.

In summary, the number of recent case decisions regarding the right to counsel at parole release hearings remains quite small, and what few there are have decided against extension of the right. The only forcible judicial support is the dissent in \textit{Menechino v. Oswald}.\textsuperscript{131} Despite the adverse decisions, however, the arguments for extension of the right, especially the \textit{Mempa} deferred sentencing rationale, are convincing enough that the courts could begin to mandate, or at least allow, counsel at parole release hearings.

\section{VI. \textsc{Habeas Corpus Proceedings}}

The writ of habeas corpus has long been recognized as "the most celebrated writ in the English law."\textsuperscript{132} Its evolution has paralleled the development of human rights and liberties within the criminal process.\textsuperscript{133} Today, the writ provides the basic method of contesting the legality of a petitioner's detention.\textsuperscript{134} Despite the obvious importance of the writ of habeas corpus, there is one notable omission in its development: neither the federal government nor a majority of states has required mandatory assignment of counsel to assist the petitioner at a habeas corpus hearing.\textsuperscript{135}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} 430 F.2d 403, 409-10 (2d Cir. 1970).
\item \textsuperscript{129} 397 U.S. 254, 270 (1970).
\item \textsuperscript{130} 3 U. TOLEDO L. REV. 585, 594 (1971).
\item \textsuperscript{131} 430 F.2d 403, 412 (2d Cir. 1970) (dissenting opinion).
\item \textsuperscript{132} 3 W. BLACKSTONE, COMMENTARIES *129.
\item \textsuperscript{133} Fay v. Noia, 372 U.S. 391, 401-02 (1963).
\item \textsuperscript{134} See Townsend v. Sain, 372 U.S. 293, 311 (1963).
\item \textsuperscript{135} Some states, however, have by statute or court rule, mandated counsel at these proceedings. See note 157 \textit{infra}.
\end{itemize}
\end{footnotesize}
The argument advanced most often for the refusal to extend the sixth amendment right of counsel to habeas hearings is that the right applies only to criminal proceedings, and, therefore, counsel need not be assigned to a habeas corpus petitioner because habeas corpus is a civil proceeding. To determine whether this civil-criminal distinction is a valid reason for refusing to extend the sixth amendment right of counsel, the cases that have developed this rationale must be examined.

The most commonly cited case in support of this civil-criminal distinction is *Ex parte Tom Tong,* an 1883 decision in which the Supreme Court stated: "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. . . . Proceedings to enforce civil rights are civil proceedings. . . ." This reasoning has faithfully been followed over the years in decisions of the lower federal courts. These results were probably justified at the time in light of the fact that there was no absolute right to counsel at trial stages of the criminal process, let alone a post-conviction stages. However, since *Ex parte Tom Tong,* the right to counsel in many areas has been broadened considerably. At the same time, the nature of the habeas corpus remedy has also undergone considerable change. Furthermore, in *Ex parte Tom Tong,* habeas corpus was labeled a civil proceeding in the context of determining which procedural rules would apply, not in determining whether such a hearing was a part of the criminal prosecution as would require extension of the sixth amendment right to counsel. Perhaps the most convincing statement of the mistaken labeling of habeas corpus was voiced by the Supreme Court itself:

We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is "the highest remedy in law, for any man that is imprisoned." The availability of the procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels.

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108 U.S. 556 (1883).

109 Id. at 559.


111 See text accompanying notes 2-13 supra.

112 See text accompanying notes 2-17 supra.

113 108 U.S. at 559.

The Supreme Court's rejection of the civil-criminal distinction has prompted several courts to abandon that distinction as a basis for refusing to appoint counsel for a habeas corpus hearing. In *People ex rel. Williams v. LaVallee*, the New York Court of Appeals, while not requiring mandatory appointment of counsel in all cases, did expressly reject the notion of depriving a habeas petitioner of counsel solely because of the formalistic civil-criminal distinction. Similarly, in *Honore v. Washington State Bd.* the Washington Supreme Court concluded that in light of the history and function of habeas corpus, the "civil" label was inappropriate.

The civil-criminal distinction as a basis for denying the right to counsel at habeas corpus hearings should continue to erode as more courts conclude that "[h]abeas corpus proceedings are criminal within the sixth amendment's requirement of counsel in that their consequences and subject matter are the same as those of the criminal trial or appeal."

Despite convincing arguments for the sixth amendment as a basis for extending the right of counsel to habeas corpus hearings, courts have relied more on other constitutional guarantees, such as the protection of due process rights. In *Ex parte Rosier*, the Court of Appeals for the District of Columbia Circuit recognized that under certain circumstances, due process mandates the assignment of counsel to represent a petitioner at a habeas corpus hearing. Although this case was later overruled, it became the basis for the test announced in *United States ex rel. Wissenfeld v. Wilkins* to determine when appointment of counsel at a habeas hearing is necessary. In *Wilkins*, although the court did not recognize a per se right to counsel, it concluded that sometimes appointment of counsel is necessary to insure a full and fair hearing:

[In certain circumstances the appointment of counsel to assist a prisoner in the presentation of his case is highly desirable. Where a petition for the writ presents a triable issue of fact

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146 133 F.2d 316, 333 (D.C. Cir. 1942).
148 281 F.2d 707 (2d Cir. 1960).
the clear presentation of which requires an ability to organize factual data or to call witnesses and elicit testimony in a logical fashion it is much the better practice to assign counsel.\textsuperscript{149}

Two lines of cases have emerged from the Wilkins rule. Some have required appointment of counsel where the issues involved are complex,\textsuperscript{150} while others have required counsel because of the illiteracy or mental incompetency of the petitioner.\textsuperscript{151} These lines of cases often overlap and can sometimes be cited to support either proposition.

In an important case, Dillon v. United States,\textsuperscript{152} the Ninth Circuit seemed to be moving toward mandatory appointment of counsel based upon a due process rationale:

\[\text{[T]he appointment of counsel may sometimes be mandatory even in those areas in which the Sixth Amendment does not apply. This is true when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing cannot be had without the aid of counsel. Compliance with the due process clause of the Fifth Amendment then requires that counsel be appointed.}\textsuperscript{153}\]

However, neither the court in Dillon nor any other federal court has undertaken to compile the situations that would mandate appointment of counsel at a habeas corpus hearing.

Nevertheless, although it has not been decided that due process requires a per se right to counsel at habeas hearings, the majority of federal courts follow the Wilkins "special circumstances" rule\textsuperscript{154} and are recognizing the need for counsel in an increasing number of situations.

As with other post-conviction proceedings, the Griffin-Douglas equal protection principle stands as another plausible ra-

\textsuperscript{149} Id. at 715.
\textsuperscript{150} See, e.g., Hawkins v. Burnett, 423 F.2d 948 (8th Cir. 1960); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); People v. Shipman, 62 Cal. 2d 225, 397 P.2d 993, 42 Cal. Rptr. 1; Boldis v. Bennet, 159 N.W.2d 425 (Iowa 1968); State v. Ramirez, 78 N.M. 418, 432 P.2d 262 (1967).
\textsuperscript{151} See, e.g., Kreiling v. Field, 431 F.2d 638 (9th Cir. 1970)(per curiam); Tucker v. United States, 427 F.2d 615 (D.C. Cir. 1970); Roach v. Bennet, 392 F.2d 743 (8th Cir. 1968); State v. Weeks, 166 So. 2d 892 (Fla. 1964); Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968).
\textsuperscript{152} 307 F.2d 445 (9th Cir. 1962).
\textsuperscript{153} Id. at 446-47.
\textsuperscript{154} See notes 150 & 156 supra.
tionale for extending a per se right of counsel to habeas corpus proceedings. It is recognized that there is a right to retained counsel at habeas hearings. In the absence of mandatory assignment of counsel, there follows the inevitable conclusion that the type of hearing a petitioner receives depends to a large extent upon whether he can pay for the assistance of counsel. Courts in several jurisdictions have reached this same conclusion and now require mandatory appointment of counsel.

In summary, although some jurisdictions have by statute or court rule extended a per se right to counsel at habeas corpus hearings, the courts in general have been reluctant to require mandatory assignment. This reluctance has been based primarily upon an outdated formalistic classification of the habeas corpus remedy as a civil proceeding. The courts that permit discretionary appointment of counsel do so when either the issues involved are complex or the petitioner lacks the mental competency to adequately present the issues. Some few jurisdictions have extended the right based on an equal protection analysis. There are persuasive arguments for using the sixth amendment, due process, or equal protection as the basis for mandating a per se right to counsel at habeas corpus proceedings, and the courts have shown a growing receptiveness to these arguments.

VII. CONCLUSION

In its present state, the right to counsel in post-conviction criminal proceedings may, in general, be characterized by such terms as "discretionary," "sometimes," and "in special circumstances." An absolute right to counsel exists in all jurisdictions only for sentencing, appeals of right, and probation and parole revocation hearings at which a sentence is first imposed. Although there are many exceptions, in the majority of jurisdictions there is no absolute right to counsel at pre-sentence investigation interviews, discretionary appeals, parole revocation hearings, and pro-

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bation revocation hearings before which sentence has already been imposed, parole release hearings, and habeas corpus hearings.

Proponents of extension of the right to such hearings have advanced various arguments in support of their position; the sixth amendment, due process, equal protection, the benefit to the court of a clear presentation of issues and facts involved, and the growth of legal aid and public defender systems to handle the increased manpower burden. In response, critics have argued not only that the sixth amendment, due process, and equal protection do not apply to such proceedings but that the nature of certain of the proceedings will be detrimentally altered and that the resulting administrative burdens on the bar, the courts, and the state render further extensions of the right to counsel impractical.

Despite the opposition of a majority of jurisdictions to further expansions, the cases indicate a clear trend toward enlargement of the right to counsel. Courts are weighing the merits of the arguments, and the number of jurisdictions that are extending the right to an increasing variety of post-conviction proceedings is unmistakably on the rise. Although the process is slow, it is steady. It is highly possible that, aided by decisions of a Supreme Court that will acknowledge the trends and recognize the validity of the supporting arguments, an absolute right to counsel at most post-conviction proceedings will become a reality in the near future.

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