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INDIGENT'S RIGHTS IN HABEAS CORPUS APPEALS AND ATTORNEY COMPENSATION

In 1963, Honore, an indigent, entered a plea of guilty to the crime of grand larceny, and was sentenced and committed to the state penitentiary. In 1966, the Washington State Board of Prison Terms and Paroles, granting parole, transferred him to the federal authorities. Thereafter, he was confined in the federal penitentiary at McNeil Island, Washington, until his release in March, 1967. In keeping with the terms and conditions of his state parole, the Washington Board reasserted its supervisory authority over him, to which he acceded. In August, 1967, alleging that Honore had violated conditions of his parole, the Board rescinded such and returned him to the state penitentiary.

Subsequently, Honore, filed his petition for a writ of habeas corpus with the Superior Court for Yakima County (the sentencing court), alleging that the state correctional authorities had lost jurisdiction over him upon his prior release to the federal authorities. The superior court appointed counsel to represent Honore, held a hearing, considered the briefs and arguments of counsel, and thereupon denied the petition. Honore's attorneys were then permitted to withdraw from the case.

Subsequent to notice of appeal being filed, the trial court ordered preparation of a statement of facts and transcript at the public expense, but denied Honore's motion for appointment of counsel to aid him in such appeal. This latter denial was appealed to the Supreme Court of Washington, which reversed, granting appointment of attorneys at the state's expense. *Honore v. Washington State Board of Prison Terms and Paroles,* 466 P.2d 485 (1970).

The purpose of this case note is to examine this bold decision of the Supreme Court of Washington, *i.e.*, whether an indigent, as a matter of right or discretion, is entitled to have court-appointed counsel represent him in a postconviction hearing. An analysis of a court-appointed counsel's right to compensation in such proceedings will follow.

THE RIGHT TO COURT-APPOINTED COUNSEL IN POSTCONVICTION PROCEEDINGS

HISTORICAL BACKGROUND

The rights granted under the fifth and fourteenth amendments to the United States Constitution under the due process clauses and also the sixth

amendment's right to aid of counsel,[1] provide the foundation for plaintiff Honore's claim. The case of *Powell v. Alabama*[2] purported to reveal the manner in which these amendments were interrelated. In doing this, several substantial points were raised.

First, the Supreme Court stated that the right of an accused person to have assistance of defense counsel in a criminal case is expressly guaranteed by the sixth amendment. However, this express grant did not remove that same right from the due process clause of the fifth amendment. Second, the Court applied the right of counsel to the fourteenth amendment under its due process clause which included the right to have sufficient time to consult with an attorney and prepare a defense. By applying these rights in *Powell*, 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. . . .[3]

The Supreme Court determined that the specific inclusion of the right to counsel under the sixth amendment did not exclude such right under the due process clauses of the fifth and fourteenth amendments.

In *Gideon v. Wainwright*,[4] the United States Supreme Court concluded that the right to counsel is basic to a fair trial. Defendant Gideon was charged with a noncapital felony in a Florida state court. He appeared without funds or counsel and requested that the court appoint an attorney for him. His request was denied on the ground that state law permitted appointment of counsel for indigent defendants only in capital cases.[5] As

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1. U.S. CONST. amends. V, VI, and XIV. The fifth and fourteenth amendments state that no person shall "be deprived of life, liberty, or property, without due process of law." The sixth amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the *Assistance of Counsel for his defense.*" (Emphasis added). These amendments must be kept well in mind during ones venture into the topic at hand, as they are basic to any decision on the matter.

2. 287 U.S. 45 (1932).

3. *Id.* at 70, 71. For a detailed historical view of the right to counsel as being fundamental in character, *see* People v. Napthaly, 105 Cal. 641, 39 P. 29 (1895); Cutts v. State, 54 Fla. 21, 45 So. 491 (1907); Sheppard v. State, 165 Ga. 460, 141 S.E. 196 (1928); State v. Moore, 61 Kan. 732, 60 P. 748 (1900); State v. Briggs, 58 W. Va. 291, 52 S.E. 218 (1905).

4. 372 U.S. 335 (1963).

5. *Id.*

a result, the defendant conducted his own defense, was convicted and sentenced to imprisonment. The state supreme court denied his petition for habeas corpus relief. The United States Supreme Court reversed the decision of the Florida Supreme Court, and in so doing overturned its holding in *Betts v. Brady*.[6] The Court stated:

> We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory on the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.[7]

In both *Gideon* and *Powell* the Supreme Court considered the right to counsel basic to the proper administration of justice in the courts. Within the framework of the Constitution and these two landmark cases, the Washington Supreme Court approached the first substantive legal problem presented in *Honore*: the court's right to appoint counsel to assist an indigent in the prosecution of an appeal from the denial of his nonfrivolous application for habeas corpus relief.

HABEAS CORPUS CHARACTERIZED

The most recent case on the subject of habeas corpus, *Harris v. Nelson*,[8] takes the position that the term *civil* is inexact when considered in the context of postconviction litigation. The remedy, therefore, is more or less unique, if not somewhat sui generis. The *Harris* case revolved about the question of the admissibility of certain interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure.[9] The appeal of the defendant was founded upon the proposition that habeas corpus proceedings are not encompassed by the Federal Rules. In characterizing the nature of habeas corpus, the Supreme Court stated that the label of "civil" to such proceedings is "gross and inexact."[10] Considering the uniqueness of the remedy, one can easily see divergent opinions arising where an indigent requests a court-appointed attorney to represent him on a habeas corpus appeal. There being no statutes on the exact point, substantive arguments are posed on both sides.

Courts opposing appointment of counsel in postconviction proceedings have stated that the constitutional guarantees of counsel, contained in the sixth amendment to the United States Constitution and similar state consti-

6. 316 U.S. 455 (1942).
7. *Supra* note 4, at 342.
8. 394 U.S. 286 (1969).
9. Fed. R. Civ. P. 33.
10. *Supra* note 8, at 293-94.

tutional provisions, do not apply to habeas corpus proceedings because they are not criminal in nature.[11] Although the appointment of counsel may have been proper and desirable in some situations, both for the protection of the petitioner for habeas corpus relief and the assistance of the judge to whom the application for the writ is made, these courts feel that they are not required to appoint an attorney for this purpose.[12]

Another line of reasoning, on the other hand, reaches the opposite result on grounds other than the sixth amendment.[13] For instance, in *Austin v. State*,[14] the prosecuting attorney, by offering to request concurrent sentences were the defendant to plead guilty, and in the alternative, by warning the defendant that if he chose to adhere to his not guilty plea, thirteen counts of forgery would be leveled against him, coerced the defendant into pleading guilty. On appeal the defendant sought to have his guilty plea quashed. He also contended that the court should provide for counsel to represent him if it elected to proceed further. The court, in its answer, proclaimed:

> Although this court has said that a petitioner in habeas corpus proceedings is not entitled, as of right, to have an attorney appointed by the court at public expense . . . in the case of a petition by one incarcerated on a conviction of a criminal offense, where it appears that the petition is not frivolous, but presents an issue requiring a hearing, the district court should appoint counsel to represent the petitioner if he is financially unable to obtain counsel for himself.[15]

Thus, although the right to counsel was not founded upon the sixth amend-

11. *See infra* note 12.

12. *See* Cullins v. Crouse, 348 F.2d 887 (10th Cir. 1965); Foster v. United States, 345 F.2d 675 (6th Cir. 1965). *See also* Dutton v. Eyman, 95 Ariz. 96, 387 P.2d 799 (1963), *cert. denied* 377 U.S. 913 (1964). *See also* Juelich v. United States, 342 F.2d 29 (5th Cir. 1965); Baker v. United States, 334 F.2d 444 (8th Cir. 1964); Barker v. State, 330 F.2d 594 (6th Cir. 1964); Loftis v. Amrine, 152 Kan. 464, 105 P.2d 890 (1940).

13. *See, e.g.*, Cullins v. Crouse, *supra* note 12. Although the court stated that there was no right to counsel under the sixth amendment for a habeas corpus case, it did state that "[a]lthough the right to counsel in a civil case is not a matter of constitutional right under the Sixth Amendment, counsel should be appointed in post-conviction matters when disposition cannot be made summarily on the face of the petition and record." 348 F.2d 887, 889 (10th Cir. 1965). It seems that the import of this statement relates to nonfrivolous appeals, which, if denied could leave the appellant without a remedy afforded those of greater means. The non-frivolous appeal in this case, took precedence over the denial of habeas corpus relief under the sixth amendment. For other cases concerning similar subject matter, *see* Foster v. United States, 345 F.2d 675 (6th Cir. 1965); Baker v. United States, *supra* note 12; Echols v. State, 276 Ala. 489, 164 So. 2d 486 (1964); and *infra* notes 14, 15, and 16.

14. 91 Idaho 404, 422 P.2d 71 (1966). *See also* Brown v. Cameron, 353 F.2d 835 (3d Cir. 1965); People v. Shipman, 62 Cal. 2d 226, 42 Cal. Rptr. 1, 397 P.2d 993 (1965); and Freeman v. State, 87 Idaho 170, 392 P.2d 542 (1964).

15. Austin v. State, *supra* note 14 at 407, 422 P.2d at 74.

ment, it was deemed necessary when based on the non-frivolity of appellant's claim.[16]

The case of *Harper v. State*[17] went as far as to state that, in certain circumstances, due process required that counsel be appointed to represent a defendant and it was abuse of the court's discretion to refuse to do so: "The question we must decide is whether the judge abused his discretion by refusing to appoint counsel to assist Harper. . . ."[18] Although most courts have not proceeded as far as *Harper*, a number of them have described the type of reasoning that should be used in similar situations.[19] In view of the slight chance of success which an individual, unskilled in the law, stands, when pitted against the state's attorney, the principle espoused in *State v. Weeks*[20] is particularly compelling: "[The] proper course would be to resolve doubts in favor of the indigent prisoner when a question of the need for counsel is presented."[21]

VIOLATION OF THE FOURTEENTH AMENDMENT

Recognizing the vast divergence of views presented by an analysis of

16. *See also* United States v. Wilkins, 281 F.2d 707 (2d Cir. 1960), where it was stated: "[i]n 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 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." *Id.* at 715. While this opinion makes good sense, the case of Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968), posed the most recent comment on the topic. "The rule adopted by the majority of the courts is that while a petitioner is not in every instance entitled to the assistance of counsel in the prosecution of his petition for a writ of habeas corpus, the nature and contents of the relief sought and the basis of the error or defect charged may require that such appointment be made. If it appears from a reading of the petition that the points raised are frivolous and plainly do not justify a judicial inquiry . . . the appointment of counsel is not required." *Id.* at 677-78, 160 S.E.2d at 751. Thus, this viewpoint does have some standing in modern times. *See also* United States v. Reincke, 415 F.2d 1126 (2d Cir. 1969).

17. 201 So. 2d 65 (Fla. 1967).

18. *Id.* at 66.

19. *See* United States v. Wilkins, *supra* note 16; People v. Wilkins, 338 F.2d 404 (2d Cir. 1964); and Anderson v. Heinze, 258 F.2d 479 (9th Cir. 1958), *cert. denied* 358 U.S. 889 (1958). *See also* People v. LaVallee, 19 N.Y.2d 238, 279 N.Y.S.2d 1, 225 N.E.2d 735 (1967), where the court held that "[t]he nature and content of the relief sought and the basis of the error or defect charged should be determinative, and not the procedural or historical form of the proceeding utilized. . . ." *Id.* at 240, 225 N.E.2d at 736. The court is really looking at the substance of the case, not the form. The nature of the right to an attorney should not be overlooked for the mere reason that it is not expressly provided for in the sixth amendment.

20. 166 So. 2d 892 (Fla. 1964).

21. *Id.* at 897.

the right to counsel under the sixth amendment, Honore's attorneys used a bit of ingenuity. They did not suggest that constitutional guarantees of counsel were found in the sixth amendment, but instead argued that to deny an indigent state convict the assistance of such, either at an appropriate state evidentiary hearing or on appeal from a judgment denying habeas corpus relief after such a hearing, denies the indigent equal protection of the law in contravention of the fourteenth amendment.[22] They maintained that such right should be applied particularly when the application for habeas corpus relief is neither frivolous nor repetitive and is urged in good faith.

In commenting upon the arguments of Honore's counsel, Justice Hamilton observed:

> In this connection they point to the constitutional and statutory right of any state prisoner to seek habeas corpus relief in the courts and to the recognized right of appeal from a denial of such relief, and observe that those who can afford to hire an attorney have a right to be heard through counsel. Thus, they contend, an indigent prisoner, who may be virtually illiterate, cut off from objective outside assistance, and hampered by limited research facilities, is invidiously discriminated against when, without counsel, he is pitted at the evidentiary hearing or appellate level against the legal resources of the state in a contest wherein the validity of a state imposed imprisonment is at issue. . . .[23]

There are two decisions upon which rests the basis for such an argument: *Griffin v. Illinois*[24] and *Douglas v. California.*[25]

Prior to the *Griffin* case, the Illinois law entitled every person convicted of a criminal act to a review by writ of error.[26] However, full, direct appellate review could only be had by furnishing the appellate court with a bill of exceptions of a report of the trial proceedings. The preparation of the above documents became, for the indigent defendant, almost impossible because they necessitated a stenographic transcript of the trial proceedings, which was furnished free *only* to indigent defendants *sentenced to death.*[27]

After being convicted of armed robbery, the defendants in *Griffin* requested that the trial court present to them without cost a certified copy of the entire record, including a stenographic transcript of the proceedings. They contended that since they were penniless, failure by the court to provide them with such documents would be a violation of the due process

22. Honore v. Washington State Board, 466 P.2d 485 (1970).
23. *Id.* at 490.
24. 351 U.S. 12 (1956).
25. 372 U.S. 353 (1963).
26. *Supra* note 24.
27. *Supra* note 24.

and equal protection clauses of the fourteenth amendment. The defendants' motion was denied at the trial level and affirmed by both the Illinois appellate and Illinois supreme court. The United States Supreme Court reversed the decision. In so doing, Mr. Justice Black, speaking for the majority of the Court expressed the following:

> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[28]

This opinion is the cornerstone for a number of decisions affirming the indigents' right to a free transcript.[29]

The *Douglas* case centered on a question of law which naturally flowed from the determination in *Griffin*. In a California state court, the defendants were convicted of thirteen felonies and sentenced to imprisonment. In exercising their only appeal as of right, they presented their case to an intermediate court of appeals.[30] After an *ex parte* examination of the record, the court determined that the appointment of counsel would be neither advantageous to the defendants nor helpful to the appellate court.[31] Their appeal was heard without assistance of counsel and their convictions

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28. *Supra* note 24, at 18-19.

29. *See, e.g.*, Entsminger v. Iowa, 386 U.S. 748 (1967); Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. Washington State Board, 357 U.S. 214 (1958). With facts similar to those of *Griffin*, the Supreme Court in *Draper* presented its interpretation of appellant's argument by stating that "[u]nder the present standard, just as under the disapproved one, they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal. Failing to convince the trial judge, they continue, they are denied adequate appellate review because the Supreme Court then passes upon their assignments of error without consideration of the record of the trial proceeding, whereas defendants with money buy a transcript are allowed a direct appeal to the Supreme Court, which affords them full review of their contentions." *Id.* at 494-95. The Court went on to decide that in all cases, the duty of the state is to provide the indigent with means of presenting his contentions to the appellate court, which are as good as those available to a non-indigent defendant. *See also* Keener v. State, 281 F. Supp. 964 (1968).

30. People v. Douglas, 187 Cal. App. 2d 802, 10 Cal. Rptr. 188 (1960).

31. *Id.*

were affirmed. Then the United States Supreme Court stepped forward and proclaimed:

> Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor. . . . The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[32]

This sound reasoning has been upheld and extended in the *Honore* decision, as will be evidenced by the discussion to follow.

RIGHT TO COUNSEL ON SUBSEQUENT APPEALS

The state sought to distinguish *Honore* from *Griffin* and *Douglas* on the *collateral* nature of Honore's case:

> Respondent, Yakima County, suggests that *Griffin* and *Douglas* are distinguishable since both cases involve direct appeals rather than, as here, postconviction collateral attacks and because both cases involve first appeal as of right rather than situations where there has already been, or conceivably could have been, an opportunity for a full appellate review of an indigent's conviction.[33]

This viewpoint has been rebutted, however, by case law dating back to 1959.[34] The obvious implications are twofold. Either the state has failed to do its homework or it hopefully anticipated that the court would fail to research its determination on that point.

In *Burns v. Ohio*,[35] the defendant appealed the right to have his docket fees paid by the state. He was denied this request because his appeal as of right had already been granted. The Supreme Court cited the *Griffin* case as the basis for allowing the payment of fees for indigent prisoners on the appeal as a matter of right. Furthermore, the Court decided that the mere fact of an indigent defendant receiving one appellate review will not alter *Griffin's* law upon a subsequent appeal. Failure to extend the law would result in allowing those who can afford the filing fee

32. *Supra* note 25, at 357-58. *See also* Smith v. United States, 384 F.2d 649 (8th Cir. 1967); and Entsminger v. Iowa, *supra* note 29.

33. *Supra* note 22 at 491.

34. *See infra* note 35.

35. 360 U.S. 252 (1959).

to have the state's supreme court consider their applications for leave to appeal, while the indigent would obviously be barred. In the words of the Supreme Court:

> This is a distinction without a difference for, as *Griffin* holds, once the state chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. . . . This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.[36]

Two years later, a subsequent case, *Smith v. Bennett*,[37] extended both the *Griffin* and *Burns* decisions to cover the right to an attorney upon appeal from a denial of habeas corpus relief—a right that must be established in order to support the *Honore* decision.

In *Smith*, Mr. Justice Clark held that the state, in making the writ of habeas corpus available only to prisoners who could pay the necessary filing fees, failed to extend the privilege to its indigent prisoners, thereby denying them equal protection of the law.[38] The state attempted to distinguish the instant case from both *Griffin* and *Burns* on the basis of the nature of the writ itself. The Court admitted that it was true that habeas corpus was not an attack on a conviction, but instead was an appeal on the validity of the detention. As such, habeas corpus was a collateral proceeding.[39] However, the Court determined that such a distinction was immaterial where such a valuable right—the right to counsel—was being considered.[40]

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36. *Id.* at 257.

37. *See infra* note 38.

38. 365 U.S. 708 (1961).

39. *Id.*

40. In proving the applicability of *Griffin* and *Burns* to habeas corpus appeals the *Smith* court held as follows: "While habeas corpus may, of course, be found to be a civil action for procedural purposes . . . it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. The State admits that each petitioner here is an indigent and that its requirement as to the $4 fee payment has effectively denied them the use of the writ. While $4 is, as the State says, an "extremely nominal" sum, if one does not have it and is unable to get it, the fee might as well be $400—which the State emphasizes it is not. In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action for, as Seldon has said, it is 'the highest remedy in law, for any man that is imprisoned.' . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." *Supra* note 38 at 712. *See also* Gardner v. California, 393 U.S. 367 (1969); Lane v. Brown, 372 U.S. 477 (1963), which uses *Burns* and *Griffin* to

Before proceeding to the second part of this case note, a few remarks concerning the first segment are in order. From the foregoing discussion, one may conclude that an indigent prisoner seeking habeas corpus relief is entitled to be furnished court-appointed counsel at the state's expense. Such right is derived from the equal protection clause of the fourteenth amendment. It should be granted whenever the indigent's petition is urged in good faith, is neither frivolous nor repetitive, and where the issues indicate the necessity for professional legal assistance, if they are to be presented and considered in a meaningful manner. These qualifications having been established in *Honore,* the court then turned to the appointed attorney's right to be compensated.

ATTORNEY COMPENSATION WHEN APPOINTED BY THE STATE

The remainder of this case note deals with the question of whether counsel, appointed to represent an indigent state prisoner on appeal from an adverse disposition of his petition for habeas corpus, can be compensated for his services. An interesting discussion of the non-applicability of state statutes in this regard was posed in the *Honore* case by Justice Hamilton:

> There are no prevailing court rules precisely applicable to these questions, and the only current statute providing for compensation of appointed counsel representing an indigent person convicted of crime on appeal is RCW 10.01.112. . . . It is to be noted, however, that RCW 10.01.112 does not have attached to it the proviso found in RCW 10.01.110, which permits application of its provisions to "such other proceedings and at such other time as may be constitutionally required." Without this proviso, the statute, therefore, concerns itself only with "criminal defendants."[41]

The court concluded that an indigent state prisoner appealing from a judgment denying his application for writ of habeas corpus was not a criminal defendant within the statute cited.[42] Without the benefit of statutory law, we must survey and interpret state decisions.

A majority of the states hold that an attorney has no right to compensation when he defends an indigent prisoner. The reasons given for this conclusion are numerous. Some jurisdictions have declared that to serve the cause of justice on behalf of an indigent is a professional honor, for which an appointed counsel need not and ought not demand compensation.[43] Other jurisdictions have indicated that such gratuitous service is a

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establish state financed collateral proceedings although one review on the merits had already transpired. Long v. District Court, 385 U.S. 192 (1966), which extends *Lane* to habeas corpus relief.

41. *Supra* note 22 at 494-95.

42. *Supra* note 22.

43. *See* Wayne County v. Waller, 90 Pa. 99 (1879); Presbay v. Klickitat

duty imposed by tradition, the Canons of Professional Ethics, and the attorneys' oath.

Thus it is a price paid by the attorney for the privilege of entering his profession.[44] Yet other jurisdictions have felt that gratuitous service may be required of an attorney, because representation of an indigent is a duty to his station as an officer of the court, he being charged with the administration of justice.[45]

On different grounds, it has been said that the courts have no power over public funds collected for public purposes, absent legislative directive.[46] Also, on the allegation of counsel's denial of a property right, it has been decided that to require an attorney to render gratuitous service on behalf of an indigent is not a denial of such.[47] While the general majority

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County, 5 Wash. 329, 31 P. 876 (1892). *See also* Arkansas County v. Freeman and Johnson, 31 Ark. 266 (1876), wherein the court stated: "The services required of them, in cases like the present, are such as charity and humanity demand in behalf of the destitute and defenseless; and the presumption cannot be admitted that they serve in expectation of a fee or reward." *Id.* at 267. Furthermore, in reference to the lack of legislative reform on the subject, it was felt that if the legislature intended counsel in such cases to be compensated, it would not have fixed and directed the payment of his court costs. These costs refer to payment as officers of the court and not to *out of pocket* expenses. The courts which express this view feel that legislature's omission of *out of pocket* expenses indicates the purpose of the legislature to make such services gratuitous.

44. *See* Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943). *See also* State v. Clifton, 247 La. 495, 524, 172 So. 2d 657, 667 (1965), where the court stated: "The professional obligations assumed by attorneys in this State require that a reasonable amount of time and effort be devoted to promoting the cause of justice, including the defense of indigent[s] accused without compensation. The high purpose and traditions of the legal profession require that this burden be shouldered by its members. So long as the burden is not oppressive and is fairly shared among the members of the bar to which they belong there is no cause for complaint." It is indicated in the above quote that if the burden becomes oppressive, *out of pocket* expenses should be awarded. However, this jurisdiction has not seen fit to change its position, although the actual situation is totally outrageous.

45. *See* Jackson v. State, 413 P.2d 488 (Alaska 1966); Warner v. Commonwealth, 400 S.W.2d 209 (Ky. 1966), *cert. denied* 385 U.S. 858 (1966).

46. *See* State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967). *See also* Commonwealth v. Burke, 426 S.W.2d 449, 450-51 (Ky. 1968), where the court held: "Appellee insists this vital matter of compensation involves the 'administration of justice' and urges us to devise some system for the allowance of reasonable attorney's fees as necessary costs of administering the criminal laws of this Commonwealth. A present insurmountable obstacle is that no system we could devise would be workable since the judiciary has no funds available for this purpose." The court indicated that the matter is one for the legislature. However, there has been no headway made in any of the majority states with regard to this matter.

47. United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied* 382 U.S. 978 (1966). The appellate court in *Dillon* posed this question: "DOES AN ATTORNEY WHO HAS BEEN APPOINTED BY A JUDGE OF A UNITED STATES DISTRICT COURT TO REPRESENT AN INDIGENT IN A CRIMI-

view has been substantially upheld, it would seem that the minority view is certainly more equitable and logical.

The minority view espoused in *Honore* is followed by only four other jurisdictions to date—Indiana, Iowa, New Jersey, and Wisconsin.[48] The *Honore* court further expands this body of case law, relating to an attorney's right of compensation for indigent defense work, to encompass services performed in collateral proceedings, *e.g.,* habeas corpus and postconviction hearings.

In their reasoning, the courts of the minority generally state that the idea of an attorney enjoying peculiar privileges, and therefore being more honorable, is not congenial to our institutions. The premise that any class should be paid for its particular services in literally empty honors is an obsolete idea belonging to another age and to a state of society hostile to liberty and equal rights.

In support of this minority stand, the Indiana courts have held that to disallow compensation for the defense of an indigent, actually imposes

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NAL CASE . . . HAVE A RIGHT UNDER THE FIFTH AMENDMENT . . . TO BE COMPENSATED FOR THE SERVICES HE RENDERS PURSUANT TO THE ORDER OF APPOINTMENT? [sic]" (*Id.* at 635). In its appendix the appellate court held: "Representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America. And yet counsel appointed to represent indigents have rarely received anything more than statutory fees which generally do not pay a lawyer what he could get elsewhere for his services. Thus, when a court requires a lawyer to represent an indigent without any compensation, or for less compensation than he could get elsewhere, the court is merely requiring the lawyer to discharge an obligation which is part of the professional tradition he assumed upon becoming a lawyer. There is no 'taking.'" 346 F.2d at 636. I believe that the circuit court, while couching its decision in different terms, is actually stating nothing new. All of the majority decisions are based on the age old *professional responsibility* concept which, in my opinion, has no standing in today's society. *See also* Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966); State v. Cliftom, 247 La. 495, 172 So. 2d 657 (1965); Hoy v. Rhay, 54 Wash. 2d 508, 342 P.2d 607 (1959).

48. *See* Indiana: State v. Allen Circuit Court, 238 Ind. 571, 153 N.E.2d 914 (1958); State v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1941); Knox County Council v. State, 217 Ind. 493, 29 N.E.2d 405 (1940); Board of Comrs. v. McGregor, 171 Ind. 634, 87 N.E. 1 (1909); State v. Miller, 107 Ind. 39, 7 N.E. 758 (1886); Board of Comrs. v. Courtney, 105 Ind. 311, 4 N.E. 896 (1886); Cheek v. Schwartz, 70 Ind. 339 (1880); Gordon v. Board of Comrs., 52 Ind. 322 (1876); Board of Comrs. v. Wood, 35 Ind. 70 (1871); Baker v. Board of Comrs., 18 Ind. 170 (1862); Webb v. Baird, 6 Ind. 13 (1854); Blythe v. State, 4 Ind. 525 (1853), Iowa: Ferguson v. Pattawattamie County, 224 Iowa 516, 278 N.W. 223 (1938); Hall v. Washington County, 2 G. Greene, 473 (Iowa 1850), New Jersey: State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966); State v. Horton, 34 N.J. 518, 170 A.2d 1 (1961), Wisconsin: Dane County v. Smith, 13 Wis. 654 (1861); Carpenter v. County of Dane, 9 Wis. 249 (1859).

an unjust tax upon the attorney. Such a denial does not support the laws of equal and just taxation upon all members of society.[49] Further, the Wisconsin courts have held that "it seems eminently proper and just that the county, even in the absence of all statutory provision imposing the obligation should pay an attorney for defending a destitute criminal."[50]

The New Jersey supreme court in *State v. Rush*, indirectly affirmed the reasoning of both the Indiana and Wisconsin courts.[51] The court began by analyzing the role of the attorney in the light of the ever expanding concepts of modern criminal law. Because of the vast increase in the number of assignments, as well as the extent of the duties imposed in each case, representation of the indigent can no longer be considered an *honorary duty*. Thus the state must ease the extremely heavy burden which has up until now been imposed upon the legal profession alone.[52] The burden can in some measure be lessened by the attorney receiving compensation for his time.

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49. Webb v. Baird, *supra* note 48, at 17: Within this decade old case there is stated the following proposition: "The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no longer at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class—clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens." This was definitely a step in the proper direction towards realistic attorney compensation.

50. Carpenter v. County of Dane, *supra* note 48, at 252. This court rejected the contention that an attorney should be required to devote his time and energies without compensation when defending an indigent. Further, they declared that while the attorney should be interested in seeing justice done, every citizen should also be so interested. In fact, the citizens of any given country should be vitally more interested in saving an innocent man from unmerited punishment, than in conviction of a guilty one. Recognizing that members of the profession should have always been cognizant of the duty to volunteer their services in behalf of the unfortunate, the court held that it was unjust to impose a laborious burden upon the attorney without granting him compensation for his services.

51. State v. Rush, *supra* note 48. *See also* 52 CORNELL L.Q. 433 (1966-67).

52. In the words of the court: "[T]oday, with rapidly changing concepts relating to sundry matters, such as confessions, search and seizure, joinder of defendants, right to counsel, etc., the defense of criminal charges consumes far more time than when we came to the bar. To this must be added the impact of the right of the indigent, without cost, to appeal, and to press post-conviction proceedings and as well as attacks in the federal courts. Further, the total demand will likely increase, for while criminal proceedings now dominate the stage, in the wings are other matters—minor offenses, juvenile delinquency, and civil commitments, areas in which counsel are now furnished but on a selective basis. We are satisfied

Dane County v. Smith[53] proceeded even further than *Rush* in its examination of this issue by declaring a state statute void, where such statute denied compensation by the county to an attorney who represented an indigent. The philosophy behind the decision was that if the legislature gave the courts authority to employ counsel, they could not, at the same time, destroy the implied promise to compensate them. As the Supreme Court of Wisconsin stated: "[T]he latter arises immediately out of the former and is, in the law, so inseparably connected with it, that where the former exists the latter exists also."[54]

If nothing else can be said for the minority view, it is most certainly the more progressive of the two. But, it also seems emminently more equitable and logical than the age-old *professional responsibility concept.* The minority decisions are based on substance, not form, and are highly sensitive to the current problems of our society. The only question that remains is what effect *Honore* and other minority decisions will have on the future status of the law.

FUTURE TRENDS

There are some jurisdictions which, while they follow the majority view, recognize the merit in proposing that assigned counsel should be compensated. However, these courts withheld relief because they believe that a change in the ancient concept of uncompensated services should come through legislative action.[55] It seems though, that as time passes, the

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the burden is more than the profession alone should shoulder, and hence we are compelled to relieve the profession of it." State v. Rush, *supra* note 48 at 412, 217 A.2d at 448. It seems that this type of reasoning was used in formulating the basis for the *Honore* decision.

53. Dane County v. Smith, *supra* note 48.

54. Dane County v. Smith, *supra* note 48 at 658-59. The court held further: "[U]nless the services are rendered gratuitously, which, under such circumstances, cannot be presumed, the promise of payment follows as of course. The statute, therefore, is so inconsistent with itself, that no effect can be given to it. It is for that reason void." *Supra* note 48 at 659. Although this case has not been in accord with subsequent cases, the basic theory of it must be given substantial weight when considering the minority view.

55. *See* Jackson v. State, *supra* note 45. *See also* Warner v. Commonwealth, *supra* note 45, at 211-12, where the court espoused: "While we think there is merit in the proposition that assigned counsel should be compensated we are not convinced that the point of time has arrived at which this Court should rule that the traditional concept of the duty of the attorney as an officer of the court to represent the indigent is no longer valid, and that the public treasury can be compelled by court order to make compensation. We think it is appropriate for the time to defer to legislative action." As will be seen, this view has not induced the legislatures to act on this important point.

needed legislation does not evolve. This is evidenced by *Jones v. Commonwealth*,[56] wherein the Kentucky court discussed the progress of legislative action since a previous decision which it had rendered.[57]

First, the court stated that in 1967, an attorney was denied compensation because the legislature allegedly did not have ample time to act.[58] In 1968, the court continued to defer action because the legislature had failed to act once again.[59] Although the legislature finally attempted to solve the problem in 1970, the governor vetoed the bill and the court thereupon continued to refuse compensation to attorneys.[60]

The court in *Jones* did almost everything *except* award remuneration. In a comment on the ever increasing burden placed upon members of the legal profession, it stated:

> Both the federal and state constitutions prohibit the trial of an indigent defendant without counsel. This means that in a case being prosecuted in a Kentucky court the state either must see that the defendant is provided counsel or it cannot proceed with the prosecution. If it should be determined that attorneys cannot constitutionally be compelled to serve as counsel without compensation, in circumstances where the burden of such service will amount to a substantial deprivation of property, it would seem that the state would be left with the choice either of not prosecuting indigents or of providing compensation for appointed counsel.
>
> Since the providing of counsel for indigent defendants in criminal prosecutions in the state courts is an obligation imposed on the state by the constitutions it would appear that the payment of reasonable compensation to such counsel would be in the category of an essential governmental expense. . . .[61]

When a court is willing to call attorney compensation an *essential governmental expense*, it seems rather odd that it failed to grant remuneration.

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56. 457 S.W.2d 627 (1970).

57. Warner v. Commonwealth, *supra* note 45.

58. Jones v. Commonwealth, 411 S.W.2d 37 (1967).

59. Commonwealth v. Burke, 426 S.W.2d 449 (1968).

60. *Supra* note 56.

61. *Supra* note 56 at 631-32. (Emphasis added). *Accord,* Autrey v. State, 44 Ala. App. 53, 202 So. 2d 88 (1967). *See also* Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486 (1967), where the court stated: "The cold facts of the matter are that every index points to increase in criminal activity at the same time that our criminal dockets from which for decades cases have flowed unhampered to trial or disposition are clogged and torpid contrary to all of our tradition. The defense and trial of a criminal case today is a complicated and time-consuming business. If we are to provide proper prosecution we must also provide appropriate defense under the Constitution as it has been interpreted. These considerations impel, it seems to us, a conclusion that when the court assigns counsel for the defense in the cases of needy criminal defendants then counsel should be paid from the county treasury. . . ." *Id.* at 723-24, 227 N.E.2d at 489. Although this case does not directly relate to habeas corpus proceedings, it is the stepping stone upon which such decisions are founded, as evidenced by *Honore.*

The only possible explanation is that the court had hoped that its words would have a strong impact upon the state legislature, precipitating a statutory remedy to the problem. Should the situation arise again in this jurisdiction, if the needed legislation has failed to materialize, a sixth jurisdiction will predictably join the minority view.

The future of the remaining "majority" states may not be as dim as it may seem, for, as the administration of justice continues to deteriorate and "minority" caselaw becomes legislative statutory law, the result will, of necessity, bring pressure to bear thus forcing the courts to bow to logic and equity. This may not occur within the next few years, but eventually, the cautious *wheels of justice* will turn to a concept resting upon individual equality, instead of monetary preference. Only when the courts and legislatures realize full well that an attorney cannot, in view of current economic conditions, afford gratuitously to devote the services necessary to guarantee due process to an indigent criminal defendant, will these deeply needed changes be made.

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