Nebraska Law Review

Volume 47 | Issue 4 Article 6

1968

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Recommended Citation
William A. Harding, *Right to Counsel for Indigents under the Nebraska Post Conviction Act*, 47 Neb. L. Rev. 722 (1968)
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RIGHT TO COUNSEL FOR INDIGENTS UNDER THE NEBRASKA POST CONVICTION ACT

Many of the rules and procedures of criminal law, especially in regard to the right to counsel, are being rapidly reshaped. While much of this reformation is being accomplished by the decisions of the United States Supreme Court,[1] a good deal of the change, particularly in post conviction review,[2] is coming from the states[3] themselves.

Nebraska passed a Post Conviction Act[4] in 1965 that is somewhat akin to the federal post conviction review proceeding.[5] The Act does not provide an avenue for repetitious review[6] but instead allows the defendant a post conviction review on the basis of constitutional changes that have emerged since his conviction.[7]

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[1] Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

[2] *See* Comment, *Post Conviction Remedies,* 46 NEB. L. REV. 135, 137-138 (1967) for a survey of state post conviction remedies.

[3] This was not always the case, as Justice Harlan noted in his concurring opinion in Gideon v. Wainwright, 372 U.S. 335, 351 (1963), when, after noting the change in right to counsel requirements, he stated: "This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights."

[4] NER. REV. STAT. §§ 29-3001-29-3004 (Supp. 1965).

[5] It was noted in State v. Parker, 180 Neb. 707, 711, 144 N.W.2d 525, 527 (1966) that: "The law relating to post conviction procedure, sections 29-3001 to 29-3004, R.S. Supp., 1965, is quite new. In many of its aspects it is similar to the Federal Statute, Title 28 U.S.C.A., Sec. 2255, p. 563." In State v. Losieau, 180 Neb. 696, 698-99, 144 N.W.2d 435, 436 (1966). it was stated that: "The Nebraska Act is broader than the federal act as to the basis for relief."

[6] "A defendant who has taken an appeal from his conviction cannot secure a second review of the identical propositions advanced in such appeal by resort to a post conviction procedure." State v. Newman, 181 Neb. 588, 589, 150 N.W.2d 113, 114 (1967).

[7] This facet of the Act is, of course, very important as it determines the scope of review allowed. In State v. Losieau, 180 Neb. 696, 699, 144 N.W.2d 435, 437 (1965), the court stated: "It is our conclusion that it was not the intent of the Nebraska Legislature to equate our Post Conviction Act literally with section 2255 of the Federal Act, but rather that it was designed to meet modern judicial requirements, and afford an adequate corrective process for hearing and determining alleged violations of federal and state constitutional guarantees in the *developing areas of their emergence.*" (emphasis added). Some broader wording appears in State v. Sheldon, 181 Neb. 360, 148 N.W.2d 301 (1967) and State v. O'Kelly, 181 Neb. 618, 150 N.W.2d 117 (1967) which allow the application of the Act for a "miscarriage of justice."

In his motion for a review of the conviction, the defendant must allege facts[8] that would raise constitutional questions about the conviction. His conclusions[9] as to his "wrongful" detention[10] are not sufficient. At this point an evidentiary hearing may be granted, and if a denial of constitutional guarantees is discovered, the prisoner shall have his judgment set aside and either be discharged or resentenced. The order entered is considered a final judgment, and

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At the time of the writing of this article, the "emergence doctrine" had not yet been clearly accepted for the Nebraska Act, but a case was pending on the subject. In arguing for such a doctrine, the state's brief in that case outlined the problem area as follows: "The logic of this rule would seem to be irrefutable; the post conviction procedure is not intended to give an appellant a second appeal or to serve as a substitute for an appeal. This procedure should be restricted strictly to constitutional rights newly declared subsequently to a defendant's conviction and specifically declared to have retroactive effect to include viiolations involved in his conviction but not recognized as such at that time. In the present case, illegal search and seizure was clearly recognized as a violation of a constitutional right at the time of appellant's trial and original appeal and to go into the matter now would, in effect, give every convicted defendant a second go around to raise all claimed violations of constitutional rights which had been available to him at the time of his original appeal despite the fact no new law had emerged in the meantime." Brief for Appellee at 10-11, State v. Losieau, No. 36643, filed April 7, 1967. The case has since been decided, with the court deciding in favor of the "emergence doctrine." State v. Losieau, 182 Neb. 367, 154 N.W.2d 762 (1967).

8 "A mere declaration or self-serving statement by a prisoner that his constitutional rights were violated does not entitle him to a hearing on a motion to vacate his conviction or sentence. He is required to allege facts which if proved would constitute an infringement of his constitutional rights." State v. Warner, 181 Neb. 538, 541, 149 N.W.2d 438, 440 (1967). *See also* State v. Sagaser, 181 Neb. 329, 148 N.W.2d 206 (1967); State v. Fowler, 182 Neb. 333, 154 N.W.2d 766 (1967); State v. Duncan, 182 Neb. 598, 156 N.W.2d 165 (1968); State v. Raue, 182 Neb. 735, 157 N.W.2d 380 (1968).

9 "The pleading of conclusions is no more acceptable in a post conviction proceeding than in any other civil proceeding." State v. Erving, 180 Neb. 680, 685, 144 N.W.2d 424, 428 (1966).

10 With due regard for the necessity of post conviction remedies, P. A. Maynard, an Asst. Atty. Gen. for the State of Michigan, in taking a rather pragmatic approach draws the following picture: "After the first pangs of guilt or remorse, if any, have worn off, the prisoner starts 'doing time.' After a while, depending upon the personality of the prisoner, he begins to feel that he has 'done enough time' for his crime. He feels that he has expiated his crime, and all sorts of extreme feelings of self-pity beset and overcome him, followed by expressions which tend to rationalize, minimize and even justify his offense." Maynard, *Post Conviction Problems and Procedures in Michigan,* 36 U. DET. L.J. 202 (1958). Explaining this all too frequent occurrence, Justice Thomas E. Fairchild has noted: "In my experience as a member of the Supreme Court of Wisconsin, it is rare that in ordering

appeal may be taken to the Supreme Court.[11] The court need not however, grant an evidentiary hearing if no facts appear from the petition, along with the files and record of the case, to justify such a hearing.[12] Needless to say, the remedy proves a powerful attraction to the convicted, regardless of the validity of their claims for review.[13]

The Nebraska Act is rather liberally construed and applied in relation to the sufficiency of the petition filed[14] and the time at

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the release of a convicted prisoner, or in ordering a new trial, we can take any satisfaction from the thought that we have freed an innocent person. Usually I suspect we have freed, or given a second chance, to a guilty individual. The justification is, and must be, that the court is enforcing in this manner rules of fair procedure which, if steadfastly maintained, will prevent injustice to others. This service to the principles of our society far outweighs the disservice which may result from turning loose someone who has little concern for the rights of others." Fairchild, *Post Conviction Rights and Remedies in Wisconsin,* 1965 WIS. L. REV. 52, 54.

11 The accused must, however, prove his allegations at the envidentiary hearing to be accorded relief under this act. *See* State v. Decker, 181 Neb. 859, 152 N.W.2d 5 (1967). Whereas denial of relief by the District Court may be appealed whether an evidentiary hearing has been granted or denied, only one appeal under the Act has ever resulted in relief at the Supreme Court level and only one case has ever been remanded for an additional evidentiary hearing. *See* State v. Tunender, 182 Neb. 701, 157 N.W.2d 165 (1968) and State v. Fugate, 180 Neb. 701, 144 N.W.2d 412 (1966), 182 Neb. 325, 154 N.W.2d 514 (1967).

12 State v. Ronzo, 181 Neb. 16, 146 N.W.2d 576 (1966).

13 Nebraska has had enough petitions filed under the Post Conviction Act to prove that such is the case. The Court noted in State v. Clingerman, 180 Neb. 344, 351, 142 N.W.2d 765, 770 (1966), that: "Defendant's motion suggests he is at least reckless with the truth." The Court, in possibly sensing such a trend, took time to emphasize that the post conviction procedure would not prove fruitful to those defendants that were merely "dissatisfied" with their sentence in State v. Silvacarvalho, 180 Neb. 755, 759, 145 N.W.2d 447, 449 (1966) and State v. Snyder, 180 Neb. 787, 790, 146 N.W.2d 67, 69 (1966).

14 Besides the motion, the sentencing court is allowed discretion in adopting reasonable procedures for determining whether substantial issues are raised from the files and records of the case also. State v. Silvacarvalho, 180 Neb. 755, 759, 145 N.W.2d 447, 449 (1966). Most courts take such an attitude where constitutional review is involved. The court, in State v. Tahash, 272 Minn. 7, 15, 136 N.W.2d 847, 852 (1965), in referring to post conviction petitions, noted that: "If it appears from the petition that it alleges defects of some substance, it should not be summarily dismissed merely because of what may appear in the record to the contrary. If it appears from the petition and record and such investigation as the trial court should make, that the defendant has been deprived of a constitutional right, the full evidentiary hearing should be accorded."

which the action may be brought.[15] It shall be the purpose of this article, however, to consider the manner in which the right to counsel[16] portion of the Act is construed and applied.

THE NEBRASKA VIEW

Before the Nebraska Post Conviction Act was passed,[17] several United States Supreme Court decisions imposed right to counsel requirements upon the states. The requirement that a state provide counsel to an indigent in a criminal trial only when lack of counsel would "constitute a denial of fundamental fairness"[18] was replaced, in *Gideon v. Wainwright*,[19] with the determination that indigents had an absolute right to appointed counsel at the state level.[20]. In *Douglas v. California*,[21] the right to counsel for indigents was extended to the direct appeal from criminal convictions. Both *Douglas* and *Gideon* made it clear that the highest court in the land recognized the necessity of legal talents in preparing and prosecuting a case,[22] and they reduced the possibility of guilt or innocence being

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[15] The question of whether a motion could be filed under the Nebraska Post Conviction Act before the prisoner has begun to serve his sentence due to the "prematurity" doctrine that was raised in a previous study of this Act, Comment, *Post Conviction Remedies*, 46 NEB. L.REV. 135, 138 (1967), would seem to be effectively answered by the case of State v. Losieau, 180 Neb. 696, 144 N.W.2d 435 (1966), that held that such a motion could be filed. In discounting the "prematurity" doctrine, the Court went on in that case to state: "In our changing concepts of criminal procedure and constitutional rights, unnecessary delay become abhorrent. Logic, necessity, and the practical considerations of modern jurisprudence make it imperative that historical doctrine not outweigh effective criminal procedure." *Id.* at 701, 144 N.W.2d at 438. The provisions of the act may not be invoked while a direct appeal is pending. See State v. Carr, 181 Neb. 251, 147 N.W.2d 619 (1967) and State v. Williams, 181 Neb. 692, 150 N.W.2d 260 (1967).

[16] NEB. REV. STAT. § 29-3004 (Supp. 1965).

[17] The act became effective April 12, 1965. Neb. Laws c. 145, pp. 486-87 (1965).

[18] Betts v. Brady, 316 U.S. 455 (1942).

[19] 372 U.S. 335 (1963).

[20] *See*, Comment, *Duty to Advise Indigent of Right to Counsel at State Expense*, 40 NEB. L. REV. 161 (1960) for a perceptive and prophetic pre-Gideon survey of the right to counsel for indigents at the state level.

[21] 372 U.S. 353 (1963).

[22] At noted in the majority opinion in Gideon v. Wainwright, 372 U.S. 335, 344-45, this need was most aply stated by Mr. Justice Sutherland in Powell v. Alabama: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the

a determinant dependent upon financial considerations.[23] For post conviction procedures, *Douglas* was the most far reaching,[24] but even *Douglas* did not press for an extension of its requirement beyond the direct appeal stage.[25]

Shortly after passage of the Nebraska Act, its right to counsel provision[26] was described as an "explicit guarantee of public-compensaed counsel...."[27] The Nebraska Supreme Court took a somewhat different view, however, and stated it as follows:

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aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S. 45, 68-69 (1932).

[23] "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." Douglas v. California, 372 U.S. 353, 357-58 (1963).

[24] The probable effect of the Douglas case on post conviction procedures was quickly made a subject of legal discussion by articles such as: Comment, *Right to Counsel in Criminal Post Conviction Review Proceedings,* 51 CAL. L. REV. 970 (1963); and Pollak, *The Supreme Court, 1962 Term,* 77 HARV. L. REV. 62, 105 (1963).

[25] The Douglas decision specifically exempted post conviction procedures from its scope but did note that judicial discretion as to appointment of counsel in that area is allowable only "so long as the result does not amount to a denial of due process or an 'invidious discrimination.'" 372 U.S. at 356.

[26] NEB. REV. STAT. § 29-3004 (Supp. 1965) provides: "The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of sections 29-3001 to 29-3004 and fix their compensation as provided in section 29-1803."

[27] Lake, *The Echo of Clarence Gideon's Trumpet,* 44 NEB. L. REV. 751, 767 (1965). Two years time, however, provided basis for the comment that the act "...provides that counsel *may* be appointed by the district court, but not that counsel *must* be appointed." Comment, *Post Conviction Remedies,* 46 NEB. L. REV. 135, 139 (1967).

> We think section 29-3004, R.S. Supp., 1965, providing the district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of sections 29-3001 to 29-3004, R.S. Supp., 1965 does not require the appointment of counsel in all cases. . . .[28]

The court further explained its view in *State v. Burnside*,[29] holding that the appointment of counsel is within the *discretionary powers* of the district court, and unless petitioner shows abuse of that discretion, the failure to appoint counsel is not error.

The stated reasons for such a view are apparently threefold.[30] In *State v. Hizl*,[31] the court explained that: "Although such a proceeding resembles a criminal action, it is in fact a civil proceeding in which a defendant is not entitled as a matter of constitutional right to the appointment of legal counsel." A second reason[32] is the limitation to direct appeals found in *Douglas* itself; and it is finally reasoned that: "The federal courts have long held that a defendant is not entitled as a matter of right to counsel in habeas corpus proceedings or in proceedings on motions to vacate a judgment of conviction."[33]

Post conviction procedures have been previously classified as civil remedies,[34] and have thus been classified as outside the scope

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[28] State v. Craig, 181 Neb. 8, 10, 146 N.W.2d 744, 746 (1966).

[29] 181 Neb. 20, 146 N.W.2d 754 (1966). *See also* State v. Williams, 182 Neb. 444, 155 N.W.2d 377 (1967) and State v. Packson, 182 Neb. 472, 155 N.W.2d 361 (1967).

[30] The additional specific reason of "only one question of law" in which counsel would serve no meaningful role was cited in State v. Craig, 181 Neb. 8, 10, 146 N.W.2d 744 (1966); and an underlying reluctance to depart from such a view is probably also found in the fear that most of the appeals would be frivolous, and the administrative burden overwhelming.

[31] 181 Neb. 680, 684, 150 N.W.2d 217, 219 (1967).

[32] "A defendant has no constitutional right to the appointment of counsel in a post conviction proceeding. Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811, relates only to the question as to the right to counsel on his first appeal from an original conviction of the crime charged." State v. Burnside, 181 Neb. 20, 22, 146 N.W.2d 754, 755 (1966). *But see* note 25, *supra*.

[33] State v. Burnside, 181 Neb. 20, 146 N.W.2d 754 (1966). *But see* LaFaver v. Turner, 231 F. Supp. 895, 898-99 (D. Utah 1964). *See also* State v. Dabney, 181 Neb. 263, 147 N.W.2d 768 (1967) and State v. Williams, 181 Neb. 692, 150 N.W.2d 260 (1967).

[34] "As said in United States v. Hayman, 342 U.S. 205, 222, 72 S. Ct. 263, 274, 96 L. Ed. 232: 'Unlike the criminal trial where the guilt of the defendant is in issue * * * a proceeding under Section 2255 is an independent and collateral inquiry into the validity of the conviction.' The remedy provided by that statute 'is a special civil rather than a

of federal and state constitutional guarantees of the right to counsel in criminal proceedings. Such a classification is only peripherally correct, however, as such procedures are now established remedies for challenging a criminal conviction and are, in fact, more a part of criminal than civil procedures. In dismissing such a classification,[35] and in following the indications of *Douglas* for post conviction procedures, the Supreme Court of California has remarked that: "It is now settled that whenever a state affords a direct or collateral remedy to attack a criminal conviction, it cannot invidiously discriminate between rich and poor."[36] The court went on to use a "required-standard" type of approach and held that upon a showing of factual allegations sufficient to justify an evidentiary hearing an indigent would be appointed counsel—a standard which other courts have since adopted.[37]

It may be true that the discretionary standard approach of the Nebraska Court will not constitute "invidious discrimination" against indigents, but note should be taken of the California Court's comment on this standard. After a thorough examination of the *Douglas* case, the court concluded:

> Since the questions that may be raised on *coram nobis* are as crucial as those that may be raised on direct appeal, the Douglas case precludes our holding that appointment of counsel in *coram nobis* proceedings rests solely in the discretion of the court.[38]

This interpretation would clearly breathe some added life into the constitutional aspects of *Douglas*' effect on post conviction procedure.

criminal proceeding even though it attacks a criminal conviction,' Taylor v. U.S., 229 F.2d 826, 832 (8th Cir. 164)" Baker v. United States, 334 F.2d 444, 447 (8th Cir. 1964).

35 "The Attorney General contends that *coram nobis* is a civil remedy and that therefore appointment of counsel is not mandatory.... Whatever the label, however, *coram nobis* 'must be regarded as part of the proceedings in the criminal case * * *.'... and it is an established remedy for challenging a criminal conviction." People v. Shipman, 62 Cal.2d 226, 231, 397 P.2d 993, 996 (1965).

36 *Id.*

37 The Supreme Court of Idaho has since held that "... where it appears that the petition is not frivilous [*sic*], 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." Austin v. State, 91 Idaho 404, 407, 422 P.2d 71, 74 (1966). The court in People v. Monahan, 17 N.Y.2d 310, 312, 217 N.E.2d 664, 666 (1966), put it a bit stronger, in holding: "The question now before us, i.e., an indigent's right to assigned counsel at a *coram nobis* hearing, is so completely circumscribed by recent and well-founded parallel decisions that it remains only to declare the rather obvious answer that such a right does exist." *See also* State v. Randolph, 32 Wis. 2d 1, 144 N.W.2d 441 (1966).

38 People v. Shipman, 62 Cal. 2d 226, 231, 397 P.2d 993, 996 (1965).

Such an interpretation would also seem to be a wise move in the field of post conviction procedure in light of the history of the direct appeal. It should be remembered that the direct appeal, like post conviction remedies, is not a constitutionally required aspect of criminal procedure. In wording much like that of *Douglas* the Court in *Griffin v. Illinois*[39] applied constitutional considerations to the direct appeal process as follows:

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g., McKane v. Durston,* 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

The Nebraska Post Conviction Act allows an evidentiary hearing to all who can present factual allegations of some constitutional merit.[40] At this point it is evident that the further provisions of the act are, in fact, a matter of right for the defendant as provided by law. The requirements of *Douglas* would then require that the district court appoint counsel for indigents.

No court has yet used the *Griffin* rule on state post conviction remedies, but any doubts that the *Douglas* requirements do extend to post conviction remedies by virtue of the *Griffin* rationale are easily resolved by a recent decision of the United States Supreme Court. In *Entsminger v. Iowa,*[41] the court considered such an extension, and summarized its previous cases as follows:

> [I]n Burnes v. Ohio, 360 U.S. 252, 3 L.Ed2d 1209, 79 S.Ct., 1164 (1959), the Court in reaffirming the *Griffin* rule, held that "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." At 257, (3 L. Ed.2d at 1213.) In Smith v. Bennett, 365 U.S. 708, (6 L. Ed. 2d 39, 81 S. Ct. 895 (1961)) the Court, once again considering the question, held that such principles are not limited to direct appeals but are also applicable to post conviction proceedings.

This is a somewhat wider reading of the *Smith* case than some might ascribe to it, but the Supreme Court in the *Entsminger* case does seem to indicate that what has been called the "liberal approach" to criminal procedure will indeed be extended to post conviction procedures.

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[39] 351 U.S. 12, 18 (1955).

[40] NEB. REV. STAT. § 29-3001 (Supp. 1965).

[41] 386 U.S. 748, 751 (1967).

The reasoning of the *Griffin* rule is perhaps even more persuasive than that of *Douglas,* but both appear to do considerably more homage to the concept of justice as she is customarily pictured—with scale and blindfold—than does the Nebraska standard which seems to posit that an indigent's case does not require aid of counsel at either the evidentiary hearing or appeal stage. This rationale is in rather marked contrast to that of *Douglas* and *Griffin.*

In light of the reasoning behind the constitutional right to counsel, and the logic of *Griffin* that extensions to basic criminal procedures must respect that right—it would appear prudent for Nebraska, legislatively or judicially, to require right to counsel for indigents under the Nebraska Post Conviction Act.

In support of this interpretation, it must be recalled that if the defendant can allege facts tending to raise constitutional questions in regard to his conviction he is guaranteed a further hearing and appeal as surely as he is guaranteed an initial trial and appeal. Thus, post conviction procedure becomes an important additional step in the adjudication process, and discrimination on a basis of monetary considerations cannot be constitutionally justified.

There would also be some logic to a requirement of counsel to aid on the petition drafting stage,[42] but as the factual allegation test must be met before the defendant may make use of the act, it is doubtful that counsel would, or could be granted at that stage.[43] It should also be noted, however, that in light of the purpose and application of the act, it is doubtful if lack of counsel at such stage will be of much consequence.

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[42] A recent case attempted to raise the issue of such a requirement, and counsel for the appellant urged that "[t]he critical time of need for services of counsel was before the court took up the motion for Post-Conviction relief." The brief for the appellant concluded that: "Unless so construed, the provision for the appointment of counsel is devoid of sense and meaning." Brief for Appellant at 8-9, State v. Carreau, No. 36644, filed April 10, 1967. The court did not specifically consider this argument in its opinion but in affirming the conviction of the lower court, is was mentioned that: "Competent counsel was appointed for defendant before his arraignment in county court, and defendant was represented by counsel at all *essential* stages of his subsequuent prosecution." State v. Carreau, 182 Neb. 295, 296, 154 N.W.2d 215, 216 (1967) (emphasis added). *See also* Lake, *The Echo of Clarence Gideon's Trumpet,* 44 NEB. L. REV. 751, 765, 767 (1965), n. 42 and accompanying text.

[43] This question has not been answered specifically, even though the act provides for legal representation "in all proceedings under the provisions of this act...." In discussing this point, one writer has outlined the problems as follows: "What remains unclear is whether counsel

This is so because the act is only intended to affect those whose conviction is questionable because of the emergence and further development of evolving areas of constitutional guarantees,[44] and the bench is surely as aware of such developments as the bar. Furthermore, the liberal manner in which the bench has granted petitions[45] under the act serves to allay any fear that constitutional guarantees might not develop as fast in Nebraska as in the rest of the nation.

In the last analysis, however, it would appear clear that the attitude of the United States Supreme Court in this area gives ample indication that right to counsel may soon be made explicitly mandatory for indigents in post conviction procedures. Concluding on like indications of forthcoming change in the reapportionment field, Judge Stephen J. Roth noted, in words propitious for this area, that change was imminent with the following analysis: "It is submitted that the Supreme Court handwriting is on the wall, for him who will [,] to read."[46]

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may be appointed to assist the prisoner in drafting and filing his 'verified motion,' or whether the prisoner must muddle through this stage of the procedure unrepresented and secure counsel only after he has successfully negotiated the drafting and filing himself." Lake, *The Echo of Clarence Gideon's Trumpet*, 44 NEB. L. REV. 751, 769 (1965).

44 *See* note 7, *supra.*

45 *See* note 14, *supra.*

46 Marshall v. Hare, 227 F. Supp. 989, 1005 (E.D. Mich. 1964) (dissenting opinion).