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Post Conviction Relief: Do It Once, Do It Right and Be Done with It

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INTRODUCTION

Many states, including Wyoming, enacted post conviction relief statutes during the 1960's in response to the broadening of federal habeas corpus[1] and the resulting increase of federal habeas corpus petitions.[2] Penitentiary inmates who demonstrate that their state or federal constitutional rights were violated during their conviction proceedings may pursue state post conviction relief.[3] State post conviction statutes allow prisoners to challenge their sentencing[4] or set aside a conviction. A prisoner may invoke post conviction relief following his final appeal from conviction or after the allotted appeal period has lapsed.[5] State post conviction relief exists in conjunction with existing state and federal habeas corpus procedures[6] and generally must be exhausted prior to filing a federal habeas request.[7]

Although the Wyoming post conviction relief statute provides counsel for indigent petitioners, it is unclear *when* that appointment should occur. In *Alberts v. State,*[8] the Wyoming Supreme Court required appointment of counsel on *initiation* of a post conviction relief proceeding.[9] Apparently in response to *Alberts,* the 1988 Wyoming State Legislature amended the post conviction statute to require review of the petition's merits before counsel is appointed.[10] The current Wyoming post conviction relief statute requires appointment of counsel only *after* the district court determines that the post conviction petition meets statutory require-

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1. The principal difference between habeas corpus and post conviction relief is where the petition is filed. In habeas, the petition is filed in the court nearest the place of confinement; in post conviction, the petition is filed with the court of conviction. Raper, *Post Conviction Remedies,* 19 WYO. L.J. 213, 214-15 (1965).

2. *See* R. POPPER, POST-CONVICTION REMEDIES IN A NUTSHELL § 5.1 (1978); UNIF. POST-CONVICTION PROCEDURE ACT, 11 U.L.A. 482 (1974).

3. WYO. STAT. § 7-14-101 (1977 & Cum. Supp. 1988).

4. Raper, *supra* note 1, at 217; *but see* Whitney v. State, 745 P.2d 902 (Wyo. 1987) (sentencing cannot be reached under post conviction statutes).

5. D. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 1-5 (2nd ed. 1987); POPPER, *supra* note 2, at § 1.1.

6. C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS § 28.01 (1980). Habeas corpus is a challenge to the constitutionality of detention. POPPER, *supra* note 2, at § 7.1. Federal habeas corpus allows state prisoners access to federal courts on assertion of a federal constitutional violation. WHITEBREAD, *supra* note 6, at § 28.01. State post conviction relief is permitted under WYO. STAT. §§ 7-14-101 to -108 (1977 & Cum. Supp. 1988); habeas corpus is permitted under WYO. STAT. §§ 1-27-100 to -134 (1977 & Cum. Supp. 1988).

7. Fay v. Noia, 372 U.S. 391 (1963); *see generally* L. W. YACKLE, POSTCONVICTION REMEDIES § 52 (1981).

8. 745 P.2d 898 (Wyo. 1987).

9. In *Alberts,* the Wyoming Supreme Court construed WYO. STAT. § 7-14-104 (1977, Rev. 1987) as requiring appointment of counsel if the petitioner is determined to be a "needy person." The *Alberts* court held that counsel was required at the initial stage of preparation of the post conviction petition. *Alberts,* 745 P.2d at 901. *See infra* text accompanying notes 79-84. *See also* Long v. State, 745 P.2d 547 (Wyo. 1987).

10. 1988 Wyo. Sess. Laws ch. 46, § 1; WYO. STAT. § 7-14-104 (1977 & Cum. Supp. 1988).

ments for content and merit and that the petitioner is without reasonable financial means to hire legal assistance.[11]

A petitioner who wants counsel appointed must request it in his post conviction petition.[12] Under the current procedure, inmates often draft post conviction petitions without assistance of counsel. This frequently results in crudely drafted documents that are frivolous, fail to meet statutory requirements or neglect to address key legal issues.[13] When the court receives a petition for post conviction relief, its initial review is limited to the face of the petition. The court has the difficult task of evaluating the petition's merits before it can appoint counsel to investigate and clarify the petitioner's allegations. The court can properly dismiss the petition because it lacks merit or is facially inadequate.[14] Thus, lack of counsel or inadequate legal skills may prevent petitioners with legitimate constitutional claims from obtaining review due to a poorly drafted petition.[15] In addition, the Wyoming post conviction statute deems the first petition res judicata, thereby preventing an inmate from filing a second petition for relief.[16] The statute also limits appointment of counsel to first petitions.[17]

Although there is no federal[18] or state[19] constitutional right to assistance of counsel to aid in preparing post conviction petitions, fundamental fairness requires "meaningful access" to the courts.[20] The pertinent question is "How 'meaningful' is access when the petitioner is unable to fathom the intricacies of legal argument and is without assistance of counsel?"[21] Access is not meaningful if the petitioner is unable to present his case due to illiteracy or ignorance of the law. Refusal to provide counsel to draft the original post conviction petition undermines the premise of fairness in our judicial system and leads to a proliferation of inadequate petitions. The present practice of invoking res judicata to bar subsequent petitions compounds this unfairness.

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11. WYO. STAT. § 7-14-104 (1977 & Cum. Supp. 1988).

12. WYO. STAT. § 7-14-104 (1977 & Cum. Supp. 1988). The Wyoming Supreme Court has interpreted the statute to mean that the court is not obligated to appoint counsel in the absence of a request to do so. Bibbins v. State, 741 P.2d 115, 116-17 (Wyo. 1987); Fondren v. State, 749 P.2d 767, 768 n.1 (Wyo. 1988).

13. YACKLE, *supra* note 7, at § 137.

14. *Id.* at § 150; WYO. STAT. § 7-14-103 (1977 & Cum. Supp. 1988).

15. YACKLE, *supra* note 7, at § 150.

16. WYO. STAT. § 7-14-103 (1977 & Cum. Supp. 1988).

17. WYO. STAT. § 7-14-104(b)(iii) (1977 & Cum. Supp. 1988).

18. In Pennsylvania v. Finley, 481 U.S. 551 (1987), petitioner claimed that his appointed post conviction counsel failed to follow the procedures for withdrawal set out in Anders v. California, 386 U.S. 738 (1967). The United States Supreme Court held that *Anders* did not apply to collateral post conviction proceedings and the right to court appointed counsel did not extend to discretionary appeals. *See infra* text accompanying notes 41-42. *See also* POPPER, *supra* note 2, at § 2.2.

19. Johnson v. Avery, 393 U.S. 483, 488 (1969) (federal and state courts are not obligated to appoint counsel for prisoners seeking post conviction relief).

20. Ross v. Moffitt, 417 U.S. 600, 611 (1974) (involving a defendant's appeal from the denial of court appointed counsel for discretionary appeal).

21. *See generally* YACKLE, *supra* note 7, at § 137.

This comment examines the Wyoming post conviction relief statutes which address appointment of counsel and res judicata. It argues that failure to appoint counsel at the beginning of the process, coupled with application of res judicata to bar subsequent petitions, defeats the purpose of post conviction relief.

BACKGROUND

Federal

The United States Constitution does not create a right to appeal a state criminal conviction.[22] Nor has the United States Supreme Court required states to provide post conviction remedies for asserted constitutional violations.[23] Despite the lack of mandatory appeal, most states grant at least one appeal[24] and some sort of post conviction review.[25] Consistent with the absence of a federal constitutional requirement for state post conviction relief,[26] no federal constitutional right to appointed counsel for post conviction relief exists.[27] However, once a state establishes a right to appeal, indigents are entitled to counsel for that appeal.[28] Even when appeal is discretionary, the United States Supreme Court has stated that an appeal must be meaningful[29] and that under some circumstances, a meaningful appeal requires the assistance of counsel.[30]

The Supreme Court almost required state post conviction review in *Young v. Ragan*.[31] There the Illinois Supreme Court affirmed the trial court's denial of a petitioner's claim that his sentencing violated the fourteenth amendment due process clause. On review, the United States Supreme Court recognized that federal habeas corpus requires exhaustion of all state remedies but that many states do not provide post conviction procedures.[32] The Court held that states must provide prisoners with a "clearly defined method" to raise claims of denied federal rights.[33] However, the Court did not define the "clearly defined method."

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22. *Ross*, 417 U.S. at 611; *see also* WILKES, *supra* note 5, at § 9-1.

23. *Finley*, 481 U.S. at 555; *Avery*, 393 U.S. at 488.

24. *Ross*, 417 U.S. at 611-12.

25. Cutbirth v. State, 751 P.2d 1257, 1276 (Wyo. 1988) (Urbigkit, J., dissenting); *see also* POPPER, *supra* note 2, at § 5.1.

26. Methods of post conviction review are generally lumped into one of three categories: habeas corpus, coram nobis and those that fit neither category and are treated separately. WILKES, *supra* note 5, at § 1.5; YACKLE, *supra* note 7, at § 1. Coram nobis challenges a judgment because of an error in fact. POPPER, *supra* note 2, at § 6.1.

27. The United States Supreme Court recently affirmed this rule in *Finley*, 481 U.S. 551, holding that the fourteenth amendment does not require appointment of counsel for indigents in state post conviction proceedings. *See generally* WILKES, *supra* note 5, at § 4-23.

28. Douglas v. California, 372 U.S. 353 (1963) (indigents convicted of thirteen felonies were denied court appointed counsel for their only nondiscretionary appeal); *see also Ross*, 417 U.S. 600.

29. *Ross*, 417 U.S. at 612.

30. Gagnon v. Scarpelli, 411 U.S 778, 790-91 (1973) (suggesting that such circumstances may include the nature of the proceeding, the complexity of the facts and circumstances and the petitioner's ability to speak for himself).

31. 337 U.S. 235 (1949).

32. *Id.* at 238-39.

33. *Id.*

Sixteen years later in *Case v. Nebraska*,[34] the Court granted certiorari to decide if the fourteenth amendment required states to provide post conviction remedies, but then did not reach the merits of the case. In *Case*, the petitioner alleged an unconstitutional denial of counsel in state district court. The Nebraska Supreme Court affirmed the lower court's dismissal because Nebraska law did not provide for post conviction review. Three days prior to oral argument before the United States Supreme Court, the Nebraska Legislature adopted a post conviction remedy. Consequently, the Court remanded the case for further proceedings under the new statute. Justice Clark's concurrence did, however, suggest that absence of a post conviction remedy may deny due process under the fourteenth amendment.[35] In his concurring opinion, Justice Brennan noted that while the states have the primary responsibility for administering their criminal laws, the fourteenth amendment and supremacy clause of the United States Constitution require fair and just procedures.[36]

Although it concerned discretionary appeal rather than post conviction relief, the Court's ruling in *Ross v. Moffit* [37] set the stage for appointment of counsel under the fourteenth amendment. In *Ross*, the North Carolina Supreme Court declined to appoint counsel to represent an indigent on his discretionary appeal. The United States District Court denied a habeas corpus petition[38] but the Court of Appeals reversed.[39] On certiorari, the United States Supreme Court noted that counsel must be provided for the indigent on the first appeal of right but reversed, holding that the fourteenth amendment due process clause did not require counsel to be provided for a *discretionary* appeal. The key to the decision was that meaningful access to the courts existed and refusal to appoint counsel for discretionary appeal did not preclude meaningful access. The Court stated "[u]nfairness results *only if the indigent are singled out* by the State and denied meaningful access to the appellate system *because of their poverty.*"[40]

The Court recently reiterated this position in *Pennsylvania v. Finley*.[41] There, the petitioner's appointed counsel reviewed the record and, finding no meritorious issues, requested the trial court's permission to withdraw. The court agreed with counsel and dismissed the appeal. On appeal, the Pennsylvania Superior Court concluded that counsel's conduct violated the petitioner's constitutional rights. On certiorari, the United States Supreme Court reversed, holding that the right to appointed counsel extends only to the first appeal of right and not to discretionary appeals.[42]

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34. 381 U.S. 336 (1965).
35. "Believing that the practical answer to the [constitutional] problem is the enactment by the several States of postconviction remedy statutes I applaud the action of Nebraska." *Id.* at 339-40 (Clark, J., *concurring*).
36. *Id.* at 344 (Brennan, J., concurring).
37. 417 U.S. 600 (1974).
38. Moffitt v. Blackledge, 341 F. Supp. 853 (W.D.N.C. 1972).
39. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973).
40. *Ross*, 417 U.S. at 612 (emphasis added).
41. 481 U.S. 551 (1987).
42. *Id.* at 555.

During the 1960's, the United States Supreme Court broadened the availability of federal post conviction remedies for state convictions in a series of cases known as the "post conviction trilogy."[43] The "post conviction trilogy" established guidelines for federal post conviction review for prisoners in state or federal court. In *Fay v. Noia*,[44] a petitioner imprisoned on a coerced confession was denied post conviction relief. The confession issue was heard and rejected at trial. The petitioner allowed the appeal period to lapse before applying for habeas corpus. On certiorari, the United States Supreme Court held that a prisoner's procedural default in state court did not bar a habeas petition in federal court absent a deliberate bypass of the state remedies.[45]

In *Townsend v. Sain*,[46] a petitioner confessed while under the influence of police-administered truth serum. Following conviction, he claimed the confession was illegal. After exhausting state remedies, he petitioned the federal district court for habeas corpus. The district court refused to allow the petitioner to call witnesses and, satisfied that the confession was voluntary, dismissed the petition.[47] The United States Supreme Court reversed the lower court, holding that an evidentiary hearing was required for certain types of factual disputes and established criteria for such relitigation in federal habeas corpus claims.[48]

In *Sanders v. United States*,[49] the petitioner's successive federal habeas petitions were denied. On certiorari, the United States Supreme Court considered the significance of prior proceedings on subsequent habeas motions and remanded for a hearing on the second petition. The Court discussed the application of res judicata and set guidelines for evaluating successive habeas petitions.[50] The guidelines set by the Court provide that denial of a prior habeas application is given controlling weight only if: 1) the same ground present in the later application was determined adversely to the applicant on the prior application, 2) the prior determination was on the merits, and 3) the ends of justice would not be served by reaching the merits of the later application.[51]

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43. *Noia*, 372 U.S. 391; Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963); *see also* Wilkes, *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 Ga. L. Rev. 13, 32-35 (1974).

44. 372 U.S. 391 (1963).

45. *Id.* at 438.

46. 372 U.S. 293 (1963).

47. United States v. Sain, 265 F.2d 660 (7th Cir. 1958).

48. The United States Supreme Court's criteria are: 1) the merits of the factual dispute were not resolved in the state hearing, either at trial or in a collateral proceeding; 2) the state factual determination is not fairly supported by the record as a whole; 3) the fact finding procedure used by the state court did not afford a full and fair hearing; 4) there is a substantial allegation of newly discovered evidence; 5) the material facts were not adequately developed at the state court hearing; or 6) the applicant was not afforded a full and fair fact hearing at the trial level. If any of these situations exist, an evidentiary hearing is required. *Townsend*, 372 U.S. at 312-18.

49. 373 U.S. 1 (1963).

50. *Id.* at 15-17.

51. *Id.*

The combined effect of *Noia, Townsend* and *Sanders* was a significant expansion of the availability of federal habeas corpus.[52] For example, in 1960, 2,177 post conviction petitions were filed in federal district courts by state and federal prisoners. By 1975, the number ballooned to 19,307, a 786.9% increase.[53] The majority of these petitions were from state, not federal, prisoners.[54] Largely as a result of this increase in federal post conviction petitions and a desire to retain state control over state prisoners, states began to adopt state post conviction remedies.[55] By 1987, forty-nine states had adopted modern post conviction remedies,[56] many of which are based on the Uniform Post-Conviction Procedure Act.[57]

Uniform Post-Conviction Procedure Act

In 1966, the National Conference of Commissioners on Uniform State Laws and the American Bar Association attempted to provide a solution to the rising conflict between federal and state courts by updating the 1955 Uniform Post-Conviction Procedure Act.[58] The Act was intended to establish a post conviction procedure meeting uniform standards of justice. A major goal was to reduce the number of federal habeas corpus actions and the resulting expense of unlimited post conviction relief applications.[59] Recognizing the importance of assistance of counsel, the Act provides for appointing counsel to indigents, stating:

> (a) If an applicant requests appointment of counsel and the court is satisfied that *the applicant is unable to obtain adequate representation, the court shall appoint counsel* to represent the applicant. (Emphasis added.)[60]

This language mandates appointing counsel on a showing of the petitioner's indigence. Appointment is unrelated to the merits of the case.

The Act does not specifically address *when* counsel should be appointed, but suggests that indigence is the sole prerequisite. The comments also imply that appointment should occur early in the process. The comments' authors anticipated that legal counsel would review each petition to determine if it is proper and, if not, draft the necessary allegations.[61] The comments also suggest that case-by-case appointment of counsel is inefficient; the preferred method is to provide counsel within the custodial institution on a regular basis.[62]

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52. *See* YACKLE, *supra* note 7, at § 20.
53. POPPER, *supra* note 2, at § 1.3.
54. *Id.* Of 19,307 petitions, 14,260 were from state prisoners and 5,047 were from federal prisoners.
55. YACKLE, *supra* note 7, at § 1. Fourteen states have authorized post conviction remedies by judicial order, thirty-six by statute. D. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 9-2 (2nd ed. 1988 Supp.).
56. Michigan, the exception, limits post conviction relief to habeas corpus actions for "old-fashioned jurisdictional errors." WILKES, *supra* note 5, at § 9-2.
57. UNIF. POST-CONVICTION PROCEDURE ACT § 5, 11 U.L.A. 480-81 (1974).
58. *Id.*
59. *Id.* at 480 (Commissioners' Prefatory Note).
60. *Id.* at 235 (Cum. Supp. 1988).
61. *Id.* at 236.
62. *Id.* (comment).

Wyoming Generally

In 1961, Wyoming enacted one of the first post conviction statutes in the nation.[63] The Wyoming statute was modeled after the Illinois Post Conviction Act rather than the Uniform Post-Conviction Procedure Act.[64] The Wyoming Act's stated purpose was to "provide a remedy for persons convicted and imprisoned in the penitentiary, who assert that rights guaranteed to them by the Constitution of the United States or the State of Wyoming, or both, have been denied or violated in the proceedings in which they were convicted."[65] One of the statute's principal goals was to provide a state remedy to minimize trying state criminal issues in federal courts.[66] If no errors were present, the post conviction appeal record would provide an adequate basis for the federal court to affirm the state's post conviction decision.[67]

Appointment of Counsel

The 1961 Post Conviction Act stated that the court "shall appoint counsel if [it] is satisfied that the petitioner has no means to procure counsel . . . ."[68] The Act did not mention *when* counsel should be appointed.[69] In 1987, the Wyoming legislature amended the Act to require the court, on request of a petitioner, to appoint the public defender to represent a petitioner who the court determined was a "needy person."[70] A "needy person" was "unable to provide for the full payment of an attorney and all other necessary expenses of representation."[71] The "needy person" requirement was also subject to the proviso that the district court determine that the request for relief was a proceeding that a "reasonable person with adequate means would be willing to bring at his own expense."[72] Again, no mention was made of *when* counsel should be appointed.

In *Long v. State*,[73] the trial court denied the defendant's petition for post conviction relief without appointing counsel. The petitioner questioned whether failure to appoint an attorney for post conviction petition

63. 1961 Wyo. Sess. Laws ch. 63, § 4; WYO. STAT. §§ 7-14-101 to -108 (1977 & Cum. Supp. 1988). By 1965, only thirteen states had adopted a modern post conviction remedy: Alaska, Delaware, Florida, Illinois, Kentucky, Maine, Maryland, Missouri, Nebraska, New Jersey, North Carolina, Oregon and Wyoming. WILKES, *supra* note 5, at § 3-5.

64. Sanchez v. State, 755 P.2d 245, 247 (Wyo. 1988). Illinois was the first state to enact a new statutory post conviction remedy. WILKES, *supra* note 5, at § 3.5.

65. 1961 Wyo. Sess. Laws ch. 63.

66. State ex rel. Hopkinson v. District Court, Teton Co., 696 P.2d 54, 59 (Wyo. 1985); Raper, *supra* note 1, at 219 (essentially, Wyoming wanted one last chance to correct its errors before relinquishing control to the federal courts).

67. *Hopkinson*, 696 P.2d at 59; Raper, *supra* note 1, at 215.

68. 1961 Wyo. Sess. Laws ch. 63, § 4.

69. Revisions in 1977 renumbered the provision for appointment of counsel but left it substantively unchanged. *Cutbirth*, 751 P.2d at 1276 (Urbigkit, J., dissenting); WYO. STAT. § 7-14-104 (1977).

70. The Public Defender Act, 1987 Wyo. Sess. Laws ch. 176, §§ 1 to 3 (codified at WYO. STAT. § 7-6-101 to -114 (1977, Rev. 1987)), became effective on May 22, 1987 and did not affect post conviction petitions filed prior to that date. *Long*, 745 P.2d at 550-51.

71. WYO. STAT. § 7-6-102(a)(iv) (1977, Rev. 1987).

72. WYO. STAT. § 7-6-104(c)(iii) (1977, Rev. 1987).

73. 745 P.2d 547 (Wyo. 1988).

was a denial of due process. The Wyoming Supreme Court reached its conclusion through statutory construction and did not address the due process question. The court reversed the trial court, holding that the petitioner was a "needy person" under the post conviction statute and was entitled to appointed counsel on petition for post conviction relief.[74] After determining that counsel was required, the court criticized the legislature's attempt to clarify the procedure for appointing counsel by replacing the statutory right to counsel with a court-assessed "reasonable person with adequate means" test. It noted that the statute gives the trial court discretion in appointing counsel and that the standard is entirely subjective. Justice Urbigkit stated "[t]his court is persuaded that the legislature should settle for the test of indigence and permit counsel to pursue all potential avenues of relief for a convicted indigent."[75]

In his dissent, Chief Justice Brown argued that the convicted should not be able to assert "any frivolous circumstance and automatically trigger the appointment of an attorney."[76] Brown contended that the legislature never intended this result and that the public defender's staff would need to be enlarged to accommodate the increased workload.

Justice Cardine also dissented, stating that an appellant is entititled to an attorney for post conviction only if he is indigent *and* a reasonable person would use his own money to pursue relief.[77] Cardine did not consider the standard for appointment of counsel to be subjective and would have the trial court review the facts and circumstances of each case prior to appointing counsel.[78]

In *Alberts v. State*,[79] a petitioner appealed the denial of his request for appointed counsel to pursue his post conviction request. Granting the petitioner's request for counsel, the Wyoming Supreme Court interpreted the post conviction statute to require appointment of counsel upon *initiation* of post conviction proceedings if the petitioner has no means of procuring counsel. The court also held that the representation of counsel must include preparation of the post conviction petition.[80] The court concluded that appointing counsel at the beginning of a post conviction appeal would assure a complete and competently prepared petition.[81] As aptly stated by Justice Macy:

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74. The court found that the record was inadequate to support the trial court's denial of counsel and remanded. *Id.* at 549. At the time of Long's petition, the pertinent statute required appointment of counsel if the court was satisfied that the petitioner had no means to procure counsel. WYO. STAT. § 7-14-104 (1977). Subsequent legislation altered the wording to include a requirement that the court must determine that the proceeding was one that a reasonable person with adequate means would bring at his own expense. WYO. STAT. § 7-6-104(c)(iii) (1977, Rev. 1987).

75. *Long*, 745 P.2d at 552.

76. *Id.* at 553 (Brown, C.J., dissenting).

77. *Id.* at 555 (Cardine, J., dissenting).

78. *Id.* at 555-56 (Cardine, J., dissenting).

79. 745 P.2d 898 (Wyo. 1987).

80. *Id.* at 901.

81. *Id.*

> To require someone unlearned in the law to file a post-conviction relief petition asserting substantial denial of constitutional rights would, in most cases, be an exercise in futility. Representation by counsel also becomes essential when considering that failure to raise any claim of substantial denial of constitutional rights in an original post-conviction proceeding constitutes a waiver of such claim.[82]

Under *Alberts,* the petitioner must only meet the financial need test to be assigned counsel.

In his dissent, Justice Cardine stated that no mandatory duty exists to appoint counsel for post conviction claims.[83] He reaffirmed his dissent in *Long* asserting that the two statutes, read together, require the trial court to appoint counsel to represent a "needy" person *only if* a reasonable person with adequate means would pursue the claim at his own expense.[84] Thus, Cardine asserts that appointment of post conviction counsel is not mandatory and application of a reasonable person test by the trial court affords adequate protection for indigent petitioners.

The Wyoming Supreme Court and Wyoming legislature differ as to when counsel should be appointed. Just five months after *Alberts,* the Wyoming legislature changed the rules in a seemingly conscious effort to avoid the result in *Alberts.*[85] The newly amended statute imposes preliminary hurdles that each petitioner must overcome before the district court appoints counsel.[86] Prior to appointing counsel, the court must evaluate the petition. It must determine that the petition is a first petition that is neither frivolous nor barred by statute and that raises issues requiring the assistance of counsel.[87] The court cannot consider the financial condition of the petitioner until this test is met.[88] Then, if the court determines the petitioner is without "any reasonable financial means" to hire his own attorney, it may appoint an attorney.[89]

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82. *Id.*
83. *Id.* at 902 (Cardine, J., dissenting).
84. *Id.*
85. *Alberts* was decided November 18, 1987. The amendment was adopted March 11, 1988 and became effective on June 9, 1988. 1988 Wyo. Sess. Laws ch. 46 § 3.
86. 1988 Wyo. Sess. Laws ch. 46 § 1; WYO. STAT. § 7-14-104 (1977 & Cum. Supp. 1988).
87. The pertinent part of the 1988 post conviction relief statute reads:
> (a) If requested in the petition, the court may appoint [an attorney] to represent a petitioner who is determined by the court to be without any reasonable financial means to hire his own attorney.
> (b) Before appointing the public defender or a private attorney to represent a petitioner, the court shall determine that the petition:
> (i) Is not frivolous;
> (ii) Is a first petition under W.S. 7-14-101(b);
> (iii) Is not barred under W.S. 7-14-103; and
> (iv) Raises issues which cannot reasonably be presented by the petitioner without the assistance of an attorney.

WYO. STAT. § 7-14-104 (1977 & Cum. Supp. 1988).
88. WYO. STAT. § 7-14-104(b) (1977 & Cum. Supp. 1988).
89. WYO. STAT. § 7-14-104(a) (1977 & Cum. Supp. 1988).

Res Judicata

Since their origin in 1961, the Wyoming post conviction statutes have included a waiver provision for any claim of substantial denial of constitutional rights not raised in the original or amended post conviction petition.[90] The waiver provision was unchanged by the 1977[91] and 1988 amendments [92] and remains intact today. The Wyoming Supreme Court has often urged that principles of res judicata are applicable, stating, "[i]t is . . . universally recognized that post-conviction relief is not a substitute for an appeal and the petition will not lie where the matters alleged as error could or should have been raised in an appeal or in some other alternative manner."[93] Essentially, any claim that could have or should have been brought in the original petition is barred by res judicata.[94]

The Wyoming Supreme Court refused a petitioner's third post conviction request in *Reynoldson v. State.*[95] Expressing its concern about repeated relitigation of the same issues, the court reflected, "a comprehensive and adequate consideration and a finite disposition in one post-conviction-relief proceeding is both indicated and mandated in the proper administration of the justice delivery system."[96] Similarly, in *Bibbins v. State,*[97] the Wyoming Supreme Court rejected a second post conviction petition stating "the post-conviction relief statutes do not contemplate successive petitions for post-conviction relief."[98]

In *Cutbirth v. State,*[99] a defendant asserted ineffective assistance of counsel in his post conviction claim. The court concluded that ineffective assistance of counsel can be raised in a post conviction petition but that the defendant must demonstrate that he was prejudiced by his counsel's omissions.[100] The court stated that unless the defendant demonstrates "good cause" for his failure to raise the issues on appeal *and* actual prejudice arising from the failure, he is foreclosed from raising the claim on post conviction.[101] The court based its use of res judicata on principles of finality and judicial economy and noted that it follows the federal rule.[102]

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90. WYO. STAT. § 7-14-103(a)(ii) (1977 & Cum. Supp. 1988); WYO. STAT. § 7-14-103 (1977, Rev. 1987); 1961 Wyo. Sess. Laws ch. 63, § 3.

91. 1987 Wyo. Sess. Laws ch. 157, § 3; WYO. STAT. § 7-14-103 (1977, Rev. 1987).

92. 1988 Wyo. Sess. Laws ch. 46, § 1 (codified at WYO. STAT. § 7-14-103 (1977 & Cum. Supp. 1988)).

93. Munoz v. Maschner, 590 P.2d 1352, 1354 (Wyo. 1979).

94. WYO. STAT. § 7-14-103(a)(ii)-(iii) (1977 & Cum. Supp. 1988). Issues that have been litigated and decided are res judicata through issue preclusion. *See* YACKLE, *supra* note 7, at § 27. Under claim preclusion, the petitioner's rights are merged with the first judgment and later action on that same claim is barred even though those same claims were not raised. *Id.*

95. 737 P.2d 1331 (Wyo. 1987).

96. *Id.* at 1335.

97. 741 P.2d. 115 (Wyo. 1987).

98. *Id.* at 116.

99. 751 P.2d 1257 (Wyo. 1988).

100. The court noted that failure to raise a claim does not constitute ineffective assistance of counsel. *Id.* at 1263.

101. *Id.* at 1261-62.

102. *Id.* at 1262.

Other Jurisdictions

Time of Appointment

The Illinois post conviction statute,[103] the model for the Wyoming statute, provides for assistance of a lawyer for the original post conviction petition.[104] Appointment of counsel is mandatory if the post conviction relief petition is not summarily dismissed as frivolous and the defendant is indigent.[105] Failure to appoint counsel under these circumstances is specifically condemned as reversible error.[106] The stated purpose of the Illinois statute is to provide assistance of counsel in drafting a "legally sufficient petition."[107]

Alaska's rules of criminal procedure require that counsel be appointed to represent an indigent on his first post conviction application.[108] The applicable rule states that if the post conviction petitioner is indigent and issues raised in his petition cannot be summarily dismissed, counsel shall be appointed.[109] The Alaska Supreme Court has interpreted the statute to require appointment of counsel "at the time the initial application is filed."[110] The court reasoned that the post conviction petition must contain genuine issues and that in order for the petition to meet this standard, it is essential that the petitioner be represented by competent counsel.[111]

Colorado, like Alaska, extends the right to appointed counsel to post conviction proceedings and provides counsel "at every stage of the proceeding."[112] The Colorado statute requires the public defender to be appointed "both before and after conviction" for each indigent defendant who requests appointed counsel.[113] In *People v. Hubbard*,[114] the Colorado Supreme Court considered the necessity of counsel in a post conviction appeal. It concluded that assistance of counsel was essential in post conviction reviews unless the asserted claim is "wholly unfounded."[115] The court reasoned that, as a practical matter, a defendant unassisted by counsel would be unable to prepare an adequate petition complying with state law.[116]

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103. ILL. ANN. STAT. ch. 38, para. 122-1 (Smith-Hurd 1973 & Cum. Supp. 1988).

104. Wilson v. State, 39 Ill. 2d 275, 235 N.E.2d 561, 562 (1968).

105. People v. Collins, 161 Ill. App. 3d 285, 514 N.E.2d 499, 501-02 (1987). The statute states: "[u]pon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it . . . shall appoint counsel on appeal, . . . without cost to the petitioner." ILL. ANN. STAT. ch. 110A, para. 651(c) (Smith-Hurd 1985).

106. *Collins*, 514 N.E.2d at 502.

107. People v. Polansky, 39 Ill. 2d 84, 233 N.E.2d 374, 376 (1968).

108. Hertz v. State, 755 P.2d 406, 408 (Alaska Ct. App. 1988). Former ALASKA R. CRIM. PRO. 35(c) was repealed and replaced by ALASKA R. CRIM. PRO. 35.1 effective Aug. 1, 1987.

109. "[a]pplicant is indigent . . . [w]here the court determines that the application shall not be summarily disposed of on the pleadings . . . counsel shall be appointed to assist indigent applicants." ALASKA R. CRIM. PRO. 35.1(e) (1988 Supp.).

110. Donnelly v. State, 516 P.2d 396, 399 (Alaska 1973).

111. *Id.*

112. People v. Hubbard, 184 Colo. 245, 519 P.2d 945, 948 (1974); People v. Naranjo, 738 P.2d 407, 409 (Colo. Ct. App. 1987).

113. *Naranjo*, 738 P.2d at 409; COLO. REV. STAT. § 21-1-103 (1986).

114. 184 Colo. 243, 519 P.2d 945 (1974).

115. 519 P.2d at 948.

116. *Id.*

The Oregon Post-Conviction Hearing Act[117] requires appointment of counsel to indigents without considering the merits or frivolity of the petition.[118] Established to "eliminate the confusion"[119] surrounding post conviction remedies, the statute requires appointing counsel before disposing of any petition.[120]

Res Judicata

Like Wyoming, the Illinois statute waives any issues not raised in the original or amended petition even if the subsequent petitions are on new grounds.[121] The Illinois Supreme Court has stated that the post conviction act is not intended to provide repeated reviews of issues already decided and limits post conviction appeals to one per petitioner.[122] However, the Illinois court refuses to apply res judicata where counsel was not appointed for the first petition.[123] Likewise, Alaska limits post conviction petitions to one,[124] but provides for mandatory appointment of counsel to assure that the single opportunity is meaningful.[125]

Colorado also restricts post conviction appeals to one, reasoning that if petitioners are provided post conviction counsel at all stages, the need for additional proceedings is reduced.[126] If a petitioner is not provided with counsel in his first post conviction petition, he is not necessarily precluded from bringing a second petition on other grounds and has a statutory right to counsel for his second motion.[127] Similarly, the Oregon statute employs

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117. OR. REV. STAT. § 138.510 to 138.680 (1983 & Cum. Supp. 1988).

118. (2) . . . If the circuit court is satisfied that petitioner is unable to pay such expenses or to employ suitable counsel, it shall order that petitioner proceed as an indigent person. . . .
(3) In order to proceed as an indigent person, the circuit court shall appoint suitable counsel to represent petitioner.
OR. REV. STAT. § 138.590 (2)-(3) (1983 & Cum. Supp. 1988).

119. Page v. Cupp, 78 Or. App. 520, 717 P.2d 1183, 1184 (1986).

120. Rodacker v. State, 79 Or. App. 31, 717 P.2d 659, 661 (1986).

121. "Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." ILL. ANN. STAT. ch. 38, para. 122-3 (Smith-Hurd 1973 & Cum. Supp. 1988).

122. McClain v. People, 15 Ill. App. 3d 929, 305 N.E.2d 423, 426 (1973).

123. *Polansky*, 233 N.E.2d at 376.

124. Hampton v. Huston, 653 P.2d 1058, 1060 (Alaska Ct. App. 1982)(citing ALASKA R. CRIM. PRO. 35(j)). The current rule, 35.1(h) reads:

> (h) Waiver of or Failure to Assert Claims. All grounds for relief available to an applicant under this rule must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Added by Supreme Court Order 822 effective August 1, 1987.

125. ALASKA R. CRIM. PRO. 35.1.

126. *Hubbard*, 519 P.2d. at 948-49.

127. *Naranjo*, 738 P.2d at 409.

res judicata to limit post conviction relief petitions to one; however, the statute includes an exception if the petitioner was not represented by counsel.[128]

ANALYSIS

The Wyoming Supreme Court has interpreted the availability of post conviction relief narrowly, concluding that:

> [p]ost-conviction relief is available only in certain instances where the error is of constitutional magnitude and the petition alleges denial of defendant's constitutional rights. . . . *Post-conviction relief may be granted only in extraordinary circumstances which strongly suggest a miscarriage of justice* and may not be entertained as a substitute for raising appealable issues. (emphasis added).[129]

"Constitutional rights" are limited to determination of whether the defendant was denied right to counsel, to have witnesses, and to prepare and present his defense.[130] Post conviction relief is not a substitute for appellate review of a conviction, nor is it treated as an appeal.[131] Further, only one post conviction proceeding is permitted.[132] In sum, post conviction relief procedures are very limited in scope; they are not a panacea for conviction providing a sure route to freedom.

Notwithstanding the rarity of successful post conviction petitions,[133] the Wyoming Supreme Court has stressed the importance of the opportunity for relief. In 1979, the court stated that post conviction relief is intended to grant relief when a sentence has been imposed without benefit of a fair trial.[134] The Wyoming Court later stated, "[w]e will afford appellant the opportunity to meaningfully pursue the courses available under Wyoming jurisprudence, and we will give it our best attention even though appellant may be mistaken about his right to relief."[135]

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128. OR. REV. STAT. § 138.550 (1983).

129. Hoggatt v. State, 606 P.2d 718, 722 (Wyo. 1980).

130. *Johnson*, 592 P.2d at 287. The Wyoming Court's scope of post conviction review appears to be narrower than federal habeas review, raising questions outside the scope of this comment. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus does not extend to fourth amendment claims where there was an opportunity for a full and fair hearing); Benton v. Maryland, 395 U.S. 784 (1969)(there is no jurisdictional bar to review based on a claim of double jeopardy); Solem v. Helm, 463 U.S. 277 (1983)(United States Supreme Court reviews sentencing under the eighth amendment prohibition against cruel and unusual punishment); *contra Whitney*, 745 P.2d at 904 (sentencing cannot be reviewed under post conviction statute); *cf. Cutbirth*, 751 P.2d at 1261-62 (the scope of state post conviction relief should be limited to the scope of federal habeas).

131. Pote v. State, 733 P.2d 1018 (Wyo. 1987).

132. WYO. STAT. § 7-14-103(a)(ii) (1977 & Cum. Supp. 1988); *Bibbins*, 741 P.2d at 116.

133. In Wyoming's 26-1/2 year history of post conviction remedies the court has heard 15 appeals, *see* Sanchez v. State, 755 P.2d 245, 248 (Wyo. 1988)(Urbigkit, J., dissenting), but only one prisoner has been successful in overturning his sentence. *See Cutbirth*, 751 P.2d at 1297 (Urbigkit, J., dissenting).

134. *Johnson*, 592 P.2d at 286.

135. *Hopkinson*, 696 P.2d at 60.

Time of Appointment

The purpose of post conviction relief is to enable the unlawfully imprisoned to obtain review of their conviction or sentencing with the possibility of a new trial when justice requires.[136] The United States Supreme Court has stated that post conviction proceedings must be more than a formality.[137] Further, state procedures cannot create a meaningful appeal process for petitioners with economic means while relegating an indigent petitioner's appeal to a "meaningless ritual."[138] The states must assure the indigent "an adequate opportunity to present [his] claims fairly."[139]

A legal background or training obviously provides an advantage within the legal system.[140] A petitioner should not be penalized for his inability to recognize his position, to adequately formulate an argument or articulate facts which show a constitutional violation. Appointed counsel is necessary for an indigent petitioner to have an adequate opportunity to present his case. Counsel is of no use unless appointed at the beginning of the initial post conviction process. In addition, where res judicata is applied, as in Wyoming, counsel must be appointed for the first petition because subsequent petitions are barred by statute.

The United States Supreme Court's statements regarding the necessity of counsel, whether made in a post conviction setting or not, support this view. The Court concedes that the unskilled or uneducated may be unable to adequately present their case[141] and that even the educated layman needs the "guiding hand of counsel" to cope with the intricacies of the law.[142] The Court has also acknowledged that the average defendant does not have the legal skills necessary to protect himself in a criminal court.[143] Appointed counsel is necessary when required by fundamental fairness or when the petitioner lacks the skills to protect his guaranteed rights.[144] The United States Supreme Court has concluded that the right to be heard would be "of little avail" if it did not include the right to be represented by counsel.[145] In addition, fundamental fairness requires "meaningful access" to the courts.[146] Thus, the United States Supreme Court has clearly stated that counsel is often essential to a fair proceeding and that indigency should not preclude such an opportunity.[147]

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136. *Avery*, 393 U.S. 483. In some instances, such as double jeopardy, Green v. United States, 355 U.S. 184 (1957), insufficient evidence, *cf.* Burks v. United States, 437 U.S. 1 (1978), or lack of a speedy trial, United States v. Strunk, 412 U.S. 434 (1923), post conviction review may result in dismissal and freedom for the petitioner.

137. *Avery*, 393 U.S at 486.

138. *Id.*; *Douglas*, 372 U.S. at 358. *Douglas* addresses only the right to counsel on first appeal but its logic can be extended to discretionary appeals.

139. *Ross*, 417 U.S. at 612.

140. YACKLE, *supra* note 7, at § 137.

141. *Gagnon*, 411 U.S at 787.

142. Powell v. Alabama, 287 U.S. 45, 69 (1932).

143. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

144. *Gagnon*, 411 U.S at 790-91.

145. *Powell*, 287 U.S. at 68-69.

146. *Ross*, 417 U.S. at 611.

147. Evitts v. Lucey, 469 U.S. 387, 393-94 (1985); *Finley*, 481 U.S. at 551.

The United States Congress codified the Supreme Court's recognition of the need for counsel for fair and proper legal proceedings in the Criminal Justice Act.[148] The Act provides a national plan for representing indigents at government expense. Although controlling only in federal courts, the Act suggests the appropriate standards for appointing counsel for indigents[149] and mandates appointment of counsel when "the interests of justice so require."[150]

Opponents to appointing counsel to prepare the initial petition argue that it will encourage post conviction review and burden the courts with frivolous petitions.[151] However, "frivolity is not solely within the domain of the impoverished. The rich as well as the poor can also be afflicted with frivolity."[152] The solution to frivolous petitions is dismissal.[153] Realistically, using an attorney may actually reduce the number of frivolous claims filed by indigents.[154] Instead of a shotgun approach by an unskilled petitioner, trained counsel can select the issues with potential for success and provide the proper procedure, thus reducing the court's workload.[155]

Other opponents insist that public policy "militates" against appointing counsel for every indigent prisoner who wants legal advice.[156] Arguing against appointing attorneys in post conviction proceedings, Justice Cardine stated, "[t]he cost and delay now built into the justice system [are] apparent. At a time when the state is struggling to balance its budget, . . . [the *Long*] decision will add large sums to the cost of government."[157] However, the potential increase in workload for the courts should not detract from fundamental fairness nor should judicial economy outweigh fair consideration of constitutional claims. As aptly stated by Justice Urbigkit, the court should not "short-circuit constitutional rights in the search for simplicity, expediency, and maybe just less work."[158]

The *Alberts* position of providing legal counsel at the beginning of the post conviction process is correct and complies with United States Supreme Court's guidelines for providing indigents with counsel and meaningful appellate procedures. The *Alberts* approach is not unusual; courts and legislatures of other states impose similar requirements.[159] Illinois, the source of the Wyoming post conviction statute, and at least

148. 18 U.S.C. § 3006A (1970).

149. Note, *Discretionary Appointment of Counsel at Post-Conviction Proceedings: An Unconstitutional Barrier to Effective Post-Conviction Relief*, 8 GA. L. REV. 434, 453 (1974) (authored by Edmund M. Kneisel).

150. 18 U.S.C. § 3006A (1982 & Supp. IV 1987).

151. Honore v. Washington State Bd. of Prison Terms and Parole, 77 Wash. 2d 660, 466 P.2d 485, 492 (1970); *see also Long*, 745 P.2d at 554 (Cardine, J., dissenting).

152. *Honore*, 466 P.2d at 492.

153. *Id.*

154. YACKLE, *supra* note 7, at § 137.

155. *Id.*

156. Duncan v. Robbins, 159 Me. 337, 193 A.2d 362, 365 (1963).

157. *Long*, 745 P.2d at 554 (Cardine, J., dissenting).

158. *Cutbirth*, 751 P.2d at 1269 (Urbigkit, J., dissenting).

159. In 1974, eighteen states required provision of counsel for post conviction proceedings. Note, *supra* note 149, at 454.

three other western states, Alaska, Colorado and Oregon, take the same approach. The Alaska reasoning is typical:

> Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited. . . . In the case of all except those who are able to help themselves - usually a few old hands or exceptionally gifted prisoners - the prisoner is, in effect, denied access to the courts unless such help is available.[160]

Thus, the Alaska court concluded that an applicant must be represented by counsel to assure that meritorious claims will be adequately presented.[161] Similarly, the Colorado Supreme Court reasoned that assistance of counsel assures a "full review" of all possible constitutional violations in one proceeding and reduces successive petitions.[162]

Res Judicata

Application of res judicata is an important factor in the equation of when to appoint counsel for post conviction relief. Where res judicata is not applied to subsequent petitions, the timing of appointment of counsel is not a particularly important concern; a later counsel-assisted petition could remedy errors. However, where res judicata is applied, errors due to lack of counsel are irremediable. Thus, appointing counsel before a decision on the petition's merits becomes crucial.

The Wyoming rule is that post conviction relief does not allow relitigation of an issue already considered and decided because that issue is res judicata.[163] Thus, if a first post conviction petition is rejected, the statute precludes a second petition even if a different claim is presented or the first petition was not considered on its merits.[164] Also, if a claim could have been raised in an earlier proceeding, and should have been, the petitioner is foreclosed from relief.[165] Under Wyoming law, although no counsel assisted with the initial petition, res judicata precludes a later application for relief.[166] This result is patently unfair and denies the petitioner an opportunity to effectively present his case to the court.

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160. *Donnelly*, 516 P.2d at 399 n.6, (quoting Johnson v. Avery, 393 U.S. 483, 487-88 (1969)).

161. *Id.* at 399.

162. *Hubbard*, 519 P.2d. at 948.

163. *Bibbins*, 741 P.2d at 116. This comment does not address the possibility of post conviction review upon discovery of new evidence.

164. WYO. STAT. § 7-14-103 (1977 & Cum. Supp. 1988).

165. *Cutbirth*, 751 P.2d at 1262. Wyoming employs claim preclusion in post conviction appeals unless the petitioner can show cause for failure to raise the claim and actual prejudice. Despite its recitation of the res judicata rule, the Wyoming court has been willing to discuss precluded issues. For example, in *Whitney*, 745 P.2d at 904, the Wyoming Supreme Court stated that sentencing could not be reached under the post conviction statutes but proceeded to address the merits of the case. So, while the Wyoming rule is one of "procedural waiver or default," *Cutbirth*, 751 P.2d at 1261, the court's present application of the rule is inconsistent. Perhaps the Supreme Court is sending a signal that res judicata will soon be applied firmly and that post conviction attorneys should review their cases for possible statutory bars.

166. WYO. STAT. § 7-14-103 (1977 & Cum. Supp. 1988).

Proponents of res judicata argue that it is the only way to prevent a flood of repetitive petitions. However, the burden of successive applications must be weighed against the need to prevent potentially unconstitutional imprisonment. While multiple requests are not desirable, equity and fairness require either provision of counsel for the initial request or allowing a second request with aid of counsel.

Wyoming is not the only state to limit the number of post conviction petitions. In fact, limitations on the number of post conviction petitions may be more the norm than the exception.[167] Generally, successive post conviction applications on the same grounds are barred and applications on new grounds are barred if the petitioner deliberately withheld those issues from earlier petitions.[168] Illinois, Alaska, Colorado and Oregon apply res judicata to post conviction appeals but provide an exception to allow review of successive post conviction petitions when the petitioner lacked assistance of counsel for his first petition.[169] For example, the Illinois Supreme Court stated that dismissing a *pro se* petition without appointing counsel, when requested, was contrary to the legislature's purpose and applying res judicata would create due process problems.[170] The Alaska Supreme Court reasoned that mandatory appointment of counsel advances the policy of limiting post conviction relief to a single application, thereby precluding successive applications over a period of time.[171]

The principal arguments for limiting the number of post conviction appeals are numerous — cost, delay, reduction of workload and abuse of the justice system.[172] The costs involved in multiple appeals and delay in finalizing an action are readily apparent. Abuse of post conviction relief occurs when a petitioner deliberately withholds an issue in hopes of bringing a later claim.[173] This should constitute waiver of the claim.[174] There is, however, no abuse when a claim is not presented because the petitioner is ignorant of the facts or their legal significance.[175] Practically speaking, it may be impossible to determine whether a petitioner was ignorant of facts or chose to withhold them for a later appeal.[176] This practical difficulty suggests that appointing counsel at the outset of a post conviction relief petition is a prudent approach.

Although the Wyoming Supreme Court has ample reason to try to limit post conviction appeals to one,[177] it must recognize, as have Illinois,

167. *Polansky*, 233 N.E.2d at 376.
168. YACKLE, *supra* note 7, at § 150.
169. *See supra* text accompanying notes 122-28.
170. *Polansky*, 233 N.E.2d at 376.
171. *Hampton*, 653 P.2d at 1060. Alaska also requires that the court provide the parties with advance notice of the reasons for summary dismissal and that the applicant be allowed to respond before the dismissal becomes final. *Id.*
172. *Long*, 745 P.2d at 554 (Cardine, J., dissenting).
173. YACKLE, *supra* note 7, at § 153.
174. *Id.*
175. Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 WM. & MARY L. REV. 265, 280 (1973).
176. *Id.*
177. The Wyoming Supreme Court has heard two post conviction appeals each from Cutbirth, Boyd and Bibbins, three from Reynoldson and four from Hopkinson — perhaps five by the time this is published.

Alaska, Colorado and Oregon, that if res judicata is to be applied, it is essential to appoint counsel for the first post conviction claim. Without counsel it may be impossible for the defendant to obtain full review of all possible constitutional issues, thereby encouraging successive petitions. If counsel is not appointed at the beginning of the post conviction process and the court applies res judicata to subsequent petitions, the petitioner loses the opportunity to appeal the constitutionality of his conviction proceedings.

The United States Supreme Court rejected the argument that a prisoner is constitutionally entitled to successive applications for post conviction relief but has acknowledged that conventional ideas of finality have no place where infringement of constitutional rights is alleged.[178] The Court has also stated that our justice system should focus on allowing the fullest opportunity for judicial review before denying a constitutional right.[179] This reluctance of the Court to permanently close the door to relief for constitutional violations, coupled with its recognition of the general necessity of counsel for fair and meaningful proceedings, suggests that res judicata should only be applied where widely accepted requirements for accurate, fair legal proceedings, specifically representation by counsel, have been met.

Extending the right to counsel at the outset of all post conviction proceedings assures that an indigent does not unknowingly waive constitutional claims by failing to raise them in the first petition.[180] It assures thorough review of potential claims and eliminates deliberate withholding of claims. It eliminates the need for successive, often repetitive, motions.[181] The court can then apply res judicata with confidence that the petitioner's claims had been reviewed by counsel and his rights had been protected. The cost of appointing counsel would seem a small burden for society to bear to protect the constitutional rights of the individual.

CONCLUSION

Denial of counsel and the consequent review of poorly drafted petitions on their merits followed by refusal to consider subsequent petitions is antithetical to both the purpose of post conviction relief and fundamental constitutional rights. As suggested in *Alberts*, logic dictates that the most prudent and efficient method to address post conviction motions is to appoint counsel to assist with the initial petition. Appointing counsel at the beginning of the post conviction process is the simplest and easiest way to eliminate concerns about whether a petitioner truly had a fair opportunity to present his case. It would provide a uniform post conviction process unhampered by discretionary appointment of counsel

178. *Sanders*, 373 U.S. at 15. Some authors believe that principles of res judicata are inapplicable to federal habeas corpus proceedings. Williamson, *supra* note 175, at 265.

179. *Noia*, 372 U.S. at 424.

180. Comment, *Right to Counsel in Criminal Post Conviction Review Proceedings*, 51 CALIF. L. REV. 970 (1963) (authored by Gordon H. Van Kessel).

181. YACKLE, *supra* note 7 at § 137.

and would avoid disputes over whether a petitioner had "meaningful access" to the court. Res judicata could then be firmly applied, eliminating successive petitions.

The Wyoming legislature should amend the post conviction statute to require appointment of counsel upon receipt of a post conviction petition and proof of indigency and should limit petitions to one per prisoner. A policy of "do it once, do it right and be done with it" should please the taxpayer and delight the courts.

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