CONSTITUTIONAL LAW—RIGHT TO EFFECTIVE COUNSEL—*Chambers v. Maroney*, 399 U.S. 42 (1970).

> While "the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial," the Court has recognized that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."[1]

On the night of May 20, 1963, Frank Chambers, armed with a .38 caliber revolver, robbed a service station attendant in North Braddock, Pennsylvania. He was apprehended by the police within an hour and in the ensuing search, evidence linking him to a previous robbery was found in his possession. Chambers, an indigent, was indicted for both robberies and the Legal Aid Society of Allegheny County was appointed to represent him. The first trial resulted in a mistrial and subsequently no attorney from Legal Aid conferred with Chambers until a few minutes before the second trial began.

Counsel's last minute entry into the case precluded his compliance with the state rule requiring that motions to suppress evidence be made before trial and the record suggests that counsel may not have had sufficient acquaintance with the case to know what arguments were worth making.[2]

Chambers was convicted, and thereafter sought a writ of habeas corpus in the Pennsylvania Superior Court, which denied the writ.[3] Upon affirmation of the denial by a Pennsylvania appellate court, habeas corpus proceedings were commenced in the United States District Court, which denied the petition without a hearing.[4] The Court of Appeals for the Third Circuit affirmed.[5]

---

1 Chambers v. Maroney, 399 U.S. 42, 59 (1970) (Harlan, J., concurring in part and dissenting in part) (quoting from Avery v. Alabama, 308 U.S. 444, 446 (1940)).

2 It can be argued that since Chambers was represented twice by Legal Aid the second attorney had access to the first attorney's files, but as Justice Harlan stated:

> Because the District Court did not hold an evidentiary hearing on the habeas petition, there is no indication in the record of the extent to which Mr. Tamburo [second Legal Aid attorney] may have consulted petitioner's previous attorney, the attorneys for the other defendants, or the files of the Legal Aid Society. What the record does disclose on this claim is essentially a combination of two factors: the entry of counsel into the case immediately before trial, and his handling of the issues that arose during the trial.

Id. at 55-56.

3 210 Pa. Super. 718, 231 A.2d 336 (1967).

4 281 F. Supp. 96 (W.D. Pa. 1968).

5 408 F.2d 1186 (3d Cir. 1969).

On certiorari to the Supreme Court of the United States the petitioner claimed, *inter alia*, that he was not afforded the effective assistance of counsel for the reasons previously stated. The Supreme Court, giving casual treatment to the issue, affirmed the court of appeals decision to deny a hearing in the case. Mr. Justice White delivered the majority opinion and allotted one paragraph to the petitioner's claim of ineffective counsel, while stating:

> Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.[6]

The sixth amendment to the United States Constitution guaranties that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This requirement is one of substance and not mere form; it requires more than a token appearance.[7] It requires "effective" assistance of counsel.[8]

Nearly four decades ago the Supreme Court in *Powell v. Alabama*[9] declared that the duty to appoint counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude giving of effective aid in the preparation and trial of the case." As Justice Sutherland there noted: "He [the indigent] requires the guiding hand of counsel at every step in the proceedings against him."[10]

Today, courts still follow the reasoning of *Powell* that counsel, to be effective, should be given sufficient time to consult with his client and prepare a defense.[11] One of the assumptions of the adversary sys-

---

6 399 U.S. at 54.

7 Pineda v. Bailey, 340 F.2d 162, 164 (5th Cir. 1965) (petitioner did not receive effective counsel where counsel's conduct was merely an attempt to go through the formalities of a trial rather than a giving of his best effort to develop and present the client's case).

8 *See* Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (prima facie case of ineffective counsel where counsel omits substantial defenses); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), *modified in other respects*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877 (1961) (counsel's inexperience, *inter alia*, prevented him from effectively assisting defendant); Holly v. Smyth, 280 F.2d 536, 542 (4th Cir. 1960) (representation afforded by co-defendant's counsel was insufficient); *cf.* Avery v. Alabama, 308 U.S. 444, 446 (1940) (distinguishable, because of attorneys' zeal in conducting the defense, and the opportunity for investigation).

9 287 U.S. 45, 71 (1932).

10 *Id.* at 69.

11 *See* Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967) (petitioner granted habeas corpus where court held that late appointment of counsel, in this case 15 to 30 minutes before petitioner was sentenced, constitutes prima facie case of denial of effective assistance

tem is that a defendant's attorney will have at his disposal the essential means and elements to conduct an effective defense.[12] One of these elements is time. Counsel needs sufficient time to conduct the proper investigations and, as was so blatantly missing in *Chambers*, time to confer with the client without undue delay and as frequently as necessary to advise him of his rights, and to determine what defenses are available and unavailable to him.[13] Sufficient time is also necessary so that counsel can gather ample background material to adequately cross-examine witnesses.[14] The counsel for Chambers at the second trial "asked questions in cross-examination that suggested that he had not had time to settle upon a trial strategy . . . ."[15]

It must be recognized that effective counsel is not equated with errorless counsel, nor is it regarded ineffective by hindsight,[16] but effective assistance does require that each defense in the defendant's favor should be investigated thoroughly, prepared efficiently and presented adequately.[17] Counsel must be willing to give his undivided

---

of counsel); United States *ex rel.* Dennis v. Rundle, 301 F. Supp. 1291, 1294 (E.D. Pa. 1969) (habeas corpus granted where total contact petitioner had with his court-appointed counsel prior to his plea of guilty was five minutes); United States *ex rel.* Williams v. Brierley, 291 F. Supp. 912, 918-19 (E.D. Pa. 1968) (counsel appointment the morning defendant was arraigned held to be in violation of accused's right to effective counsel); Bentley v. Florida, 285 F. Supp. 494, 497 (S.D. Fla. 1968) (petitioner denied effective counsel where, *inter alia*, he met with counsel five minutes before his plea of guilty); *cf.* Stamps v. United States, 387 F.2d 993, 995 (8th Cir. 1967) (distinguishable, counsel was present at the defendant's commissioner's hearing, and conferred with defendant several times during a five-day period between arraignment and trial); Eubanks v. United States, 336 F.2d 269, 270 (9th Cir. 1964) (distinguishable, counsel was appointed eleven days before trial).

12 REPORT OF ATTORNEY GENERAL'S COMM. ON POVERTY AND ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 6 (1963) [hereinafter cited as REPORT OF A.G.].

13 Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (petitioner denied effective counsel where counsel did not conduct appropriate investigations or allow himself enough time for reflection and preparation for trial); Martin v. Virginia, 365 F.2d 549, 554 (4th Cir. 1966) (interval of only three and one-half hours between indictment and trial was insufficient time for appointed counsel to investigate case); Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir.), *cert. denied*, 375 U.S. 832 (1963) (defendant was deprived of effective counsel when court-appointed attorney did not ask for adjournment to investigate suspicious circumstances surrounding confession and to determine how many crimes defendant could be legally convicted of under six count indictment).

14 REPORT OF A.G., *supra* note 12, at 12, 57.

15 399 U.S. at 58.

16 MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

17 Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970) (counsel not effective where he visited client only once for fifteen minutes and made no objection to exhibits which were irrelevant, prejudicial and improperly identified); Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967) (counsel judged ineffective where he inadequately prepared defendant's only possible defense to charge of assault with intent to rape).

loyalty to his client; this is essential to due process.[18] His assistance should be of such a disposition as to maintain the vital integrity of the proceedings.[19]

Although the equities and inequities of the means currently employed in appointing counsel for the indigent are beyond the scope of this note, practicality would suggest that the assigned counsel system can and very often does provide the poor person with a lawyer who is inexperienced in criminal justice or who is appointed too late to be effective.[20] Despite their formal qualifications as members of the bar, assigned counsel often lack the years of experience and knowledge which are usually found in a salaried public or private defender who specializes in criminal cases. This lack of experience on the part of assigned counsel may well jeopardize the interests of their clients, especially if the state is represented by an experienced prosecutor.[21] To make up for this lack of experience, more hard work and time are essential if counsel is to be effective.

Section one of the fourteenth amendment to the Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This right requires that all persons, rich or poor, be entitled to come before a court of law on equal terms and to be tried in the same manner.[22] Although equality of representation may not be possible, invidious discrimination which infringes on the constitutional rights of the poor must be eliminated.[23] Ineffective counsel not adequately prepared does, in fact, infringe on an indigent's constitutional right.

Our system recognizes that there is no equal justice where the kind of trial that a man gets depends upon the amount of money he possesses.[24] An indigent's inability to pay court costs in advance bears no rational relationship to his guilt or innocence and cannot be used as an excuse to deprive him of a fair trial.[25] In many instances a man who is financially sound can retain a competent attorney upon his

18 Glasser v. United States, 315 U.S. 60, 76 (1942) (defendant's counsel representing other defendants with conflicting interests); MacKenna v. Ellis, 280 F.2d 592, 600 (5th Cir. 1960) (conflict of interest prevented counsel from defending with undivided dedication to their client).

19 MacKenna v. Ellis, 280 F.2d 592, 600 (5th Cir. 1960).

20 I L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 19, 20 (1965).

21 *Id.*

22 Chambers v. Florida, 309 U.S. 227, 241 (1940).

23 *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (petitioners' constitutional rights violated where they were unable to get a full appellate review solely because of their poverty).

24 *Id.* at 19.

25 *Id.* at 17-18.

arrest and keep him in pursuit of fresh evidence and further research until his sentence is finally invoked.[26] There can never be, for this reason, equality; nor is it absolutely required.[27] But there is a point in many cases where the balance of competency is so much in favor of the "man of means" as to be grossly unjust. Just where this point is must be determined by a stringent probe of the court, not a casual inquiry.

The right to appointed counsel will become an absurd gesture unless there are safeguards or guidelines to make counsel effective.[28] If the courts continue to take the lackadaisical efforts of appointed counsel lightly, convicted indigents will not receive their right to equal protection under the laws, but instead they will receive a protection which is of little value;[29] that is, a token appointment of counsel who is for all intents and purposes unprepared to present a meaningful defense.[30]

It has become increasingly prevalent in recent years for a convicted indigent to claim incompetency or ineffectiveness of counsel.[31] These claims will continue to grow and be motivated by the growth of public defender movements and Legal Aid Societies which, although exceedingly useful, must be scrutinized with an ever-cautious eye bent on preserving the rights of the indigent defendant.[32]

The close inspection necessary for the preservation of these all

---

26 Douglas v. California, 372 U.S. 353, 358 (1963).

27 *Id.* at 357.

28 *See* Griffin v. Illinois, 351 U.S. 12 (1956).

29 Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967):

> Doubtless in the past there have been numerous instances of the designation of counsel on the day of the trial and even in the last hour before trial. The procedure, however, is no longer considered satisfactory for it invites lax performance of professional duty and endangers defendants' constitutional right to the effective assistance of counsel.

30 Lumbard, *The Adequacy of Lawyers Now in Criminal Practice*, 47 J. AM. JUD. SOC'Y 176, 179 (1964). J. Edward Lumbard, chief judge for the United States Court of Appeals for the Second Circuit, states in his article:

> While everyone professes belief in the right to effective representation for the indigent, the public and most lawyers really have a Yes—but attitude: Yes—but Number One is that 95 per cent are going to plead guilty anyway and they don't need a lawyer. Yes—but Number Two is that almost all the rest are guilty anyway and any lawyer is good enough for what needs to be done. Yes—but Number Three is—Well, I'll give some money but I can't do anything else.

31 *See generally* Gray v. United States, 299 F.2d 467, 468 (D.C. Cir. 1962); Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). Although prisoners often abuse habeas corpus proceedings, it must be recognized that many claims have substance and warrant serious consideration.

32 MacKenna v. Ellis, 280 F.2d 592, 595 (5th Cir. 1960):

> [H]e is entitled to have his trial guided by a judge sensitive to the duty of protecting the accused's constitutional rights in all cases, but especially in a case when fledgling lawyers are appointed counsel over the protest of the accused.

important rights was lacking in *Chambers*.[33] The district court's failure to hold an evidentiary hearing prompted the court of appeals to state:

> We do not know what preparation, if any, counsel was able to accomplish prior to the date of the trial as he did not testify in the state habeas corpus proceeding and there was no evidentiary hearing in the district court. From the lower court opinon . . . we are led to believe that counsel was not wholly familiar with all aspects of the case before trial.[34]

The court of appeals then went on to say that the petitioner "was not prejudiced by the late appointment of counsel"[35] and the majority of the high court was not inclined to disturb the judgment of the court of appeals.[36] This language would certainly lead one to believe that the Court felt counsel had very little acquaintance with the facts of the case and no opportunity to plan a defense, but that the errors caused by this lack of acquaintance with the facts and brevity of time to plan a defense were harmless and the petitioner would not have prevailed had these errors not been made.[37] This is dangerous reasoning, since even in the most routine-appearing proceedings the assistance of able, well-prepared counsel may be of inestimable value.[38] Therefore it is not an answer to a petitioner's claim for the reviewing court simply to conclude that he has failed after the fact to show that, with adequate assistance, he would have prevailed at trial.[39]

It must be conceded that the courts are put in an awkward position when claims of incompetent and ineffective counsel are raised, since a decision in favor of the indigent would be a designation that the indigent's counsel was a poor or indolent lawyer or both, even though he may simply be overworked. But the courts must realize that "the value of any right lies in the practical results which flow

---

33 399 U.S. at 59. Justice Harlan stated:

It seems to me that what this record reveals about counsel's handling of the search-and-seizure claims and about the tenor of his cross-examination of the government witness Havicon, when coupled with his late entry into the case, called for more exploration by the District Court before petitioner's ineffective assistance of counsel claim could be dismissed.

34 408 F.2d at 1191 (3d Cir. 1969).

35 *Id.* at 1196.

36 399 U.S. at 54.

37 *Id.* at 60 (Harlan, J., concurring in part and dissenting in part).

38 Reynolds v. Cochran, 365 U.S. 525, 530-33 (1961).

39 399 U.S. at 60; *see* Glasser v. United States, 315 U.S. 60, 75-76 (1942); *cf.* White v. Maryland, 373 U.S. 59 (1963); Reynolds v. Cochran, 365 U.S. 525, 530-33 (1961).

from it"[40] and the type of treatment that was accorded Frank Chambers' claim of ineffective counsel can only result in the harboring of complacency among the rank and file of counsel who serve the indigent defendants.

Frank J. Zinna

40 Cross, *"The Assistance of Counsel for His Defense:" Is This Becoming a Meaningless Guarantee?*, 38 A.B.A.J. 995 (1952).