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to shippers for their cargo losses.⁵⁵ There is no apparent reason why liability for these damages should not be apportioned between the negligent vessels in the same ratio as liability for property damage. Admittedly, that issue was not before the Court in *Reliable*, since no personal injury claims were involved. The problem is thus one which inheres when the process of rulemaking is undertaken by the judiciary rather than by the legislature. Instead of establishing a comprehensive regulatory scheme, the Court adjudicates only those issues properly before it. Hopefully future decisions will establish that personal injury and death claims are to be borne by the offending vessels in the same proportion as property damage.

Bernard S. Johnson

RIGHT TO COUNSEL ON APPEAL AND REVIEW IN LOUISIANA

Federal jurisprudence has established minimal constitutional requirements for providing criminal defendants assistance of counsel in state appellate proceedings. In *Douglas v. California*,¹ the United States Supreme Court relied upon the due process and equal protection clauses of the fourteenth amendment in holding that an indigent defendant has a right to court-appointed counsel to assist in the first appeal of his conviction, stating that to hold otherwise would discriminate between moneyed and indigent defendants in the preparation of their appeals.² Distinguishing the need for counsel on first

55. See discussion and cases in note 25, *supra*. Cf. *Hagan v. Department of H'ways*, 368 F. Supp. 446 (M.D. La. 1973) (lost profits included in damages to be divided); *Savoie v. Apache Towing Co.*, 282 F. Supp. 876 (E.D. La. 1968) (payments made for maintenance and cure included in total damages). Cargo interests should have little quarrel with the rule in *Reliable*, since it does not include the Brussels Convention's bar to recovery for the percentage of damages caused by the carrier's negligence. Cargo's right to recover its entire loss from the negligent noncarrier should therefore not be affected.

1. 372 U.S. 353 (1963).

2. "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

appeal of right, as considered in *Douglas*, the majority in *Ross v. Moffitt*³ held that the United States Constitution does not guarantee a right to appointed counsel for a criminal defendant seeking discretionary review⁴ of his case beyond the first appeal; the need for counsel is made unnecessary by the adequacy of the materials already in a defendant's record by the time such additional review is sought. Thus, whether assistance of counsel at the appellate level is constitutionally mandated will depend on the state's appellate structure and at what stage of the proceeding the defendant requests such assistance.

Louisiana's intermediate appellate courts do not hear criminal appeals,⁵ thus a criminal defendant has only one appeal, direct from the trial court in which sentence was imposed to either the Louisiana Supreme Court or the district court having jurisdiction over a lower court.⁶ The Louisiana Constitution grants appeals of right to the Louisiana Supreme Court to all defendants convicted of felonies⁷ and to other criminal defendants only when "a fine exceeding five hundred dollars or imprisonment exceeding six months actually has been imposed."⁸ In *State v. Graves*,⁹ the Louisiana

himself." 372 U.S. 353, 357-58 (1963). See also *Mayer v. Chicago*, 404 U.S. 189 (1971).

3. 417 U.S. 600 (1974).

4. For the purposes of this note, "discretionary review" is permissive appellate review by the state's highest appellate court, which may grant or deny review in its discretion subsequent to a filing of writ of certiorari by the defendant.

5. LA. CONST. art. V, § 10(A). However, appeals of criminal prosecutions of juveniles are heard by the courts of appeal. *Id.*

6. LA. CONST. art. V, § 5(D)(2); LA. CODE CRIM. P. art. 912.1 (Supp. 1974); LA. R.S. 13:1896-97 (Supp. 1974). See also *State v. Ash*, 257 La. 337, 242 So. 2d 535 (1970).

7. LA. CONST. art. V, § 5(D)(2). LA. R.S. 14:2(4) (Supp. 1962) defines "felony" as "any crime for which an offender may be sentenced to death or imprisonment at hard labor." District courts have exclusive original jurisdiction of felony cases. LA. CONST. art. V, § 16(A). LA. R.S. 14:2(6) defines "misdemeanor" as "any crime other than a felony." Misdemeanors may be tried in district courts and in city, parish, and municipal courts. LA. CONST. art. V, § 16 (A); LA. R.S. 13:1894 (Supp. 1960); LA. R.S. 13:1894.1 (Supp. 1970), as amended by La. Acts 1973, No. 82 § 1; LA. R.S. 13:2488.24 (Supp. 1970), as amended by La. Acts 1975, No. 716 § 1; LA. R.S. 13:2493 (1950), as amended by La. Acts 1975, No. 386 § 1; LA. R.S. 13:2561.3 (Supp. 1962); LA. R.S. 13:2562.3 (Supp. 1966).

8. LA. CONST. art. V, § 5(D)(2). An appeal to the Louisiana Supreme Court when the court lacks jurisdiction over the conviction may, in the court's

Supreme Court adopted the *Douglas* rationale and assured defendants convicted of felonies of their right to counsel on their only appeal.¹⁰ Although *Douglas* and *Graves* concerned felony convictions and did not discuss misdemeanors, the United States Supreme Court in *Douglas* appeared more concerned that the defendants were indigent than with the nature of their offenses.¹¹ Since the thrust of *Douglas* dealt with the needs of an indigent defendant on his "one and only appeal" of right,¹² both felons and misdemeanants having a right of appeal to the Supreme Court of Louisiana should be assured of assistance of counsel on appeal.

Under the Louisiana Constitution of 1921, a trial de novo¹³ in district court was available to defendants convicted of misdemeanors or violations of municipal ordinances in city, municipal, or mayors' courts whose sentences were insufficient to give them a right of appeal to the Louisiana Supreme Court.¹⁴ The present Louisiana Constitution does not provide for the trial de novo procedure; instead, all criminal defendants not having a right of appeal to the Louisiana Supreme Court are given a "right of appeal or review, as provided by law,"¹⁵ apparently leaving the legislature to determine the review procedure to be used in minor cases.¹⁶ The

discretion, be treated as an application to the court's supervisory jurisdiction. LA. SUP. CT. R. I, § 11 (1975). *E.g.*, *State v. Robertson*, 310 So. 2d 619 (La. 1975).

9. 246 La. 460, 165 So. 2d 285 (1964).

10. *Id.* at 467, 165 So. 2d at 288 (1964).

11. *Douglas v. California*, 372 U.S. 353, 357 (1963).

12. *Id.* at 357.

13. La. Const. art. VII, § 36 (1921). LA. CODE CRIM. P. art. 692 Comment (b) (defining trial de novo as "a trial anew, from the beginning, in the appellate tribunal, according to the usual or prescribed procedure in other cases, involving similar questions, whether of law or fact"). In trials de novo, the sentence imposed by the lower court could not be increased, generally no new evidence could be presented, and the trial could not take place before a jury. *E.g.*, La. Const. art. VII, § 36 (1921); *State v. Debose*, 235 La. 875, 106 So. 2d 294 (1958). See Marcantel, *The Need for Constitutional Reform on Trial de Novo*, 9 LA. BAR J. 287 (1961-62).

14. La. Const. art. VII, § 36 (1921); *State v. Seals*, 254 La. 904, 228 So. 2d 310 (1969); *State v. Cumming*, 251 La. 416, 204 So. 2d 769 (1967); *State v. Lanthier*, 241 La. 790, 131 So. 2d 790 (1961). La. Const. art. VII, § 10(5) (1921) provided that a right of appeal to the supreme court was available to those defendants convicted of a felony or sentenced to a fine exceeding \$300 or imprisonment exceeding six months.

15. LA. CONST. art. V, § 5(E).

16. See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 60-62 (1974).

legislature has responded, providing the defendant in unappealable misdemeanor cases the "right of judicial review by application for a writ of review to the supreme court . . . accompanied by a complete record of all evidence upon which the judgment is based."¹⁷ Trial de novo in district court was retained by statute for criminal appeals from mayors' courts and justice of the peace courts.¹⁸ District courts were given appellate jurisdiction over criminal cases tried under municipal ordinances in city, parish, and municipal courts.¹⁹ An indigent defendant having the right to court-appointed counsel at trial²⁰ in the above courts should retain the right at trial de novo or appeal in district court.²¹ However, the question now exists whether defendants in unappealable misdemeanor cases have the right to assistance of counsel in seeking writs of review to the Louisiana Supreme Court.

The current practice of the Louisiana Supreme Court is to appoint counsel to represent an indigent only after a writ has been granted.²² However, an argument can be made that defendants having the right to appointed counsel at trial and

17. LA. CODE CRIM. P. art. 912.1 (Supp. 1974). The provisions of article 912.1 are apparently a combination of LA. CONST. art. V, § 5(D)(2) and (E) (see text at notes 8, 15, *supra*), and art. I, § 19.

18. LA. R.S. 13:1896(A)(1) (Supp. 1974). See La. Const. art. VII, § 51(E) (1921), made statutory by LA. CONST. art. XIV, § 16(A) (criminal jurisdiction of mayors' courts); LA. R.S. 13:2584(C) (Supp. 1975) (criminal jurisdiction of justice of the peace courts).

19. LA. R.S. 13:1896(B) (Supp. 1974); LA. R.S. 13:1336-37 (Supp. 1975) (Orleans Parish). Where the lower court declares an ordinance or state law unconstitutional, the appeal is to the Louisiana Supreme Court. LA. CONST. art. V, § 5(D)(1). After appeal or trial de novo in the district court, defendants may attempt to invoke the supervisory jurisdiction of the supreme court by means of writs. LA. CONST. art. V, § 5(A).

20. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) ("absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classed as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"). *State v. Coody*, 275 So. 2d 773 (La. 1973); *State v. Chighizola*, 281 So. 2d 702 (La. 1973) (where imprisonment is a possible sentence, the defendant has a right to counsel at trial). See also LA. CONST. art. I, § 13; LA. CODE CRIM. P. art. 513 (Supp. 1974); *State v. Love*, 312 So. 2d 675 (La. 1975); *State v. Strange*, 308 So. 2d 795 (La. 1975); *City of Monroe v. Fincher*, 305 So. 2d 108 (La. 1974).

21. Under the previous Louisiana constitution, a trial de novo was in effect a guaranteed "new trial" for a minor case defendant. See text at note 13, *supra*. The guarantee provided a strong argument for retention of a right to counsel if imprisonment is a potential sentence. *Douglas*, read in light of *Argersinger*, should also be applicable to an appeal in district court.

22. Telephone conversation with Mr. Harold Moise, Chief Clerk of Court, Clerk of Court's Office, Louisiana Supreme Court, on September 10, 1975.

sentenced in unappealable misdemeanor convictions should also have a right to counsel when applying for a writ of review to the Louisiana Supreme Court. Historically, most criminal defendants in Louisiana have had the continuing benefit of court-appointed counsel after trial, even in the absence of statutory or jurisprudential requirements.²³ Also, the right to such counsel is implicit in the statutes creating indigent defender boards and public defender offices in Louisiana, as such statutes specifically provide for counsel for defendants in meritorious appeals or other postconviction proceedings.²⁴

Furthermore, federal jurisprudence limiting the right to counsel may not apply in Louisiana because of its criminal appellate and review procedure. In the state criminal system considered by the United States Supreme Court in *Ross v. Moffitt*,²⁵ an appeal of right was heard by a lower appellate court. By the time discretionary review of the intermediate appellate opinion was sought in that state's supreme court by writ of certiorari, the defendant's record included not only a transcript of the trial proceedings and a brief by his appointed attorney in the court of appeals setting forth any alleged claims of error, but also at least one appellate opinion disposing of the case.²⁶ These materials, the Court reasoned in *Ross*, supplemented by any *pro se* submissions the defendant might make, provided the state supreme court "with an adequate basis for its decision to grant or deny review,"²⁷ and thus lessened the need for counsel on discretionary review.

23. *State v. Graves*, 246 La. 460, 467, 165 So. 2d 285, 288 (1964); Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175, 200 (1967). For criticism of the system of indigent representation by random appointment of lawyers by the court as sometimes resulting in lack of effective representation, see Rault, *Representation of Indigents in Criminal Cases: Guidelines for Louisiana*, 27 LA. L. REV. 592, 596 (1967), pointing out that, "lack of compensation seems to be at the heart of the problem." See also Note, 39 TUL. L. REV. 345 (1965).

24. LA. R.S. 15:141(E) (1967); LA. R.S. 15:142(K) (Supp. 1974) (creating the office of Public Defender in lieu of an indigent defender board for the Seventh, Eighteenth, and Twenty-Second Judicial Districts); LA. R.S. 15:144(E) (Supp. 1974) (establishing the indigent defender board for Thibodaux City Court); LA. R.S. 15:145(I) (Supp. 1975) (creating the office of Public Defender for the Eleventh and Thirteenth Judicial Districts). See also Rausch, *Balance Sheet of Appointed Counsel in Louisiana Criminal Cases*, 34 LA. L. REV. 88 (1973).

25. 417 U.S. 600 (1974).

26. *Id.* at 615.

27. *Id.* Some federal courts of appeal are willing to find that indigents need assistance in preparing *pro se* petitions. See, e.g., *Haggard v. State of*

In Louisiana, review for unappealable misdemeanors is not analogous to the review procedure analyzed by the United States Court in *Ross* because intermediate appellate courts do not hear criminal appeals in this state.²⁸ Since the abundance of materials relied upon by the Court in *Ross* to assure equal protection to the indigent defendant would not exist in the record of a criminal misdemeanor defendant applying for review to the Louisiana Supreme Court,²⁹ that decision's applicability is doubtful. Instead, the *Douglas* rule, guaranteeing assistance of counsel on a defendant's first appeal of right, should apply also to Louisiana misdemeanants seeking writs of review to the Louisiana Supreme Court, since such a writ in an otherwise unappealable case is the only means of gaining review similar to a "one and only appeal" of right.³⁰

Finally, the right to counsel for such defendants may be constitutionally mandated. Article I, section 13 of the Louisiana Constitution states in part:

At each stage of the proceedings in a criminal prosecution every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.³¹

Although a final definition of "stage of the proceedings" has yet to be formulated, *Thomas v. U.S.*³² refers to an appeal as an "integral part" of the trial system,³³ and *Lawrence v. Henderson*³⁴ notes that "until a defendant has exhausted his av-

Alabama, 494 F.2d 1187 (5th Cir. 1974); *Fryer v. MacDougall*, 462 F.2d 1093 (5th Cir. 1972); *Wilson v. Phend*, 417 F.2d 1197 (7th Cir. 1969); *Donnell v. Swenson*, 258 F. Supp. 317 (C.D. Mo. 1966). See also *Zeigler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y. UNIV. L. REV. 159 (1972).

28. LA. CONST. art. V, § 10(A).

29. For a listing of what is in the record of a criminal defendant in Louisiana seeking a writ of review in the Louisiana Supreme Court, see LA. SUP. CT. R. I, §§ 6, 9; LA. SUP. CT. R. X, § 5. See also LA. CONST. art. I, § 19; LA. CODE CRIM. P. arts. 912.1 (Supp. 1974) and 843 (Supp. 1975).

30. *Douglas v. California*, 372 U.S. 353, 357 (1963).

31. However, "the record of the [Constitutional Convention] debate contains virtually no references to the scope of the right [to counsel] after trial, and the emphasis in the comments is to pre-trial proceedings." Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 47 (1974).

32. 368 F.2d 941 (5th Cir. 1966).

33. *Id.* at 945. See cases cited *id.* at 945 n.9.

34. 318 F. Supp. 230 (E.D. La. 1970).

enues of appeal, he has not been finally and irrevocably adjudged guilty."³⁵ If an appeal is construed as a stage of the proceedings in a criminal case, then an application for a writ of review should also be considered a stage of the proceedings and therefore within the state constitutional guarantee. Both proceedings when concerning state statutes are before the Louisiana Supreme Court, both are of right,³⁶ and both serve essentially the same purpose: a higher court's review of trial court proceedings leading to a conviction.³⁷ If an application for writ of review to the Louisiana Supreme Court is considered a "proceeding" arising out of the process determining guilt or innocence in Louisiana for otherwise unappealable misdemeanors, a defendant charged with such an offense punishable by imprisonment should, under Article I, section 13, have the right to assistance of counsel in preparing his application for a writ.³⁸

Clearly, the accused has great need for the aid of counsel in preparing an application for a writ of review. Granting of a writ by the court is discretionary and will be based upon the writ's contents.³⁹ At such a delicate stage in the proceedings, the trained hand of counsel is needed in preparing the writ to insure an adequate presentation of the issues on which review is sought, and to bring out reasons supporting granting of a writ which may not be evident on the face of the record. Few criminal defendants would alone have the technical and legal skills necessary to accomplish such a task.⁴⁰

35. *Id.* at 233. *But see* *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974); *Hood, The Right of Appeal*, 29 LA. L. REV. 498 (1969).

36. LA. CONST. art. V, § 5(D)(2) and (E). *See also* LA. CODE CRIM. P. art. 912.1 (Supp. 1974); *State v. Robertson*, 310 So. 2d 619 (La. 1975).

37. In criminal matters, the appellate jurisdiction of the Louisiana Supreme Court extends only to questions of law. LA. CONST. art. V, § 5(C). The appellate jurisdiction of a district court in a criminal appeal extends only to questions of law, except in Orleans Parish. *E.g.*, LA. R.S. 13:1896(B) (Supp. 1974); LA. R.S. 13:1336-37 (Supp. 1975). *See* LA. CODE CRIM. P. art. 920 (Supp. 1974) (scope of appellate review by the Louisiana Supreme Court). *See also* LA. CODE CRIM. P. arts. 841-45 (Supp. 1974); *State v. Gresham*, 313 So. 2d 236 (La. 1975); *State v. Shillow*, 310 So. 2d 103 (La. 1975).

38. *Accord*, ABA PROJECT STANDARDS, Criminal Appeals, Approved Draft 73-74, § 3.2(a) (1970). *But see* *Miller, The Declaration of Rights: Criminal Provisions*, 21 LOY. L. REV. 43 (1975). LA. CONST. art. I, § 13 may also affect other post-conviction proceedings by defendants seeking collateral relief from a criminal conviction. *See State ex rel. Cherry v. Cormier*, 281 So. 2d 99 (La. 1973) (necessity of counsel to represent habeas petitioner at evidentiary hearing). *See also* *Johnson v. Avery*, 393 U.S. 483 (1969).

39. *See* text at note 29, *supra*.

40. *Boskey, The Right to Counsel in Appellate Proceedings*, 45 MINN. L.

In conclusion, an argument can be made, based on historical, constitutional, and practical considerations, that misdemeanor defendants having a right to counsel at trial should, if their conviction is unappealable, also have a right to counsel in seeking a writ of review to the Louisiana Supreme Court. However, until statutory or jurisprudential action is taken, these criminal defendants may continue to face the situation of having access to an important and complex legal procedure without the aid of counsel to adequately implement that right.⁴¹

Jerry Glen Jones

STATE TAXATION OF INTERSTATE BUSINESSES:
A MORE LIBERAL TREND

Plaintiff, an interstate carrier of petroleum products, sued to recover taxes paid under the Louisiana corporation franchise tax,¹ challenging the tax as an unconstitutional levy on the privilege of doing interstate business. Plaintiff owns and operates over two hundred fifty miles of pipeline

REV. 783 (1961). The need for counsel to insure an effective application for review has already been recognized at the federal level. FED. R. CRIM. P. 44(a). See also Note, 9 WAKE FOREST L. REV. 579, 587-88 (1974).

41. For a further examination of indigent defendants in Louisiana, see Erickson, *The Standards of Criminal Justice in a Nutshell*, 32 LA. L. REV. 369 (1972); Powell, *Extending Legal Services to Indigents and Low Income Groups*, 13 LA. BAR J. 11 (1965); Slovenko, *Representation for Indigent Defendants*, 33 TUL. L. REV. 363; Smith, *Indigent Representation by Law Students: Forum Juridicum*, 30 LA. L. REV. 476 (1970); Note, 33 LA. L. REV. 740 (1973); Note, 33 LA. L. REV. 731 (1973); Note, 47 TUL. L. REV. 446 (1973); Note, 16 LOY. L. REV. 495, 496-97 (1969-70).

1. LA. R.S. 47:601 (1950), as amended by La. Acts 1970, No. 325, § 1, provides in pertinent part: "Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, . . . shall pay an annual tax . . . on any one or all of the following alternative incidents: (1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as the buying, selling or procuring of services or property. (2) The exercising of a corporation's charter or the continuance of its charter within this state. (3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity."