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One Year Review of Criminal Law and Procedure

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ONE YEAR REVIEW OF CRIMINAL LAW AND PROCEDURE

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In the criminal law field, the reported cases decided by the Colorado Supreme Court during 1957 deal, as usual, mostly with procedural problems, and only to a lesser extent with problems of substantive criminal law.

I. SUBSTANTIVE CRIMINAL LAW

POWER TO CREATE CRIMES

Under its so-called "police power" a state has broad power to regulate its internal affairs for the protection or promotion of the public welfare—particularly the health, safety or morals of its people; and it is common for state legislation so regulating to provide criminal penalties for violations. No doubt much that is done in the name of promoting the public welfare is the result of the effective operation of pressure groups on the legislature, rather than the result of a genuine determinaton by the legislature of the requirements of the public welfare. Courts have seldom substituted their own notions of what the public welfare requires for those of the legislature; and similarly have seldom held a statute invalid because they know or believe the statute is the product of pressure from an effective lobbying group. The Colorado Supreme Court in *Mosko v. Dunbar*[1] considered the constitutionality of a 1955 Colorado criminal statute making it a misdemeanor for anyone to sell new or used cars (excepting farm tractors and trucks) on Sunday. Very likely the statute was passed at the instigation of Denver car dealers who wished to eliminate the Sunday competition of suburban dealers, who were accustomed to doing a brisk Sunday business while their Denver colleagues were observing the Sabbath in a more solemn, less commercial fashion. The supreme court upheld the statute in a four to three decision, the majority stating that the legislature has the exclusive power to determine what the public welfare requires, and that the courts should not try to substitute their own views on the matter. Chief Justice Moore dissented on the ground that the statute did not in fact promote the public health, safety, morals or welfare (the legislature did not even intend that it should, since the statute was enacted to serve the private purposes of a small group); and a statute which takes away the right to work when one pleases, if not done to promote the public welfare, constitutes a deprivation of liberty or property without due process of law.[2] The majority view seems more in accord with modern judicial attitudes toward the police power.

ACCESSORY AFTER THE FACT

A Colorado criminal statute punishing an accessory after the fact defines him as one "who, after full knowledge that a crime has been

[1] 309 P.2d 581 (Colo. 1957).

[2] The other two dissenters, Justices Knauss and Sutton, considered the statute unconstitutional, not on the broad due process ground stated by Judge Moore, but on the narrower ground that by singling out dealers in cars (as distinguished from other products, including even farm tractors and trucks) the statute unreasonably discriminated against car dealers, in violation of the equal protection clause of the fourteenth amendment of the United States Constitution, and constituted a "special law" forbidden by the Colorado Constitution.

committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime."[3] Does one "conceal" a crime which he knows has been committed, when he merely remains silent? The supreme court said no, in *Lowe v. People*.[4] Something of an affirmative nature is required in order to "conceal." The court held that there was no evidence that Lowe concealed the crime or harbored the criminal.

II. CRIMINAL PROCEDURE

VENUE

A criminal defendant in Colorado has a constitutional right to trial by a jury of the county wherein the crime is alleged to have been committed.[5] This constitutional right, like most other such rights, is generally considered to be for the sole benefit of the defendant, so that he may waive it if he sees fit, as where he expressly consents to trial in another county.[6] In *Vigil v. People*[7] the supreme court went further, and stated that, since the defendant pleaded guilty at arraignment, the constitutional right to a local trial was inapplicable, because there can be no "trial" after a guilty plea. Is it true that one who wishes to plead guilty has no right to object to doing so in a county other than the county of the crime? The reasons for the constitutional right to a local trial are usually expressed to be: (1) the greater ease and inexpensiveness for the defendant to produce his witnesses, since the witnesses are most apt to be clustered around the place of the crime; and (2) the advantage to the defendant when tried among his neighbors, friends and acquaintances, who know his good reputation (if any), compared to trial among strangers who know nothing about him except the one bad fact that he is accused of crime. It is true these reasons are more applicable to a trial on a guilty plea; but the defendant does have a right to produce in evidence mitigating circumstances after a guilty plea, and perhaps there is a somewhat similar advantage, in a proceeding to determine the sentence, in having it held before a local, rather than a strange and distant, judge, as there is in a trial before a local, as distinguished from a strange and distant, jury. The question whether

[3] Colo. Rev. Stat. Ann. § 40-1-13 (1953).
[4] 309 P.2d 601 (Colo. 1957).
[5] Colo. Const. art. II, § 16 (1876). Though the constitution speaks of "county or district," this probably requires trial in the county of the crime.
[6] Vigil v. People, 310 P.2d 552 (Colo. 1957) (another county in the same district), following Davis v. People, 83 Colo. 295, 264 Pac. 658 (1928) (implied waiver by proceeding without objection to trial in another county of another district).
[7] 310 P.2d 522 (Colo. 1957).

the proceedings on a plea of guilty constitute a "trial" within the meaning of the constitutional right to a local trial seems to be a novel one; perhaps it deserves more attention than the court gave it in the *Vigil* case, where it was not actually necessary to the decision. The same constitutional provision, for instance, gives the defendant a right to a "speedy trial" and to a "public trial," as well as to a trial in the county. Must not the proceedings be public even if the defendant pleads guilty; and is not the defendant entitled to a speedy arraignment even though he may at arraignment plead guilty?

In another Colorado case, there was some question as to whether a rape was committed in *X* County, as the information alleged, or in *Y* County. The police officer who visited the scene of the crime testified that he thought, but was not sure, it was in *X* County. In the absence of any proof by the defendant to the contrary, the court held a directed verdict for the defendant was properly denied.[8]

Right to Counsel

Two Colorado cases raise again the question of whether the trial court, in a non-capital felony case, must, under the Colorado constitutional or statutory law or under the due process clause of the fourteenth amendment, inform an indigent defendant of his right to counsel before accepting from him a guilty plea.[9] In *Freeman v. Tinsley*[10] the defendant in a kidnapping case was twenty-one years old, had only a sixth grade education, had no friends in Colorado, and, though he had had previous trouble with the law in another state, had never had counsel to defend him. At his arraignment, the judge apparently did not tell him of his right to counsel and made no effort to appoint counsel. (The defendant later claimed he did not know of his right to counsel.) After the judge explained the consequences of pleading guilty and not guilty, the defendant pleaded guilty. In *Vigil vs. People*[11] the defendant, charged with rape, was twenty-six; no other facts of his background appear. He too was not informed at arraignment of his right to counsel. He expressly waived his right to be tried in the county where the crime was committed and then pleaded guilty, receiving a twelve to twenty year sentence. In each case the supreme court held that there was

[8] Abeyta v. People, 134 Colo. 441, 305 P.2d 1063 (1957).
[9] Freeman v. Tinsley, 308 P.2d 220 (Colo. 1957); Vigil v. People, 310 P.2d 552 (Colo. 1957), expressly following Kelley v. People, 120 Colo. 1, 206 P.2d 337 (1949).
[10] 308 P.2d 220 (Colo. 1957).
[11] 310 P.2d 522 (Colo. 1957).

no violation of the defendant's rights, under either Colorado law or federal due process[12]

It is, of course, true that the supreme court has the final say as to the meaning of the Colorado constitutional[13] and statutory[14] provisions concerning a criminal defendant's right to counsel. It is not entirely clear whether the court is holding that Colorado law does not require the appointment of counsel for an indigent defendant in a non-capital felony case; or that he does not have such a right if he pleads guilty (having it only if he pleads not guilty); or that though he has such a right whether he pleads guilty or not guilty, he has no right to be informed of the right, whether he knows of the right or not. It would seem that fair criminal procedure requires that counsel should be appointed for an indigent defendant in at least a serious non-capital felony case, even in the situation where he pleads guilty, as he should have proper advice as to how he should plead. And if counsel should be appointed, fairness requires that the judge tell him of this right and make an offer to appoint counsel, at least if he does not know of his right to appointed counsel. Doubtless there are many convicts now in the Colorado penitentiary who were not told at arraignment of their right to appointed counsel. The supreme court naturally does not wish to open the door to a flood of petitions from such people. But could the Colorado Supreme Court not announce a new rule, applicable to future trials only, which would incorporate some of these matters which fair play would seem to require?[14a]

As to the requirements concerning counsel imposed upon the states by the due process clause of the fourteenth amendment, the United States Supreme Court has in a series of cases made it clear that the states must appoint counsel for indigent defendants in capital cases; and as to non-capital felony cases it all depends upon various factors: the seriousness of the offense charged, the complexity of the issues involved, the age, intelligence and educational background of the defendant, his prior experience in criminal proceedings, how actively the trial judge looked after his interests at the trial, and no doubt also whether the

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[12] The Freeman case is based partly on the ground that habeas corpus was the wrong remedy, even assuming there was a violation of constitutional rights.

[13] Colo. Const. art. II, § 16: "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel."

[14] Colo. Rev. Stat. Ann. § 39-7-29 (1953), providing that district courts "may" assign defense counsel for indigent defendents in felony or misdemeanor prosecutions in the district courts.

[14a] For a suggestion of this useful technique, see Frankfurter, J., concurring in Griffin v. Illinois, 351 U.S. 12, 25-26 (1956).

defendant is tried on a not-guilty plea or pleads guilty.[15] Applying these tests to the two Colorado cases decided in 1957, it is not at all certain that the United States Supreme Court would hold that the requirements of due process were met, especially in the *Freeman* case, where the charge was serious (kidnapping), the defendant was young (twenty-one), his education was poor (sixth grade), and his prior courtroom experience was meager. And that Court has held that due process may be violated by a state in an appropriate non-capital case where the defendant, as here, was not informed of his right to counsel, made no request for counsel, and pleaded guilty.[16] Of course, the fact that Freeman's petition for certiorari to the United States Supreme Court was denied after the Colorado Supreme Court had affirmed his original conviction over his contention that he was denied his right to counsel, was not a determination by the United States Supreme Court that due process was not violated. All that the denial of certiorari means is that, with all the pressure of business, the Court does not have time to consider the matter.[17]

INFORMATION—VARIANCE BETWEEN INFORMATION AND PROOF

In one case the information charged that the defendant stole property owned by Hylda Howard; the proof showed that the owner's real name was Hylda Vossen, though she was commonly known, to the defendant and others, as Hylda Howard. The supreme court sensibly affirmed his conviction, over his contention of a fatal variance, on the ground he could not possibly have been prejudiced in presenting his defense.[18]

INFORMATION—DUPLICITY

In another case, the defendant was charged with perjury, the information alleging in one count several lies told by the defendant on the witness stand, all to the effect that the defendant was not guilty of violating an injunction at place *X* because he was at all times at place *Y*.

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[15] See cases collected in Boskey & Pickering, Federal Restrictions on State Criminal Procedure, 13 U. of Chi. L. Rev. 271, 279 (1946). The more recent cases are: Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Gibbs v. Burke, 337 U.S. 773 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Townsend v. Burke, 334 U.S. 736 (1948); Gryger v. Burke, 334 U.S. 728 (1948); Wade v. Mayo, 334 U.S. 672 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Gayes v. New York, 332 U.S. 145 (1947); Foster v. Illinois, 332 U.S. 134 (1947); De Meerleer v. Michigan, 329 U.S. 663 (1947); Carter v. Illinois, 329 U.S. 173 (1946).

[16] Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956), where defendant was 21, had had 6 years of school, had one prior courtroom experience (where he had no counsel), and was charged with several non-capital felonies.

[17] The court's statement in the Freeman case 308 P.2d at 223, that denial of certiorari shows there is no violation of due process, is thus clearly wrong.

[18] Pownall v. People, 311 P.2d 715 (Colo. 1957).

Is each falsehood a separate perjury, so that to join them all in one count would be duplicity; or do all the falsehoods together constitute one crime of perjury? The court held the latter, so that there was no duplicity; and anyway, even if there was duplicity, the defendant raised the issue too late, since he raised it for the first time during the trial.[19]

TRIAL—EVIDENCE

The *Archina* case[20] involved several questions of evidence in criminal cases. A novel question was presented as to the competency of a wife to testify against her husband, when she had married him abroad in a civil ceremony for the sole purpose of enabling him to be admitted to the United States, with the understanding that there should be a later religious ceremony (never held), and she had never slept with him or otherwise consummated the marriage. The court held she was not his "wife" for the purpose of the Colorado statute making a wife incompetent to testify against her husband. The court also held that for a deposition to be used at the trial, there must be a showing (not here made) of the unavailability of the witness at the trial; and that the trial court's admission of lurid photographs of various deceased persons, having no probative value and serving only to inflame the passions of the jury, constituted prejudicial error.

In another Colorado case, the court reaffirmed its long-standing

[19] Marrs v. People, 312 P.2d 505 (Colo. 1957). The court also stated that the question of whether a witness's falsehood is material (materiality being an element of perjury) is a question for the court, not the jury.

[20] Archina v. People, 307 P.2d 1083 (Colo. 1957).

view that evidence obtained by an unreasonable search and seizure (in violation of the Colorado Constitution) is nevertheless admissible.[21]

SENTENCE

Several cases arose in 1957 in the wake of the 1956 *Smalley* case.[22] In two cases the principle of the *Smalley* case was applied so as to require a new sentencing. In one[23] a defendant, convicted in 1953 of burglary at age sixteen, was sentenced to the penitentiary when convicted again of burglary in 1956 at nineteen. The court held this sentence erroneous, since the statute (before its amendment in 1957) required that he be sentenced to the reformatory. In the other case,[24] the court held that the *Smalley* case applied, so as to void an habitual criminal sentence, even though the defendant had previously been actually sentenced (wrongly) when under age twenty-one to the penitentiary.

In two other cases[25] the court held that the reformatory statute involved in the *Smalley* case—which before 1957 required the trial judge to sentence to the reformatory instead of the penitentiary males under twenty-one convicted of felony (except for felonies involving life-imprisonment and murder and voluntary manslaughter), was in addition inapplicable to robbery convictions, since the robbery statute (enacted after the reformatory statute) has a special provision giving the trial

[21] Williams v. People, 315 P.2d 189 (Colo. 1957). Though the trend among other states in recent years has been toward making such evidence inadmissible, there has been no indication that any of the Colorado justices are disposed to change the rule. At all events, this was not a proper case to make a new rule, as the defendant, having consented to the search, had waived his constitutional right.

[22] Smalley v. People, 134 Colo. 360, 304 P.2d 902 (1956), which was concerned with the word "felony" in the Colorado habitual criminal statute, Colo. Rev. Stat. Ann. § 39-13-1 (1953), providing for life imprisonment for one, convicted of a felony, who has three times previously been convicted of a "felony". Smalley had three prior convictions, but the first one was for burglary (normally, of course, a felony) committed when he was 19. Colo. Rev. Stat. Ann. § 39-10-1 (1953), provides that Colorado criminal courts "shall" sentence to the reformatory (not the penitentiary) all male persons between 16 and 21 on their first conviction for a felony, excepting murder, voluntary manslaughter and crimes punishable by life imprisonment. It was held (4 to 3) that Smalley's first conviction was not for a "felony", so he had only two prior felony convictions, so he was not an habitual criminal, so his life sentence was excessive.

The Colorado Legislature amended Colo. Rev. Stat. Ann. § 39-10-1 (1953), by Colo. Laws 1st Reg. Sess. 1957, c. 120, so as to provide that the judge may sentence the first offender under 21 either to the reformatory or to the penitentiary. The result is that the crime may be a "felony" within Colo. Rev. Stat. Ann. § 39-13-1 (1953), even though the sentence may be a reformatory sentence, since the offense is now "punishable" in the penitentiary, within the definition of Colo. Const. art. XVIII, § 4, defining "felony" for all Colorado purposes. But it may be expected that "Smalley" cases will be troubling the courts for some time to come; the new law does not turn past non-felony convictions into felonies.

[23] Barrett v. People, 315 P.2d 196 (Colo. 1957).

[24] Latham v. People, 317 P.2d 894 (Colo. 1957).

[25] Thompson v. People, 316 P.2d 1043 (Colo. 1957); Romero v. Tinsley, 317 P.2d 1043 (Colo. 1957).

judge power to sentence convicted robbers under twenty-one to the penitentiary or reformatory in his discretion. Two maxims of statutory interpretation lead to this result: in the case of two conflicting statutes (1) the later controls the earlier, and (2) the special controls the general. The court's decision is right under either maxim.

EXTRADITION

Several 1957 cases involved the validity of extradition proceedings, where men were picked up in Colorado at the request of the governor of another state. Colorado, like most states, has adopted the Uniform Criminal Extradition Act.[26] The Colorado statute, after providing for the extradition of one who is charged with a crime in another state and has fled to Colorado, omits specifically to state, as the Uniform Act provides, that extradition applies to parole or probation violators. Two Colorado cases held, however, that parole violators are none the less extraditable; they are still "charged with crime" so long as they have not satisfied the judgment of conviction by serving their sentence.[27]

The United States Constitution, and federal statutes implementing the Constitution,[28] provide for extradition in the case of one who commits a crime in one state and then flees to another state. They are silent, however, on the situation of one, at all times out of a state, who yet commits a crime within the state, as by shooting his victim across the border, or by obtaining property by false pretenses through the mails, or by failing to support his family after leaving the state where the family lives. In such cases, he has not "fled from justice" to an asylum state. The Uniform Act (adopted by Colorado), unlike the Federal Constitution and statutes, sensibly provides for the situation, authorizing extradition. But in *Matthews v. People*,[29] which was a non-fugitive case (non-support), the Nebraska governor unfortunately, in asking Colorado for the man's extradition, worded his requisition in terms of *federal* law instead of *Colorado* law; so the supreme court let the man go. This is at least consistent with an earlier Colorado case where the Indiana governor, in another non-fugitive case, requested Colorado to extradite a man under *Colorado* law, but the Colorado governor unfortunately ordered his arrest pursuant to *federal* law.[30] The truth of the matter, as Justice Knauss points out in his dissenting opinion in the *Matthews* case, is that both cases pay too much attention to form—how can the man possibly be prejudiced by such a minor and technical mistake?

In another extradition case,[31] a man had been convicted of a felony in Texas in 1945, had been conditionally paroled in 1951, had then come to Colorado in violation of his parole, and had committed a burglary here, receiving a sentence to the Colorado penitentiary. In 1955, while he was still a guest of Colorado in Canon City, Texas tried to extradite him as a parole violator, and the Colorado district court re-

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[26] Colo. Rev. Stat. Ann. §§ 60-1-1 to 60-1-23 (1953).

[27] Travis v. People, 308 P.2d 997 (Colo. 1957); Tinsley v. Woods, 313 P.2d 1006 (Colo. 1957). Another case, Cutting v. Geer, 313 P.2d 314 (Colo. 1957), allows extradition from Colorado to Alaska, a territory rather than a state, in spite of the fact that the U.S. Constitution on extradition, art. IV, § 2, cl. 2, speaks only of a "state", without mention of a "territory".

[28] U.S. Const. art. IV, § 2, cl. 2; 18 U.S.C. §§ 3182, 3194, 3195. (1952).

[29] 314 P.2d 906 (Colo. 1957).

[30] Stobie v. Barger, 129 Colo. 222, 268 P.2d 409 (1954).

[31] Seigler v. Canterbury, 318 P.2d 219 (Colo. 1957).

fused to allow his extradition (on grounds not here expressed). The man having finished his sentence in Colorado, Texas in 1957 asked again to extradite him for the same violation of the same parole. The Colorado Supreme Court held that the 1955 action of the district court was *res judicata,* so the man could not be extradited for the same matter in 1957. It is true that *res judicata* is applicable to habeas corpus extradition proceedings, though only where the decision of the first proceeding is on the merits, rather than because of some defect or irregularity in the extradition process.

APPELLATE REVIEW

The supreme court on several occasions in 1957 reiterated its statements of prior years that the Colorado Rules of Civil Procedure have no application to criminal proceedings; that a criminal defendant seeking review of his conviction on writ of error must file an abstract of record and assignments of error; otherwise the writ of error will be dismissed.[32] By way of contrast, the court held that the Rule of Civil Procedure, rather than rules relating to criminal procedure, govern the review of the trial court's action in a habeas corpus proceeding brought by a convict, since habeas corpus is in the nature of a civil, not a criminal, action.[33] It seems quite plain that Colorado would do well to adopt in the criminal field, as it has done in the area of civil procedure, rules of criminal procedure based upon (though not necessarily an exact copy of) the successful Federal Rules of Criminal Procedure,[34] incorporating, where applicable to criminal cases, some of the sensible rules relating to civil procedure.

FREE TRANSCRIPT FOR REVIEW

The United States Supreme Court in 1956 held, in *Griffin v. Illinois,*[35] that the fourteenth amendment's equal protection clause requires that the state furnish an indigent defendant, who wishes to appeal his conviction, with a free copy of the transcript of the trial proceedings, in order to equalize justice as between the rich (who can obtain a transcript and thus effectively appeal) and the poor (otherwise unable effectively to appeal). In one 1957 case, the Colorado Supreme Court recognized the binding effect of this case on Colorado, and remanded the case to the district court for a determination of the question of the convicted defendant's indigency.[36]

HABEAS CORPUS

Several cases dealt with the availability of the remedy of habeas corpus to one who is serving his sentence after having been convicted of a crime.[37] In the *Freeman* case, already discussed on the question of the right of counsel, the court held that habeas corpus is not a proper remedy to upset a conviction obtained at a trial at which this right was

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[32] Rochon v. People, 306 P.2d 1080 (Colo. 1957); Armbeck v. People, 313 P.2d 715 (Colo. 1957); Williams v. People, 315 P.2d 189 (Colo. 1957). However, the court does sometimes look at the merits of the defendant's case, in spite of the fact that the defendant failed to use the correct procedure for review.

[33] Barrett v. People, 315 P.2d 192 (Colo. 1957) (no abstract of record or assignment of error).

[34] See Scott, Criminal Procedure in Colorado, 22 Rocky Mt. L. Rev. 221 (1950).

[35] 351 U.S. 12 (1956).

[36] In re Patterson's Petition, 317 P.2d 1041 (Colo. 1957) (if indigent, one is entitled to a free transcript or bill of exceptions).

[37] 308 P.2d 220 (Colo. 1957); Barrett v. People, 315 P.2d 192 (Colo. 1957); Farrell v. District Court, 311 P.2d 410 (Colo. 1957). One case dealt with habeas corpus after arrest and before trial: Oates v. People, 315 P.2d 196 (Colo. 1957).

violated. The court nevertheless went on to consider whether the right was violated, concluding it was not. The reason given was that habeas corpus lies after conviction only if the trial court had no jurisdiction over the crime or the defendant, or if the court imposed a void sentence. Of course, the rule about the availability of habeas corpus in federal courts after a federal conviction is expressed also in terms of jurisdiction, yet the United States Supreme Court has held there is no "jurisdiction" where the defendant's right to counsel is denied.[38] Most states probably follow the federal lead and allow habeas corpus. Perhaps the remedy in Colorado is a writ of error coram nobis, addressed to the trial court; or its modern equivalent, a motion to vacate the judgment of conviction.[39] The important thing is that, in right-to-counsel cases, there be some available remedy other than the writ of error.

DOUBLE JEOPARDY

One unusual case involved the problem of double jeopardy.[40] Defendant was charged with embezzlement of public funds, was convicted, and took his case to the supreme court for review. Before the supreme court rendered a decision, the defendant was again charged in effect with the same embezzlement, and the second trial began. Then the supreme court reversed the first conviction. The second trial proceeded, over the defendant's objections of former jeopardy, resulting in his conviction. He again applied for a writ of error. This time the supreme court reversed on the ground of double jeopardy. While there is no double jeopardy in a new trial conducted after the defendant's original conviction is reversed, the new trial must begin after, not before, the reversal takes place.

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[38] Johnson v. Zerbst, 304 U.S. 458 (1938). The Court there pointed out that there must be some remedy other than appeal, since a defendant without counsel generally finds it difficult or impossible to appeal.

[39] Most jurisdictions would probably hold this remedy not available, because it is generally allowed only to raise issues of fact not known at the trial, which if known might have led to another result. In cases of criminal trials without counsel, it is hard to find that there were any unknown facts.

[40] Bustamante v. People, 317 P.2d 885 (Colo. 1957).