by plaintiff from J. C. Tenorio Enterprises pursuant to the Bank of America Contract Number 97014.

4. No costs are awarded.

In the Matter of the Application of VICENTE R. MATAGOLAI
For a Writ of Habeas Corpus

Civil Action No. 1052

Trial Division of the High Court

Mariana Islands District

September 1, 1972

Petition for habeas corpus. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that victim could make in-court identification of accused where she had had only a rear view of him at time of offense and had made no pre-trial identification.

1. **Habeas Corpus—Availability of Writ**
   Determination of a prisoner's guilt is not a function of habeas corpus.

2. **Habeas Corpus—Jurisdictional Error**
   Habeas corpus reaches only jurisdictional error, and does not reach procedural error.

3. **Constitutional Law—Due Process—Remedies for Deprivation**
   If conviction was a nullity because it was based on in-court identification which denied due process, the most petitioner for habeas corpus could expect would be a new trial, and he would not be entitled to be set free.

4. **Criminal Law—In-Court Identification—Harmless Error**
   If conviction depended upon evidence other than in-court identification which allegedly violated due process, the admission of the identification was harmless procedural error at most, not a denial of due process.

5. **Habeas Corpus—Availability of Writ**
   Habeas corpus is not a substitute for appeal to search for procedural error.

6. **Appeal and Error—Late Appeal**
   Late appeal from conviction would not be granted petitioner for habeas corpus where no plain error was demonstrated and there was no appriate authorized procedure for allowing late appeals where plain error is demonstrated; and the only available appeal would be from denial of habeas corpus relief.

7. Evidence—Weight

The weight or probative value of evidence is for the trier of fact.

8. Appeal and Error—Findings and Conclusions—Weight

Habeas corpus petitioner could not prevail on claim he was entitled to a new trial because in-court identification alleged to be in violation of due process was also allegedly almost the exclusive basis for conviction where trial judge specifically stated basis for conviction and the statement was contrary to petitioner's assertion.

9. Criminal Law—In-Court Identification—Weight

The weight to be given in-court identification is for trier of fact, is procedural, and does not go to the question of fair trial embodied in due process.

10. Criminal Law—In-Court Identification—Propriety

Accused could be identified in court while sitting at defense counsel's table.

11. Constitutional Law—Compelling Court Attendance

It is not a denial of constitutional privileges to compel an accused to appear in court.

12. Criminal Law—In-Court Identification—Propriety

It was not a denial of due process for victim to identify accused in court where her only view of him at the time of the offense was from the rear.

13. Criminal Law—In-Court Identification—Propriety

It was not a denial of due process for victim to identify accused in court without making a pre-trial identification.

14. Constitutional Law—Due Process—Appeals

An appeal is not an essential of due process.

15. Constitutional Law—Right to Counsel—Appeals

A defendant is not entitled as a matter of right to assistance of counsel to prosecute an appeal.

16. Appeal and Error—Adequacy of Counsel

Court would reject habeas corpus petitioner's claim that counsel was incompetent for failure to file an appeal and that petitioner was thus denied due process, where counsel testified that in his opinion nothing in the trial sustained grounds for an appeal and that any appeal without new matter would be frivolous.

17. Appeal and Error—Presumptions—Opportunity to Appeal

The law presumes knowledge of opportunity to appeal.

18. Habeas Corpus—Due Process—Burden of Proof

Petitioner for habeas corpus had burden of proving that he was denied due process of law because he was denied adequate and effective assistance of counsel.

19. Appeal and Error—Presumptions—Opportunity to Appeal

Denial of knowledge of opportunity to appeal, made by person with ten convictions and jail sentences, was not sufficiently convincing to overcome presumption of knowledge.

Counsel for Petitioner: Micronesian Legal Services Corporation: EDWARD C. KING, ESQ., and THEODORE R. MITCHELL, ESQ.; and JAMES E. DUGGAN, ESQ.

Counsel for Respondent: CARLOS H. SALII, ESQ., *District Attorney Mariana Islands District*

TURNER, *Associate Justice*

Petitioner, through counsel, applied for and was granted writ of habeas corpus to bring him before the court for hearing to show cause as to the propriety of his imprisonment. The petitioner was convicted of the offenses of burglary and rape and was sentenced May 5, 1972, to serve concurrent terms of two and five years, respectively.

At the trial, petitioner was represented by the Public Defender and by the Public Defender's Representative, a Micronesian trial assistant, a fact especially noted because of its significance developed at the hearing on the writ. Within a week after time for appeal from the conviction had expired, counsel from Micronesian Legal Services Corporation, now representing petitioner, ordered transcript of the trial record and eventually filed the application for the writ. As noted later, this timing is significant.

The court heard testimony of witnesses called by the petitioner, including his former counsel, the Public Defender, and considered extensive memoranda submitted by counsel. From the testimony adduced at the hearing and from the transcript of the trial evidence, we are convinced the petitioner was not denied due process of law and that

the writ of habeas corpus heretofore issued on ex parte application must be set aside and dismissed.

Petitioner contended he was denied due process of law in that:

(1) His in-court identification by the complaining witness "was unduly, unfairly and unnecessarily suggestive and conducive to irreparable mistaken identification", and

(2) "His trial counsel failed to inform him of his right of appeal" and did not appeal "thereby depriving him of the effective legal assistance" essential to due process of law.

Before taking each of the two propositions, we first consider the relatively minor point of the relief asked in the alternative that: (1) petitioner's conviction be declared void and that he be set free; (2) he be granted a new trial which would exclude identification testimony by the complaining witness; and (3) he now be permitted to appeal some three months after time for appeal has expired. The first relief sought would require substitution of our opinion as to petitioner's guilt or innocence, without in-court identification, for the determination of the trial judge.

[1, 2] Determination of the guilt or innocence of the prisoner is not the function of habeas corpus. *Figir v. Trust Territory*, 4 T.T.R. 368, 371. Habeas corpus reaches only jurisdictional error and not procedural error. *Purako v. Efou*, 1 T.T.R. 236, 240.

[3–5] If the judgment of conviction was a nullity because the defendant was denied due process because he was identified as the rapist by the victim in court, the most he could expect would be a new trial with the identification testimony eliminated. If, however, his conviction depended upon evidence other than identification testimony (and the trial court so held), the most that could be said about the admission of the identification testimony was that it was

harmless error in procedure and not denial of due process. Habeas corpus is not a substitute for appeal to search for procedural error. *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824.

[6] The Federal courts have an authorized procedure to permit late appeal by directing that the sentence be vacated and the matter remanded for imposition of new sentence with time to appeal running from the sentence. This is not done, however, unless there is a showing of "plain error". *Fennel v. United States*, 339 F.2d 920; *Mitchell v. United States*, 254 F.2d 954. Having failed to demonstrate "plain error" and there being no appropriate authorized procedure, we will not further consider granting an opportunity for appeal from the criminal conviction. The only appeal available, therefore, must be from this denial of habeas corpus relief.

[7, 8] Petitioner also argues "since his conviction is almost exclusively based on this constitutionally infirm identification", he should be granted a new trial. The weight or probative value of evidence is for the trial judge. The judge in this case stated for the record what he based the conviction upon. It is contrary to petitioner's argumentative assumption. The identification made by a witness was discussed in *Trust Territory v. Ngiraitpang*, 5 T.T.R. 282, another rape case in which a courtroom identification was objected to by the defense. References to principles there stated will shorten this opinion.

In the present case, the trial judge demonstrated that in his mind the identification in court was neither "impermissibly suggestive" nor was it conclusive of the guilt of petitioner. The court said at the conclusion of the trial:

"The possibility that there was a measure of suggestion by reason of the place in which she saw him consequently might well not be sufficient to stand alone as identification, but certainly it

does have value in corroboration with the other circumstances, which have put the accused in this courtroom." (Tr. 82)

The other circumstances which "put the accused into this courtroom" were amply demonstrated in the trial transcript. With or without the identification testimony, habeas corpus is not the vehicle to test the adequacy of the evidence of guilt.

This identification was made only in the court from the witness stand. There was no pre-trial lineup, confrontation or photograph. The courtroom confrontation, says petitioner, "was unnecessarily and improperly suggestive to the complainant that he was the guilty party."

The same argument was employed in *United States v. King*, 433 F.2d 937:

". . . appellant argues that the courtroom identification by witness Sanguinetti and witness Nunn occurred under prejudicial conditions because he was the only Negro in the courtroom."

[9] The Federal court held the weight to be given an identification under such circumstances was for the jury—or for the court without a jury. The discretion granted is procedural. It does not go to the question of "fair trial" embodied in due process of law.

The circumstances of the identification in the present case are even more compelling than in *King*. Here the accused was not the only man of his race in the courtroom. He sat at defense counsel's table with another Micronesian, the Public Defender's Representative. Was it "impermissibly suggestive" for the witness to pick one of two Micronesians sitting at counsel's table in the courtroom? One of the two she had seen at the time of the assault upon her. The other one, for all the trial record shows, she had never seen before.

She identified the accused with the statement (Tr. 20):

"This is the young man; I can tell by the back of his head. I never saw his face but I saw the back of his head as he left my house . . . ."

The witness was searchingly cross-examined as to her identification of the defendant by the Public Defender (Tr. 27):

"Q. And you only observed him from the rear as he was leaving, is that true?

A. That is right.

Q. And where did you see him, under a light, or how?

A. It was getting light, and he was just going out the door and it was light enough for me to see the shape of his head. And I am a sculptor and an observant person for form, size and shape. I don't forget a head; I have sculptured too many of them."

[10] By a theory of "impermissibly suggestive" identification as a denial of due process of law, petitioner insists he may not be identified in court while sitting at defense counsel's table. We reject the argument. All criminal defendants, from time immemorial, have been identified in court and are set free if not identified and connected with the crime.

What counsel suggests is that the complainant—the victim—of the rape should be forbidden from looking at the accused on trial and comparing his features (in this case the shape and size of his head) with the memory of her assailant's features. A similar argument was rejected by Justice Holmes in *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 6:

"The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof."

[11] It is not a denial of constitutional privileges to compel a prisoner to appear in court. When there, he is subject to identification by a trial witness.

Such identification, resting upon an "independent origin" and not the fruit of a tainted pre-trial confrontation is not a denial of due process. *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826; *Trust Territory v. Ngiraitpang*, supra.

Petitioner's objection to the identification procedure in this case is that there was not a pre-trial lineup, which is, of course, completely contrary to the cases on identification on which petitioner relies. The three Supreme Court decisions which established the due process rule relating to "impermissibly suggestive" identification procedures related to pre-trial identifications, which assertedly tainted the in-court trial identification. In this present case, petitioner says there should have been a pre-trial lineup, thereby avoiding "serious doubt" as to the propriety of the in-court identification.

It would unnecessarily lengthen this opinion to again review the law in the United States on the question of identification. Sufficient here is that decisions from which the current law has grown are *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926; *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951; and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967.

This court reviewed these cases, and others, in another challenge to a rape case identification in *Ngiraitpang*, supra. A very thorough analysis of the law of identification is found in *Clemons v. United States*, 408 F.2d 1230. We do note, however, petitioner cited eight Federal Circuit Court cases, *none* of which rejected in-court identification, including *Clemons*, supra, which petitioner cited as holding due process was violated, which was contrary to the decision. *Clemons* emphasizes that the question on in-court identification is one as to probative value, i.e., the weight to be given to the identification testimony rather than its validity from a due process standpoint. The court said in *Clemons* at 408 F.2d 1237:

"Where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility. The court . . . should then rule upon whether a pre-trial identification by the same eyewitness is violative of due process. . . . If the judge regards only the in-court identification as admissible, the defense may, as a

matter of trial tactics, decide to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification."

[12, 13] In the present case, there was no pre-trial identification, and, of course, no denial of due process. All that was available to the defense was to attack the weight to be given to the in-court identification. In the light of the totality of the circumstances surrounding the in-court identification of petitioner, his claim that he did not have a fair trial and that his conviction was void because he was denied due process of law is rejected.

Petitioner's second ground for relief was his claim he was denied due process because he did not have "effective legal assistance" in that the Public Defender did not inform him of his right to appeal. The cases cited in support relate to the Federal statute requiring "effective assistance of counsel." 28 U.S.C.A. Sec. 2255.

Non-statutory Federal court decisions reject petitioner's argument. There is no Trust Territory statute comparable to the Federal Act. The most he is entitled to under the Trust Territory Code is to have an attorney or representative "defend him at the trial" and that services of the Public Defender are available "for these purposes without charge." 12 T.T.C. 68 and 151(2).

[14, 15] An appeal is not an essential of due process and a defendant is not entitled as a matter of right, to the assistance of counsel to prosecute an appeal. *Errington v. Hudspeth*, 110 F.2d 384 (Cert. denied). *Moore v. Aderhold*, 108 F.2d 729, 732, holds: "The failure of petitioner's attorney to perfect the appeal is not ground for discharge on habeas corpus."

The Public Defender, called by petitioner as a witness at the habeas corpus hearing, testified in his opinion there was nothing in the trial that sustained grounds for appeal

and that any appeal "without new matter" would be frivolous. This testimony is far more persuasive than the court's findings in *De Maurez v. Swope*, 104 F.2d 758, 759:

"The petitioner's allegation that he was 'unable to secure further assistance of counsel' does not disclose circumstances justifying issuance of a writ of habeas corpus. Counsel for petitioner may have been of the opinion that motion for new trial or an appeal would have been useless."

In *McGuire v. Hunter*, 138 F.2d 379, the court said:

". . . an appeal is not a necessary element of due process. . . . Therefore the failure of the attorney in this instance to take the required steps to appeal the case does not warrant the discharge of petitioner on habeas corpus." (Citing)

[16, 17] We reject as scandalous and subject to be expunged from this record the proposition that the Public Defender was incompetent and petitioner accordingly was denied due process of law. We also reject as contrary to the law, petitioner's argument that "it cannot be assumed that he knew he had a right to appeal." The presumption is the opposite. In *Price v. Johnson*, 125 F.2d 806, 809, the court said:

"At this point it is advisable to again stress that appellant was represented by an attorney throughout the trial, and as the petitioner did not allege the time of his discharge of the attorney, if he was discharged prior to the expiration of the time for appeal from the judgment, it must be presumed that he was aware of the necessity of perfecting an appeal if he desired to contest the judgment of conviction."

In the present case, we need not presume as to petitioner's knowledge. He admitted he was told "by his brother" about his right to appeal within five days after he was sentenced. Also, we find it difficult to accept as mere coincidence the juxtaposition of the policy of the Micronesian Legal Services (now representing petitioner) not to handle criminal matters and the undertaking to represent

him in a habeas corpus civil proceeding within the week after time for criminal appeal expired.

[18] The burden was on the petitioner to prove that he was denied due process of law because he was denied effective and adequate assistance of counsel. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019; *Bostic v. Rives*, 107 F.2d 649, 652. Even the textwriters recognize the applicable presumption is contrary to that urged by petitioner. In 39 C.J.S., Habeas Corpus, Section 100, page 672, it is said:

". . . it will be presumed that petitioner was informed as to his privilege of appeal from a conviction and the necessity of appealing within the prescribed time. . . ."

[19] Petitioner's denial of knowledge as to appeals, even though this is his tenth conviction and sentence to jail, was not sufficiently convincing to overcome the presumption against him. It is

Ordered, the writ of habeas corpus heretofore issued pending hearing be dismissed, denied and set aside.

GREGORIO MARBOU, and HENRY DACHELBAI, Plaintiffs
v.
EUSEVIO TERMETEET, CHIEF OF POLICE, PALAU DISTRICT, Defendant

Civil Action No. 520

Trial Division of the High Court

Palau District

September 19, 1972

Petition for habeas corpus. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, ruled that a juvenile suspected of committing a crime may only be proceeded against as a juvenile offender, though government may subsequently move for trial of a juvenile sixteen or older as an adult.