DUE PROCESS IN STATE CAPITAL CASES: THE RIGHT TO COUNSEL FOR INDIGENT DEFENDANTS BEYOND THE INITIAL APPEAL AS OF RIGHT

I
INTRODUCTION

During the summer of 1976 the United States Supreme Court declared in *Gregg v. Georgia*[1] that the use of the death penalty as punishment for murder does not, *per se*, constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments.[2] This pronouncement by the Court resolved the issue left open in *Furman v. Georgia*,[3] and set the stage for the first execution in the United States in nearly ten years.[4] With over four hundred men and women on death row in this country,[5] and thirty-three states providing for some form of capital punishment,[6] there is potential for the wide-scale resumption of the death penalty.

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1. 428 U.S. 153 (1976).

2. *Id.* at 169. *Gregg* was one in a series of five cases before the Court dealing with the issue of capital punishment. The Court upheld the constitutionality of the state death penalty statutes in *Gregg*, Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), and invalidated those in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976). Each statute was judged by the standard set forth four years earlier in Furman v. Georgia, 408 U.S. 238 (1972), that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S. at 189.

3. 408 U.S. 238 (1972). In *Furman*, the Supreme Court, in a 5-4 *per curiam* opinion, held that the death penalty as imposed under two state statutes was cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* at 240-41. The Court, however, never decided the issue of the *per se* constitutionality of capital punishment. *See* note 135 *infra*.

4. On January 17, 1977, the United Stgates Supreme Court refused to reimpose a stay to block the execution of Gary Mark Gilmore. Ritter v. Utah, 429 U.S. 1058 (1977). The stay of execution had been imposed the previous day by Federal District Judge William R. Ritter and then revoked by the United States Court of Appeals, Tenth Circuit. Gilmore was put to death by a Utah firing squad on January 17, ending a ten-year moratorium on executions in the United States. N.Y. Times, Jan. 18, 1977, at 1, col. 4.

5. As of December 15, 1977, there were a total of 407 persons under sentence of death in the United States, according to the NAACP Legal Defense and Education Fund, Inc. They were distributed among 23 states, N.Y. Times, Jan. 3, 1978, at 20, col. 5.

6. N.Y. Times, April 17, 1978, at A12, col. 3.

Gregg and its companion cases[7] have generated a renewed interest in the constitutional rights of the condemned prisoner. A major concern is the scope of the capital defendant's right to counsel. The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[8] The Supreme Court, in extending this guarantee to the states through the fourteenth amendment, has required the state to furnish free counsel for indigent criminal defendants at all proceedings up to and including the first appeal as of right.[9] The stages at which the state must provide counsel are: (1) any pretrial but post-indictment lineup;[10] (2) the preliminary hearing to determine the existence of probable cause;[11] (3) any pretrial custodial interrogation;[12] (4) the pretrial arraignment when certain defenses must be pleaded or waived;[13] (5) the entering of a plea of guilty at any time;[14] (6) the trial;[15] (7) the sentencing hearing;[16] and (8) the initial appeal as of right.[17] The Supreme Court, however, has not required states to provide counsel to indigent defendants beyond the first appeal as of right. In *Ross v. Moffitt*,[18] the Court held that the fourteenth amendment does not guarantee free counsel for indigent defendants preparing petitions either for discretionary review in the highest state court or for certiorari to the United States Supreme Court. Although the Court has not decided the precise issue of counsel for habeas corpus stages, it acknowledged in *Johnson v. Avery*[19] that states have discretion in such matters.

The Supreme Court did not differentiate in either *Ross* or *Johnson* between capital and non-capital cases, which suggests that states might not have to provide counsel even for those upon whom a sentence of death has been imposed. This Note contends that notwithstanding *Ross* and *Johnson*, indigent state defendants sentenced to death should be provided counsel up to the point of execution or until commutation of sentence. The specific stages at which appointed counsel is imperative are: (1) the preparation of petitions for discretionary review;[20] (2) the preparation of petitions for certiorari to the United States Supreme Court; and (3) the assertion of state[21] and federal[22] habeas corpus

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7. *See* note 2 *supra*.
8. U.S. CONST. amend. VI.
9. *See* cases cited in notes 10-17 *infra*.
10. United States v. Wade, 388 U.S. 218 (1967). *But see* Kirby v. Illinois, 406 U.S. 682 (1972) (no right to counsel at a pre-indictment lineup).
11. Coleman v. Alabama, 399 U.S. 1 (1970).
12. Miranda v. Arizona, 384 U.S. 436 (1966).
13. Hamilton v. Alabama, 368 U.S. 52 (1961).
14. Moore v. Michigan, 355 U.S. 155 (1957).
15. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).
16. Mempa v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948).
17. Douglas v. California, 372 U.S. 353 (1963).
18. 417 U.S. 600 (1974).
19. 393 U.S. 483 (1969). *See* text accompanying notes 70-77 *infra*.
20. For the purposes of this Note, discretionary review is permissive appellate review by a state's highest appellate court.
21. Common habeas corpus remedies provided by the states include vacation of judgment and vacation of sentence.
22. 28 U.S.C. § 2254(a) (1970) states:

rights. The Supreme Court's traditional recognition of special due process guarantees for those facing capital punishment, the peculiar plight of the capital prisoner after the initial appeal as of right, and the significant role that an attorney may play during these proceedings compel this extension of the right to counsel.

II
HISTORY OF THE RIGHT TO COUNSEL AT THE TRIAL AND APPELLATE STAGES

Over the past half-century the extent to which the fourteenth amendment obligates the states to provide free counsel to indigent defendants has been a source of considerable controversy.[23] The Supreme Court's focus in this area has been primarily on the trial and appellate stages of the criminal proceeding. The decisions of the Court have relied on two concepts fundamental to the fourteenth amendment—due process and equal protection.

A. The Powell *Decision*

The modern law of constitutional criminal procedure began in 1932 with the case of *Powell v. Alabama*,[24] in which for the first time the Supreme Court interpreted the due process clause of the fourteenth amendment to guarantee the right to counsel in state criminal proceedings.[25] In *Powell*, nine illiterate black youths were arrested and charged with the rape of two white women. The nine were tried for the capital offense "in an atmosphere of tense, hostile and excited public sentiment," without even being "asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives" who might assist if contacted.[26]

The *Powell* Court held that the failure by the Alabama court to give the defendants reasonable time and opportunity to secure counsel was a denial of due process. The Court ruled that the fourteenth amendment established that a state could not deny the right to the aid of counsel without violating fundamental principles of liberty and justice.[27] It maintained that "[e]ven the intelligent

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The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

See generally 28 U.S.C. §§ 2241-2255 (1970).

23. Construed broadly, the sixth amendment could be interpreted as granting the right to counsel at all stages of every criminal proceeding. *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961).

24. 287 U.S. 45 (1932). This case has become known as the *Scottsboro Case*.

25. *See* Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518.

26. 287 U.S. at 51-52.

27. *Id.* at 67.

and educated layman . . . requires the guiding hand of counsel at every step in the proceedings against him."[28]

Although the *Powell* decision was based upon a broad theoretical notion which could have supported significant expansion of the right to counsel, the actual holding was limited to the facts of the case:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.[29]

The *Powell* case thus left unresolved many issues relating to the right of an indigent defendant in a state case to have assigned legal counsel. The quoted language from the majority opinion indicates that the Court sought to decide only the particular question before it, while allowing for such eventual growth in the doctrine as the Court might find desirable.[30] The possibility of flexible expansion of the right to counsel is entirely consistent with the *Powell* Court's treatment of due process.

B. Betts v. Brady: *The "Special Circumstances" Rule*

The right to counsel for indigent defendants in non-capital state proceedings was considered ten years later in *Betts v. Brady*.[31] The defendant in *Betts* was charged in a Maryland court with robbery and his request for appointed counsel for his trial defense was denied. He pleaded not guilty, elected to be tried without a jury, and conducted his own defense. He was found guilty, and proceeded to file a writ of habeas corpus, alleging that he had been deprived of the right to assistance of counsel which was guaranteed him by the fourteenth amendment.

The Supreme Court refused to apply *Johnson v. Zerbst*[32] to the states, holding under the due process clause of the fourteenth amendment that a state need not supply counsel at the trial of every indigent defendant charged with a felony. The Court recognized, however, that due process might require appointed counsel in "certain circumstances,"[33] when the absence of legal representation would deprive a defendant of a fair trial.[34] Applying its newly

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28. *Id.* at 69.
29. *Id.* at 71.
30. *See* Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 237-38. *See also* Fellman, *The Federal Right to Counsel in State Courts*, 31 NEB. L. REV. 15, 19 (1951).
31. 316 U.S. 455 (1942).
32. 304 U.S. 458 (1938). The Court in *Johnson* held that the sixth amendment requires appointed counsel for all indigents in all federal criminal trials in which the defendant's "life or liberty" is at stake.
33. 316 U.S. at 462.
34. *Id.* at 473.

articulated standard, the Court found that Smith Betts was not denied due process by the Maryland court. Mr. Justice Roberts stated for the Court that the case had presented only the simple issue of the veracity of conflicting testimony that an adult with Betts's background was competent to handle himself. Because Betts was "not helpless, but . . . of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue,"[35] no "special circumstances"[36] requiring the assistance of counsel existed.

C. *The Initial Aftermath of* Betts: *Special Consideration for Capital Cases*

Although the *Betts* Court hinted at various factors that might constitute the "special circumstances" necessary to invoke the appointment of counsel, the particular elements of the special circumstances rule were poorly defined. In the twenty years following *Betts*, the Court heard numerous challenges to state criminal procedures based upon this standard. In an effort to delineate the contours of the rule, during this period, the Court employed a special approach for cases involving crimes punishable by death. While continuing case-by-case determinations whether counsel was required in non-capital trials,[37] the Court established a uniform procedure for capital cases. In capital trials there was no need to show that the absence of counsel under the particular facts of the case would result in a trial lacking in fundamental fairness. The due process clause was interpreted to demand court-appointed counsel for all defendants facing the death penalty.[38]

This departure from the *Betts* discretionary rule was a gradual process. Two 1945 decisions hinted at the privileged status of capital defendants.[39] It was not until 1948, however, that the capital offense exception was explicitly acknowledged, and then only in dictum. The Court in *Bute v. Illinois*,[40] though denying counsel at the trial of one charged with the non-capital offense of "taking indecent liberties with children," nevertheless recognized that "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment" to assign counsel to the accused for his trial defense.[41] This dictum was cited in later decisions.[42] All doubts regarding the special nature of capital cases were finally removed in 1961 by *Hamilton v. Alabama*.[43] In pro-

35. *Id.* at 472.

36. Although the *Betts* Court spoke of "certain circumstances," this phrase has since been labelled the "special circumstances" rule. *See* Argersinger v. Hamlin, 407 U.S. 25, 65 (1972) (Powell, J., concurring); Gideon v. Wainwright, 372 U.S. 335, 350 (1963) (Harlan, J., concurring).

37. *See* Hudson v. North Carolina, 363 U.S. 697, 701 (1960); Gryger v. Burke, 334 U.S. 728, 731 (1948); Foster v. Illinois, 332 U.S. 134, 137 (1947).

38. *See* text accompanying notes 39-44 *infra*.

39. Williams v. Kaiser, 323 U.S. 471, 474 (1945); Tomkins v. Missouri, 323 U.S. 485, 487 (1945).

40. 333 U.S. 640 (1948).

41. *Id.* at 674.

42. *See, e.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 440-41 (1948).

43. 368 U.S. 52 (1961).

viding for the appointment of counsel at a pretrial arraignment, the *Hamilton* Court explicitly rested its decision on the ground that the case before it involved a capital crime. No showing of prejudice to the defendant was required.[44]

D. Gideon v. Wainwright: *The End of "Special Circumstances"*

The "special circumstances" approach of *Betts* was formally abandoned by the Supreme Court in 1963 in *Gideon v. Wainwright*.[45] In *Gideon*, the State of Florida had refused to appoint counsel at a non-capital trial. The defendant conducted his own defense and was found guilty and sentenced to five years imprisonment. The Supreme Court noted at the outset that the facts and circumstances of *Betts* were nearly indistinguishable from the case at bar. Thus if the *Betts* holding were left standing, the Court would have been compelled to hold that the defendant's request for counsel was properly denied by Florida. The Court explicitly overruled *Betts* and extended *Johnson v. Zerbst*[46] to the states by incorporating the sixth amendment right to counsel into the fourteenth amendment due process clause:

> We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.[47]

The *Gideon* decision introduced an absolute requirement that counsel be appointed for indigent defendants in all state felony trials.[48]

In a concurring opinion, Mr. Justice Clark noted that the established distinction between capital and non-capital cases had been erased: "The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in non-capital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence."[49]

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44. *Id.* at 55.

45. 372 U.S. 335 (1963). During the years following *Betts*, the "special circumstances" rule had been undermined in non-capital cases, although to a lesser degree than in capital cases. For ten years the Court occasionally found "special circumstances" lacking, but often by sharply divided votes. *See, e.g.*, Gryger v. Burke, 334 U.S. 728 (1948); Foster v. Illinois, 332 U.S. 134 (1947). After Quicksall v. Michigan, 339 U.S. 660 (1950), however, no decision by the Court upheld a refusal by a state to provide counsel on the basis of *Betts*. *See* 372 U.S. at 351 (Harlan, J., concurring).

46. *See* note 32 *supra*.

47. 372 U.S. at 342.

48. *Gideon* was followed in 1972 by Argersinger v. Hamlin, 407 U.S. 25 (1972), which held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial." 407 U.S. at 37.

49. 372 U.S. at 351.

E. The Griffin-Douglas *"Equality" Standard*

The constitutional right to counsel was extended to defendants engaged in the initial appeal as of right by two landmark decisions by the Supreme Court, *Griffin v. Illinois*[50] and *Douglas v. California*.[51] These cases differ from the previous "right to counsel" decisions[52] in that they are based on the equal protection clause rather than the due process clause of the fourteenth amendment.

In *Griffin*, the Court examined an Illinois law which had the effect of allowing a convicted criminal defendant to present claims of trial error to the state supreme court only if he procured a transcript of the testimony offered at his trial. An exception was made only for the indigent defendant sentenced to death; a non-capital defendant who was unable to pay the cost of the transcript was precluded from obtaining appellate review of an alleged trial error. The defendants in *Griffin* claimed that they lacked the funds to pay for such materials and that the failure of the state court to furnish them with free transcripts violated their rights under the due process and equal protection clauses of the fourteenth amendment.

Although the Supreme Court mentioned both due process and equal protection in its *Griffin* opinion,[53] it based its decision for the defendants primarily, if not entirely, on the equal protection clause.[54] While recognizing that a state is not required by the Federal Constitution to provide appellate review at all, the Court nevertheless decided that a state which does grant appeals may not do so in a way which discriminates against convicted defendants on the basis of their poverty: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[55] The Supreme Court thus held as a matter of equal protection that denial of a free transcript was impermissible.[56]

In *Douglas v. California*, decided the same day as *Gideon*, the Court was faced with a California rule which permitted state appellate courts, upon a request for counsel by an indigent defendant, to make an independent investigation of the record and determine whether the presence of counsel would be advantageous either to the defendant or to the court. Counsel for the indigent defendant would be denied if, in the court's judgment, the appointment would serve no useful purpose. The *Douglas* Court, in overturning this procedural rule, found the state's refusal to provide counsel on appeal to all indigent de-

50. 351 U.S. 12 (1956).
51. 372 U.S. 353 (1963).
52. *See* text accompanying notes 24-49 *supra*.
53. 351 U.S. at 17.
54. *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956).
55. 351 U.S. at 19.
56. Succeeding cases invalidated similar financial barriers to the state appellate process on grounds of equal protection while affirming the principle that the state need not provide *any* appeal for criminal defendants. *See* Draper v. Washington, 372 U.S. 487 (1963); Burns v. Ohio, 360 U.S. 252 (1959).

fendants to be a discrimination as invidious as the refusal to give the indigent defendants a transcript in *Griffin*. Relying on the equal protection reasoning of *Griffin*, the Court again focused on equality:

> The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between "possibly good and obviously bad cases," but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but the poor man cannot. 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 himself.[57]

Due process was discussed only briefly by the *Douglas* Court, in a passage stating that "[w]hen an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure."[58]

Although in *Douglas* the right to counsel was extended to the appellate stage, the question remained whether counsel is guaranteed beyond the initial appeal as of right:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike . . . from a criminal conviction.[59]

The issue was to be resolved eleven years later in *Ross v. Moffitt*.[60]

F. The Ross *Decision*

The indigent defendant in *Ross* had been twice convicted of forgery in North Carolina courts, and twice unsuccessful in appeals as of right to the state court of appeals. In one case, the defendant was denied appointment of counsel to aid his preparation of a petition for discretionary review by the North Carolina Supreme Court. In the other case, following denial of certiorari in the state supreme court, his request for court-appointed counsel to prepare a petition for certiorari to the United States Supreme Court was also turned down. A federal district court denied habeas relief, but the Court of Appeals for the Fourth Circuit reversed, holding that the defendant was entitled to appointment of counsel in both cases.[61]

The majority opinion by Chief Circuit Judge Haynsworth stressed both the

57. 372 U.S. at 357-58.
58. *Id.* at 357.
59. *Id.* at 356.
60. 417 U.S. 600 (1974).
61. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973).

due process and the equal protection concerns. The court observed that "[a]s long as the state provides such procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court."[62] The United States Supreme Court, however, reversed the court of appeals decision. Therefore, the *Douglas* determination that the right to counsel extends through the first appeal as of right currently sets the boundary of the constitutional requirement of free counsel for indigent state defendants.

The Supreme Court in *Ross* analyzed both due process and equal protection and concluded that neither clause called for an extension of the sixth amendment beyond the first appeal. Mr. Justice Rehnquist's majority opinion began with the contention that the precise rationale of the *Griffin-Douglas* line of cases had never been explicitly stated, as those decisions drew both from due process and equal protection. Treating the two clauses separately, the opinion clarified the conceptual differences between them: " 'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[63]

With regard to due process, the Court confirmed the requirement that states supply counsel for indigent defendants at trial, but declined to extend the rule to discretionary appeals. The reasoning was grounded on the differences between the two stages:

> The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. . . .
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> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below.[64]

The Court illustrated its point by characterizing the defense attorney at trial as a "shield" for protection, and the attorney in an appeal as a "sword" employed to upset a prior determination of guilt. The Court also noted the long established difference in due process requirements for the two stages: states must provide criminal trials, but need not provide any appeals at all.[65]

In its discussion of equal protection, the Court suggested that "[t]he question is not one of absolutes, but one of degrees."[66] Accordingly, the Court did not find that the North Carolina defendant had been singled out by the state

62. *Id.* at 654.
63. 417 U.S. at 609.
64. *Id.* at 610.
65. The Court cited McKane v. Durston, 157 U.S. 684 (1894). 417 U.S. at 611.
66. 417 U.S. at 612.

and denied meaningful access to the appellate system because of his poverty. Under the North Carolina multi-tiered system, the defendant already had available, at the very least, the transcript of his trial, the brief in the state court of appeals setting forth his claim of error, and frequently an opinion by that court disposing of his case. Such materials, according to the *Ross* Court, provided the state supreme court with an adequate basis for its decision to grant or deny discretionary review. The state's duty, the Court concluded, was not "to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process."[67]

The Court considered last the question whether a state must provide counsel for an indigent defendant filing a petition for certiorari to the United States Supreme Court. In its rejection of the equal protection argument for counsel at this stage, the Court used an analysis similar to the one applied to state discretionary appeals. It pointed out that in deciding whether to grant certiorari, the Supreme Court would have the benefit of the appellate brief prepared by counsel appointed for the defendant's appeal, as well as at least one appellate opinion. The source of the right to petition was another basis for rejecting the equal protection challenge:

> [T]he argument relied upon in the *Griffin* and *Douglas* cases, that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.[68]

The Court added that it had consistently denied applications for court-appointed counsel by persons seeking to file jurisdictional statements or petitions for certiorari to the Supreme Court.[69]

III
HABEAS CORPUS AND THE RIGHT TO COUNSEL

The United States Supreme Court has not ruled whether or not an indigent state prisoner seeking state or federal habeas corpus relief must be provided counsel either for the preparation of his petition or for the proceeding itself. A related matter was presented in *Johnson v. Avery*,[70] where the Court found unconstitutional a Tennessee prison regulation which prohibited inmates from assisting other prisoners in the preparation of habeas corpus petitions. The Court held that Tennessee, which offered no alternative legal assistance to illit-

67. *Id.* at 616.
68. *Id.* at 617.
69. The Court cited Oppenheimer v. California, 374 U.S. 819 (1963); Drumm v. California, 373 U.S. 947 (1963); and Mooney v. New York, 373 U.S. 947 (1963). 417 U.S. at 617.
70. 393 U.S. 483 (1969).

erate or poorly educated inmates, had unlawfully obstructed access to federal habeas corpus.[71]

While promoting assistance within the inmate population, the *Johnson* Court nonetheless indicated that there is no general requirement to provide counsel for habeas petitioners. "It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief."[72] This dictum by the *Johnson* Court confirmed the consensus among appellate courts that there is no constitutional right to appointed counsel for indigent prisoners engaged in the pursuit of post-conviction remedies. Despite significant expansion in recent decades of the right to counsel at other stages of the criminal justice system,[73] most state and federal courts have not extended the right to counsel to collateral attack proceedings.

The most frequent basis given for this refusal to require counsel has been the "civil" label attached to post-conviction proceedings.[74] Most courts have held that the guarantees of counsel contained in the sixth amendment and similar state constitutional provisions are limited to "criminal prosecutions" and do not extend to "civil proceedings."[75] A common practice has been the discretionary appointment of counsel when the post-conviction application is not frivolous or when the court would find it helpful to have the assistance of counsel at the proceeding.[76] Some courts, however, have held counsel to be required when the indigent application presents an issue which is neither frivolous nor repetitive.[77]

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71. *Id.* at 487.

72. *Id.* at 488 (dictum).

73. *See* text accompanying notes 24-58 *supra*.

74. The most commonly cited case in support of the civil-criminal distinction is *Ex parte* Tom Tong, 108 U.S. 556 (1883), in which the Supreme Court held: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. . . . Proceedings to enforce civil rights are civil proceedings . . . ." *Id.* at 559. This distinction has been reaffirmed over the years in decisions by lower federal courts. *See, e.g.*, Dorsey v. Gill, 148 F.2d 857 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945); Hodge v. Huff, 140 F.2d 686 (D.C. Cir.), *cert. denied*, 322 U.S. 733 (1944); Brown v. Johnston, 91 F.2d 370 (9th Cir.), *cert. denied*, 302 U.S. 728 (1937).

75. *See, e.g.*, Pope v. Turner, 426 F.2d 783 (10th Cir. 1970); Ford v. United States, 363 F.2d 437 (5th Cir. 1966); Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964); Graeber v. Schneckloth, 241 F.2d 710 (9th Cir. 1957); Dutton v. Eyman, 95 Ariz. 96, 387 P.2d 799 (1963), *cert. denied*, 377 U.S. 913 (1964); Croker v. Smith, 225 Ga. 529, 169 S.E.2d 787 (1969); Ross v. Ragen, 391 Ill. 419, 63 N.E.2d 874 (1945); Loftis v. Amrine, 152 Kan. 464, 105 P.2d 890 (1940); State v. Hizel, 181 Neb. 680, 150 N.W.2d 217 (1967); Summers v. Rhay, 67 Wash.2d 898, 410 P.2d 608 (1966); *See generally* Annot., 162 A.L.R. 922 (1946).

76. *See, e.g.*, Foster v. United States, 345 F.2d 675 (6th Cir. 1965); Cullins v. Crouse, 348 F.2d 887 (10th Cir. 1965); Baker v. United States, 334 F.2d 444 (8th Cir. 1964). *See also* Echols v. State, 276 Ala. 489, 164 So.2d 486 (1964); Austin v. State, 91 Idaho 404, 422 P.2d 71 (1966); Darnell v. Peyton, 208 Va. 675, 160 S.E.2d 749 (1968).

77. *See, e.g.*, Marshall v. Wilkins, 338 F.2d 404 (2d Cir. 1964); Anderson v. Heinze, 258 F.2d 479 (9th Cir.), *cert. denied*, 358 U.S. 889 (1958); Harper v. State, 201 So.2d 65 (Fla. 1967). *Cf.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961) (indigent petitioners not entitled to appointed counsel unless failure to appoint would violate due process).

IV
CURRENT LAW: THE RIGHT TO COUNSEL FOR INDIGENT CAPITAL DEFENDANTS BEYOND THE INITIAL APPEAL AS OF RIGHT

The decision in *Ross* and the dictum in *Johnson* together indicate that states need not appoint counsel for indigent criminal defendants beyond the first appeal as of right. Because neither case distinguished defendants charged with capital crimes, each is potentially applicable to both capital and non-capital situations.

The Supreme Court has never addressed specifically the issue of the appointment of counsel in capital cases beyond the initial appeal as of right. The question was presented to, but not decided by, the Court in a pre-*Gideon* decision, *Coleman v. Denno*.[78] The *Coleman* case involved a habeas corpus proceeding brought by a New York State prisoner who had been sentenced to death. The petitioner argued that following the exhaustion of state appellate procedures, the state had an obligation to appoint counsel for him until the death sentence was carried out. The Second Circuit Court of Appeals held that free counsel for the capital defendant was not mandated during the "post-appellate and Federal Court"[79] stages. The court focused on the federal arena, stating that:

> The petition for a writ of certiorari is addressed to the Supreme Court. Surely that Court in a meritorious case would assign counsel. If habeas corpus were sought in a federal court the district court would be the forum for the application. . . . Appointed counsel should be responsible to the appointing court in which the case or proceeding is being heard.[80]

The Supreme Court denied certiorari in the case, precluding definitive resolution of the issue.

In a more recent case, *Carey v. Garrison*,[81] an indigent North Carolina prisoner, convicted of murder and sentenced to death, filed a "Petition for Appointment of Counsel."[82] The federal district court treated this petition as one seeking a writ of habeas corpus and held that the petitioner was confined in violation of the sixth amendment, because the state had failed to provide counsel for his certiorari petition to the United States Supreme Court. The *Carey* court ordered the respondents to answer the allegation of the petition and show cause why a writ should not issue if the state were unwilling to provide counsel.[83]

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78. 313 F.2d 457 (2d Cir.), *cert. denied*, 373 U.S. 919 (1963).
79. *Id.* at 460. The defendant had been furnished counsel for his appeal as of right to the New York Court of Appeals. People v. Coleman, 10 N.Y.2d 765, 177 N.E.2d 53, 219 N.Y.S.2d 612 (1961).
80. 313 F.2d at 461.
81. 403 F. Supp. 395 (W.D.N.C. 1975).
82. *Id.* at 395.
83. *Id.* at 397.

The order by District Judge McMillan distinguished the *Ross* case as a non-capital situation:

> Moffitt, however, faced only imprisonment; Albert Lewis Carey, Jr., on the other hand, may conceivably lose his very life, if his petition for certiorari is not granted; *and the fate of the petitioner, as Justice Rehnquist recognized, must inevitably be tied, at least in part, to the quality and presuasiveness* [*sic*] of the petition.
>
> Where a man's life is at stake, I am not prepared to concede that the law in *Moffitt*, the case of a small time forger, should apply.[84]

The court added that the burden of supplying counsel in a capital case properly rests with the state, because it is the state which seeks to deprive a death row inmate of his life.[85] There was no higher court review of *Carey*; the United States Supreme Court decision in *Woodson v. North Carolina*,[86] which held unconstitutional the capital punishment statute of North Carolina, set aside the defendant's capital sentence.

V
DUE PROCESS ANALYSIS

A. Procedural Due Process and Capital Punishment

The due process clause of the fourteenth amendment has traditionally been defined in broad conceptual terms. The United States Supreme Court expounded over fifty years ago that due process requires "that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[87] Working within this general conception, the Court has, not surprisingly, taken a flexible approach to specific applications of due process. The Court has historically maintained that due process is not a fixed concept, but one adaptable to the particular situation at hand. The *Betts* case exemplifies this posture:

> Asserted denial [of due process rights] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[88]

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84. *Id.* (emphasis in original).
85. *Id.*
86. 428 U.S. 280 (1976).
87. Herbert v. Louisiana, 272 U.S. 312, 316 (1926); *See also* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Twining v. New Jersey, 211 U.S. 78, 106 (1908); Hurtado v. California, 110 U.S. 516, 537 (1884).
88. 316 U.S. at 462. *See also* Wolf v. Colorado, 338 U.S. 25, 27 (1949); Lisenba v. California, 314 U.S. 219, 236 (1941); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708-09 (1884).

The flexibility of procedural due process[89] is central to the argument for supplying counsel to indigent capital defendants during: (1) the preparation of petitions for discretionary review;[90] (2) the preparation of petitions for certiorari to the United States Supreme Court; and (3) the assertion of state and federal habeas corpus rights.[91]

1. Special Treatment of the Death Penalty

Nowhere is the flexibility of due process more evident than in the treatment by the Supreme Court of defendants in capital cases. Those facing the possibility of the death penalty have traditionally been assured greater procedural protections than those not subject to capital punishment.[92] The justification for this higher standard of due process is the severity of the punishment of death. The Court has implied that deprivation of the "life" component of the due process clauses represents the most grievous loss. This approach was articulated by Mr. Justice Harlan, concurring in *Reid v. Covert*:[93]

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death.[94]

The most important recent evocation of this distinction appeared in the 1972 decision of *Furman v. Georgia*,[95] in which the Court first considered the constitutionality of the death penalty.[96] Although declining to label capital punishment unconstitutional *per se*, the Court in *Furman* invalidated the Georgia and Texas death penalty statutes, finding that their arbitrary and capricious implementation constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Mr. Justice Douglas, concurring in *Furman*, rejected sentencing which leaves to the uncontrolled discretion of judges and

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89. Equal protection analysis does not provide a compelling argument for mandatory appointment of counsel for indigent capital defendants beyond the initial appeal as of right. Unlike due process, the equal protection model has never been used by the Supreme Court as a basis for special treatment to persons facing the death penalty. *See generally* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1133 (1969). *See also* Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

90. *See* note 20 *supra*.

91. *See* notes 21-22 *supra*.

92. Justices Stewart, Powell, and Stevens, announcing the decision of the Court in Gregg v. Georgia, 428 U.S. 153 (1976), pointed out that "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." 428 U.S. at 187.

93. 354 U.S. 1 (1957).

94. *Id.* at 77 (Harlan, J., concurring). *See also* Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 346 U.S. 156, 196 (1953); Andres v. United States, 333 U.S. 740, 752 (1948).

95. 408 U.S. 238 (1972).

96. *See* note 3 *supra* & note 135 *infra*.

juries the determination whether persons convicted of capital crimes should be imprisoned or executed. His concurrence insisted on the use of standards to govern the choice.[97]

In the capital punishment decisions during 1976, the Supreme Court applied the *Furman* due process standard to five state statutes, upholding three[98] and invalidating two.[99] In *Gregg v. Georgia*,[100] the Court found the revised Georgia death penalty statute valid under the *Furman* standard. The new Georgia law required the sentencing authority to focus attention on the defendant and the circumstances of the crime and compelled the state's highest court to compare each capital sentence with sentences imposed on similarly situated defendants. Mr. Justice Stewart, writing for the *Gregg* majority, reaffirmed the conceptual distinction in *Furman* when he stated: "Because of the uniqueness of the death penalty . . . it [cannot] be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner."[101] The majority opinion in the companion case of *Woodson v. North Carolina*,[102] which declared the North Carolina statute invalid, also drew a clear distinction between capital and non-capital cases. The Court pointed out that although the trend toward individualized sentencing in general reflects enlightened policy rather than a constitutional obligation, in capital cases fundamental respect for humanity *requires* consideration of "the character and record of the individual offender and the circumstances of the particular offense . . . ."[103]

The special procedural guarantees for those facing the death penalty were more recently described by the United States Supreme Court in *Roberts v. Louisiana*.[104] The Court in *Roberts* held that under the eighth and fourteenth amendments, states may not make the death penalty the mandatory punishment for the murder of a police officer performing his regular duties. Reaffirming the capital punishment decisions of July, 1976, the Court stated that judges and juries must be allowed to consider "mitigating"[105] circumstances and choose a lesser punishment if they think it appropriate.

2. *The Capital Defendant Beyond the Initial Appeal as of Right*

Although the Supreme Court has stressed special treatment for defendants in capital cases generally, the highest degree of due process protection should be given to the convicted prisoner after his first appeal as of right. Compounding the severity of the imminent sanction is the pressure of time. The source of

97. 408 U.S. at 256-57.

98. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). *See* note 2 *supra*.

99. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). *See* note 2 *supra*.

100. 428 U.S. 153 (1976). *See* text accompanying notes 1-2 *supra*.

101. *Id.* at 188.

102. 428 U.S. 280 (1976).

103. *Id.* at 304.

104. 431 U.S. 633 (1977).

105. *Id.* at 1995-96.

this pressure on the petitioning prisoner is the finality of capital punishment.

The Court and individual Justices have emphasized the finality of the death penalty.[106] Mr. Justice Brennan has pointed out that an executed prisoner loses his "existence" and his "right to have rights."[107] The capital defendant who wishes to petition for review thus has a finite time to seek further relief in the criminal justice system. Unlike a felon sentenced to long-term imprisonment, the prisoner on death row cannot look forward with certainty to appeals in future years.[108]

A sense of urgency necessarily accompanies capital cases during these later stages. The Supreme Court has specifically recognized this, stating that when a stay in a capital case is requested, "[i]f there is doubt whether due process has been followed in the procedures, the stay is granted because death is irrevocable."[109] The immediate concern of the capital defendant after his initial appeal as of right is not the proof of his innocence, but rather the avoidance of the ultimate sanction. Mr. Justice Burton, in his *Griffin* dissent, acknowledged this motive: "Very often we have cases where the convicted seek only to avoid the death penalty. . . . There is something pretty final about a death sentence."[110]

B. The Vital Role of Counsel Beyond the Initial Appeal as of Right

The due process argument for appointment of counsel beyond the first appeal as of right for indigent capital defendants is strengthened further by the significant role which an attorney may play at these stages. The importance of counsel stems from both the complexity of the legal tasks involved[111] and the frequent ignorance of the indigent prisoner.[112]

1. Discretionary State Review and Certiorari to the United States Supreme Court

In *Ross v. Moffitt*, which established that the fourteenth amendment does not compel a state to provide free counsel to help indigent defendants prepare

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106. *See* Woodson v. North Carolina, 428 U.S. 280, 287 (1976); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring); Kinsella v. Singleton, 361 U.S. 234, 248 (1960); Reid v. Covert, 354 U.S. 1, 45 (1957) (Frankfurter, J., concurring).

107. 408 U.S. at 290 (Brennan, J., concurring). Mr. Justice Brennan stated that while an individual serving a prison sentence "remains a member of the human family," one who is executed loses everything, including the right to "treatment as a 'person' for purposes of due process and equal protection of the laws." *Id.*

108. The executed prisoner loses "the right of access to the courts." 408 U.S. at 290 (Brennan, J., concurring).

109. Holtzman v. Schlesinger, 414 U.S. 1304, 1319 (1973) (dictum).

110. 351 U.S. 12, 28 (1956) (Burton, J., dissenting).

111. *Cf.* Powell v. Alabama, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

112. The *pro se* litigant in the federal court system is usually formally untutored in law and often uneducated. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 181-82 (1972).

petitions either for discretionary review or for certiorari to the United States Supreme Court, the majority examined the respective procedures involved. Under the North Carolina system, the defendant seeking discretionary review in the state supreme court would have the benefit of the transcript of the trial, the brief in the lower appeals court setting forth his claim of error, and often an opinion by that court disposing of his claim.[113] If he requested certiorari to the United States Supreme Court, the defendant would be assisted by the brief prepared by counsel appointed for the initial appeal, as well as at least one appellate opinion.[114] For both petitions the Court deemed the available materials adequate aids to a court's decision to grant or deny review.

The *Ross* Court, however, did not examine fully the obstacles faced by the typical indigent defendant during the petitioning process.[115] Certiorari proceedings themselves constitute a highly specialized part of the appellate stage. The factors to which a court attaches importance in its decision whether or not to grant certiorari are certainly not within the commonplace knowledge of the indigent defendant.[116] Mr. Justice Brennan, in an address to the Pennsylvania Bar Association, spoke of the complexity of the petition for a writ of certiorari to the United States Supreme Court:

> Both the petition and response should identify the federal questions allegedly involved, argue their substantiality, whether they were properly raised in the state courts, whether they were decided by the state court contrary to controlling federal precedents, and whether in any event the state court decision may rest on an independent state ground.[117]

The inability of many *pro se* petitioners to express themselves is an additional block to obtaining a hearing:

> *Pro se* petitions are a particular problem for defendants who are incarcerated. Petitions from prisoners are often a jumble of rambling factual assertions and legal conclusions culled from the latest appellate reports that have made the prison rounds. It is often impossible to identify the claims made or to discern their factual or legal bases.[118]

The need for counsel to ensure an effective application for appellate review has already been recognized at the federal level. The Criminal Justice Act of 1964[119] has been interpreted by the federal courts of appeals to mandate ap-

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113. 417 U.S. at 615.

114. *Id.* at 616.

115. The Court did concede that "a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions . . . [would] prove helpful to any litigant able to employ him." 417 U.S. at 616.

116. *See* Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1961).

117. Brennan, *State Court Decisions and the Supreme Court*, 31 PA. B.A.Q. 393, 400 (1960). *See also* Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n, 242 U.S. 430, 434 (1917).

118. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 54 (1967).

119. Criminal Justice Act of 1964, Pub. L. No. 88-455, § 4, 78 Stat. 552, *as amended by* Act of Oct. 14, 1970, Pub. L. No. 91-447, 84 Stat. 916 (codified at 18 U.S.C. § 3006A (1976)).

pointed counsel for indigents who wish to seek certiorari to the Supreme Court. The Act provides that "[a] person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court *through* appeal."[120] Mr. Justice Douglas, concurring in *Doherty v. United States*,[121] asserted that the Criminal Justice Act establishes a federal policy of providing every indigent federal defendant with appointed counsel at every stage of his defense, from arraignment through direct review by the Court, including a petition for certiorari.[122]

Indigent criminal defendants who have come through the federal court system thus receive the benefit of counsel for their certiorari petitions. In *Ross v. Moffitt*, counsel for Moffitt, in its brief to the Supreme Court, argued against limiting this appointment to federal defendants: "The federal practice clearly recognizes the value of appointed counsel for indigents seeking discretionary review by this Court. There is no reason to conclude that state criminal defendants are any more capable of running the gauntlet alone or that their claims are less meritorious than their federal counterparts."[123]

2. Habeas Corpus: Petition and Proceedings

The assistance of counsel is equally significant for the indigent prisoner asserting his right to habeas corpus relief. The difficulties arising from the complexity of the procedure and the ignorance of the petitioner are similar to those encountered by the certiorari petitioner. The filing of an adequate petition for habeas corpus constitutes a formidable legal task.[124] The prisoner should be cognizant of "rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. . . . [and] *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing."[125] Again the primary barrier is the fact that the typical habeas petitioner is poorly educated or illiterate.[126] Therefore, without legal assistance, the petitioner is unlikely even to understand which issues belong in his petition.[127]

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120. 18 U.S.C. § 3006A(c) (1976) (emphasis added).

121. 404 U.S. 28 (1971).

122. *Id.* at 33 (Douglas, J., concurring). Mr. Justice Douglas added that the defendant in the federal court system is also protected by Federal Rule of Criminal Procedure 44(a), which provides: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." *Id.* at 31-32. *See also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 379 (4th ed. 1969).

123. Brief for Respondent at 11, Ross v. Moffitt, 417 U.S. 600 (1974).

124. 28 U.S.C. § 2242 (1970) contains the requirements for a petition for a writ of habeas corpus: "It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known."

125. Gilmore v. Lynch, 319 F. Supp. 105, 110, *prob. juris. postponed, aff'd*, Younger v. Gilmore, 404 U.S. 15 (1971) (emphasis in original).

126. Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 347-48 & n.23.

127. The Supreme Court, in Johnson v. Avery, 393 U.S. 483 (1969), discussed the importance of assistance: "[F]or all practical purposes, if [illiterate and poorly educated] prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court." *Id.* at 487, *citing* the lower court decision at 252 F. Supp. 783, 784 (D.C. 1966).

In the improbable event that the prisoner is able to persuade the judge of the necessity of an evidentiary hearing, he still faces complex legal problems concerning the burden of proof and the admissibility of evidence. "[H]e may need counsel's assistance to gather facts necessary to substantiate his claims and explore other potential grounds for relief. An attorney can interview witnesses and analyze the records of the proceedings that led to the conviction."[128]

C. *The Inapplicability of* Ross v. Moffitt *to Capital Cases*

Despite the Supreme Court's abandonment of the distinction between capital and non-capital cases for the appointment of counsel at the trial stage,[129] the opinion in *Ross v. Moffitt*,[130] which held that states need not provide counsel to aid indigent defendants in preparing petitions either for discretionary review or for certiorari to the Supreme Court, should be restricted to non-capital felonies. The subject matter covered by the *Ross* decision, as well as its particular due process analysis, suggest its inapplicability to those convicted of capital crimes.

The *Ross* Court, concerned with a forgery conviction, bypassed the entire issue of the right to counsel in capital cases. The Court made general reference to "criminal proceedings"[131] without mentioning *Powell v. Alabama*[132] or any other decision involving the death penalty.[133] A possible explanation for this oversight is that the opinion came two years after *Furman v. Georgia*,[134] which had created doubts as to the very constitutionality of capital punishment.[135] In

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128. *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1198 (1970) (citations omitted).

129. *See* text accompanying notes 37-49 *supra*.

130. 417 U.S. 600 (1974).

131. *Id.* at 610.

132. *See* text accompanying notes 24-30 *supra*.

133. The Court in *Ross* cited three instances in which it had refused to appoint counsel for certiorari petitions. *See* note 69 *supra*. But the cases cited were one-sentence orders, which gave no hint that they might have been capital cases.

134. 408 U.S. 238 (1972).

135. Since each member of the *Furman* majority wrote a separate opinion, the exact scope of the decision was at the time unclear. Justices Stewart, White, and Douglas wished to limit the holding to a pronouncement that state statutes giving complete discretion to judge and jury in imposing death sentences were unconstitutionally arbitrary and capricious. *See* 408 U.S. at 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 311 (White, J., concurring). They did not decide the issue of the *per se* constitutionality of capital punishment. Justices Brennan and Marshall stated that the death penalty was always cruel and unusual and would have held it to be *per se* violative of the eighth amendment. *See* 408 U.S. at 305 (Brennan, J., concurring); *id.* at 358-60 (Marshall, J., concurring).

The impact of the *Furman* decision reinforced the Court's refusal to assert the constitutionality of the death penalty. As two dissenters stated, the majority opinion mandated the nullification of capital punishment laws of 39 states and of the federal government, as well as the reversal of death sentences which had been imposed on over 600 persons. 408 U.S. at 411 (Blackmun, J., dissenting); *id.* at 417 (Powell, J., dissenting).

A number of commentators saw the complete proscription of the death penalty in the United States as a possible result of *Furman*. *See, e.g.*, *The Supreme Court: 1971 Term*, 86 HARV. L. REV. 1, 85 (1972); Note, Furman v. Georgia—*Deathknell for Capital Punishment?*, 47 ST. JOHN'S

any event, the omission of the capital issue, in light of the special due process guarantees given those on death row, suggests that the *Ross* holding should be limited in application to non-capital defendants.

In addition to the omission of the capital issue in *Ross*, the weakness of the Court's particular due process analysis, when applied to those on death row, argues against its extension to capital cases. The *Ross* opinion distinguished the trial and appellate stages of a criminal proceeding in metaphorical terms, comparing the attorney in the former to a "shield" to protect the presumption of innocence and the attorney in the latter to a "sword" to upset the prior determination of guilt.[136] Although the metaphor is accurate in non-capital situations, its applicability to capital cases, which demand the highest possible procedural safeguards, is doubtful. The immediate concern of a condemned prisoner after his initial appeal as of right is not his guilt or innocence, but rather the punishment to be imposed—the death penalty.[137] Thus the indigent capital defendant needs counsel as a "second shield" to protect himself against the ultimate sanction and to assure the possibility of future appeals.

D. Counsel for Habeas Corpus Petitioners in Capital Cases

The Supreme Court in *Johnson v. Avery*[138] acknowledged the absence of any general obligation of state or federal courts to appoint counsel for prisoners seeking post-conviction relief.[139] This statement, however, was dictum; the Supreme Court has yet to pronounce on the right to counsel for habeas corpus petitioners generally, including those faced with capital punishment.

Most state and federal courts agree that the sixth amendment right to counsel is limited to "criminal prosecutions." It is interpreted as not extending to criminal defendants' post-conviction remedies, which concern the civil right of liberty.[140] Beyond sixth amendment questions, the "civil" label is not relevant to general due process considerations; this position is compelled by the "criminal" implications of habeas corpus. A habeas corpus proceeding determines the legality of detention imposed by the criminal process and is therefore of an essentially criminal nature. It serves as a method for "testing the validity and fairness of criminal penalties and of necessity treats the same substantive issues as do criminal trials and appeals."[141] The Supreme Court has mininized the civil-criminal distinction in the area of habeas corpus:

> We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is "the highest remedy in law, for any man that is imprisoned." . . . The availability of a procedure to regain

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L. REV. 107, 147 (1972). *But see* Polsby, *The Death of Capital Punishment?*: Furman v. Georgia, 1972 SUP. CT. REV. 1, 40 (1972).

136. *See* text accompanying notes 64-65 *supra*.

137. *See* text accompanying notes 106-10 *supra*.

138. 393 U.S. 483 (1969).

139. *Id.* at 488 (dictum). *See* text accompanying notes 70-73 *supra*.

140. *See* text accompanying notes 72-76 *supra*.

141. Miller, *The Right to Counsel in Collateral Proceedings—Habeas Corpus*, 15 How. L.J. 200, 209 (1969).

liberty lost through criminal process cannot be made contingent upon a choice of labels.[142]

Although a number of commentators have advocated appointed counsel for all indigent defendants seeking habeas corpus relief,[143] the case is most compelling for those prisoners facing the death penalty. The capital situation strikingly exemplifies the "criminal" character of habeas corpus. Any reference to a "civil proceeding" in capital cases seems absurd, as the prisoner either will or will not be subjected to the penal sanction of death depending upon the outcome of the proceeding. The danger of losing his "right to have rights"[144] calls for the highest possible due process protection—including appointment of counsel.

Applying the specific due process metaphor described in *Ross*,[145] that of the "sword and shield,"[146] the argument for counsel at the habeas corpus stage of a capital case is even more convincing. In habeas proceedings, no question going to guilt or innocence may be considered. The petitioner's objective is not to upset a prior determination of guilt, but rather to contest the legality of detention.[147] The "second shield" rationale[148] applies to capital defendants seeking habeas corpus relief; the immediate legal result is release from imprisonment, but the paramount interest is to avert the death penalty.

VI
CONCLUSION

The United States Supreme Court has not addressed directly the issue of the right to counsel beyond the initial appeal as of right for indigent state prisoners facing the death penalty. The decision in *Ross v. Moffitt* and the dictum in *Johnson v. Avery*[149] together indicate that the state is not obliged to supply criminal defendants with counsel for the preparation of petitions for discretionary review, for the preparation of petitions for certiorari to the United States Supreme Court, or for the assertion of state and federal habeas corpus rights. Neither case, however, treated the delicate situation of the prisoner on death

142. Smith v. Bennett, 365 U.S. 708, 712 (1961).

143. *See, e.g.*, Note, *Discretionary Appointment of Counsel at Post-Conviction Proceedings: An Unconstitutional Barrier to Effective Post-Conviction Relief*, 8 GA. L. REV. 434 (1974). One commentator has even suggested that habeas corpus proceedings are "criminal" within the sixth amendment requirement of counsel. Miller, *The Right to Counsel in Collateral Proceedings—Habeas Corpus*, 15 How. L.J. 200, 209 (1969).

144. *See* text accompanying notes 106-07 *supra*.

145. It has been suggested that "the underlying philosophy that supported [the *Ross*] decision will also bar a finding of any state duty to appoint counsel on collateral attacks or other post-conviction remedies." Note, Ross v. Moffitt: *The End of the* Griffin-Douglas *Line*, 24 CATH. UNIV. L. REV. 314, 327 (1975).

146. *See* text accompanying notes 64-65 *supra*.

147. *See Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1057 n.104 (1970).

148. *See* text accompanying notes 136-37 *supra*.

149. *See* text accompanying notes 70-73, 138-39 *supra*.

row. With potential wide-scale use of the death penalty approaching, this issue must be resolved.

The capital defendant, after the initial appeal as of right, is faced with a situation unique in the criminal justice system. There is a limited time to attempt to preserve the "right to have rights."[150] The United States Supreme Court has recognized that such a defendant deserves the most stringent procedural due process protections. The important role of an attorney during these often complex proceedings further demonstrates that the state—the force which seeks to deprive the prisoner of his life—should provide counsel until the convicted individual is executed or until the sentence is commuted.

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150. *See* text accompanying notes 106-07 *supra*.