5-1-1965

The Right to Appointed Counsel at Collateral Attack Proceedings

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I. INTRODUCTION

In recent years the Supreme Court has become the most active and chief protector of the rights of indigents who have been accused or convicted of crimes. Much of the force of this activity has focused upon the rights of accused indigents to have counsel appointed to assist them at criminal trials\(^1\) or in the prosecution of subsequent appeals.\(^2\) However, no opinion has been rendered dealing with the subject matter of this comment—the right of an indigent to have counsel appointed to aid him in asserting a post-conviction remedy\(^3\) collaterally attacking a prior criminal conviction, after the appellate process has been exhausted.\(^4\) Although the Supreme Court has been silent in this regard, its vigor in dealing with related right to counsel problems\(^5\) and other aspects of post-conviction relief\(^6\) indicates that it may simply be a question of time before an opinion is handed down.

1. Gideon v. Wainwright, 372 U.S. 335 (1963) (States have an absolute duty to appoint counsel to represent indigents at criminal trials.).
2. Douglas v. California, 372 U.S. 353 (1963) (States have an absolute duty to appoint counsel to represent indigents at the first and only criminal appeal granted as a matter of right.).
5. See notes 1 and 2 supra.
Until then, perhaps the best way to undertake a study of this area of the law lies in first explaining why it seems to have only recently invoked controversy. The "why" should become apparent once it is recognized that until fairly modern times, especially in England, there were other and more basic right to counsel considerations to be resolved. Indeed, the absolute right to retain counsel for all felonies was not guaranteed in England until 1836; and the right of an indigent to have counsel appointed to aid him at a criminal trial was not made absolute in the United States until 1963, and has not yet achieved that status in England.

It seems quite natural that only after those basic rights were secured would the judiciary focus attention on the indigents' right to counsel at collateral attack proceedings. But now that attention has focused on the collateral attack problem, a new problem must be solved: What right should an indigent have to appointed counsel to assist him in asserting a collateral attack on a prior criminal conviction?

It is the purpose of this paper to help in providing an answer by: (1) reviewing the historical development of the right to counsel; (2) surveying the current state of the law with respect to the right of an indigent to have counsel appointed to aid him in asserting a collateral attack on a prior criminal conviction; (3) examining the Florida position in this area; and (4) suggesting what, in the author's opinion, the indigents' right in this regard ought to be.

II. Historical Development of the Right to Counsel

A. Early History to 1932

Since history has a bearing on present rights, it is necessary to place the question of the right to counsel at collateral attack proceedings in its most proper setting. In order to do this it seems that we must briefly review some of the important developments of the right to counsel in the United States.

that in federal habeas corpus proceedings instituted by a state prisoner, the district court must hold an evidentiary hearing if the petitioner did not receive a full and fair evidentiary hearing in a state court, wherein the state court decided the issues of fact alleged by the petitioner. See generally Comment, 40 N.Y.U.L. Rev. 154 (1965).

7. 6 & 7 W. 4, c. 114, § 1 (1836).
10. In the interest of completeness the writer has summarized some of the more important developments of the right to counsel in England in the following paragraphs.

Even though inadequate records cloud our knowledge regarding the extent of the right as it existed in England during the middle ages, it is clear that legal assistance was permitted during some trials. However, presentation of the case as we know it now was unknown; in fact witnesses were not allowed in civil trials until the fifteenth century and the date of their entry into criminal trials is unknown. Even though the date of their
entry into criminal trials has been obscured by time, it is fairly certain that the presentation of factual evidence by witnesses became prevalent by the sixteenth century.

However, the entry of witnesses into criminal trials brought with it a peculiar distinction in the law dealing with the right to counsel. This distinction permitted defendants to have attorneys aid them in pleading questions of law, but denied them the right of assistance of counsel in the demonstration of fact. By the seventeenth century this distinction became very rigid, and it appears by then to have been accepted as having always existed.

It is interesting that this peculiar distinction between law and fact existed only in felony cases, whereas in misdemeanors counsel was permitted to assist in the demonstration of facts as well as in pleading questions of law. Peculiar as this distinction appears to be, it seems that there were reasonable grounds for its existence.

Apparently, at that time criminal law was a means used by the state to protect society from those who were considered a threat. This was necessary due to the inadequacy of the police force and army at the Crown's disposal. Furthermore, the basic premise in felony cases was that the accused was guilty, and besides, it was thought, as noted by Lord Coke, that the court as an impartial body would adequately protect the rights of the defendant. In short the Crown was too weak and society was too insecure to permit counsel for all purposes in felony cases, and the court was thought of as a sufficiently adequate substitute.

Although Coke was a proponent of the law-fact distinction, he was not in favor of a trial without counsel such as the indigent defendant had in the United States case of Betts v. Brady, 316 U.S. 455 (1942); rather he favored a trial in which counsel's role was limited to pleading questions of law. In other words, he believed that counsel's role ought to be limited, but that the limited right ought to be granted to all.

So in England at that time, whether or not a point of law arose was the determinative factor as to whether a man should have counsel, not his ability to pay.

Apparently during this period all right to counsel pronouncements emanated from judicial sources and there was no legislative activity until the late seventh century.

The first legislative enactment emasculating the law-fact distinction occurred in 1695, when Parliament provided that one accused of treason had the right to retain counsel for assistance regarding matters of fact as well as questions of law. 7 & 8 W.3c.3, 5.1 (1695). The act also provided that the court must appoint counsel upon the request of the accused indigent. Although a welcome development, the appointment of counsel feature of the act was simply legislative recognition of an existing judicial fact. After 1695 further emasculation occurred by judicial fiat, as the judges became more and more lenient with respect to felonies in general, by broadening the meaning of questions of law, and by the 1800's counsel was permitted to conduct the direct and cross examination, both of which had been traditionally connected with demonstrations of fact.

Notwithstanding this leniency, neither the law-fact distinction nor the right to have counsel appointed with respect to felonies in general became a matter of legislative concern until much later. Finally in the Act of 1836 the law-fact distinction was abolished with respect to all felonies, but the striking feature of the Act was that it was limited to retained counsel and it made no provision at all for having counsel appointed. The act did not preclude counsel from being appointed to assist indigents, but rather it did not guarantee such appointment as an absolute right. Once again an anomalous situation arose, as the legislature broadened the scope of counsel's function to include questions of fact, it concurrently limited by inaction the previously existing right of the indigent to have counsel appointed.

Indeed, it was not until the Poor Prisoners' Defense Act of 1903, 3 Edw. 7, c. 38, § 1 that provision was made in England for the appointment of counsel in all felonies. However, the act was once again merely legislative recognition of existing judicial practice, and it introduced some features which actually may have had a limiting effect upon the appointment of counsel rather than expanding it. For example, the act required the indigent to reveal some aspects of his case to the judge before he would appoint counsel.

Its many inadequacies became apparent, but it was not until 1930 that the legislature again acted, when it passed The Poor Prisoners' Defense Act, 1930, 20 & 21, Geo. 5, c. 32, § 1(3)(a). The new act had as its chief improvement the mandatory appointment of counsel for murder, however, in other felony cases appointment remained discretionary depending upon the circumstances. The right to counsel provisions were again modified in 1949, but, to this day, except for murder, appointment of counsel rests in the discretion of the judges. The Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51.
To the credit of the American colonies the then prevailing English distinction between law and fact never took hold.\textsuperscript{11} It was a distinction which permitted defendants to have attorneys aid them in pleading questions of law, but denied them the right to assistance of counsel in the demonstration of fact.\textsuperscript{12} It precluded the assistance of counsel during such a basic procedure as cross examination, and its unfairness was recognized even then.\textsuperscript{13}

The early American courts were also progressive in dealing with indigents, as exhibited by their tendency to appoint counsel for them in all felony cases. However, this judicial concern did not manifest itself in the legislature, and it seems that only in New Jersey and Connecticut did the indigent have an absolute right to have counsel appointed in both capital and non-capital felonies, as appointment of counsel provisions in most states dealt only with capital offenses.\textsuperscript{14}

In 1789 the sixth amendment was proposed to Congress and it was ratified in 1791. Since the proposal was not accompanied by any comment or controversy, historical analysis has been difficult. However, there are important constitutional writers who have made judgments about the framers' intent regarding its meaning. They seem to conclude that the framers intended the right to counsel provision of the sixth amendment to guarantee an absolute right to \textit{retain} counsel in all criminal proceedings, but to guarantee indigents an absolute right to have counsel \textit{appointed} only in capital cases.\textsuperscript{15}

Although the Supreme Court did not venture an opinion as to the meaning of the sixth amendment at any time between the period of 1791 to 1938, when the occasion arose in the famous \textit{Johnson v. Zerbst}\textsuperscript{16} case, it totally obliterated the capital-non-capital distinction and held that the right to counsel under the sixth amendment was an absolute one, guaranteed to indigents and non-indigents alike in \textit{all} criminal proceedings. The precedents for \textit{Zerbst} were few, but the sweeping language of the 1932

\textsuperscript{11} BEANEY, \textit{op. cit. supra} note at 1-36; Heidelborough & Becker, \textit{Benefit of Counsel in Criminal Cases in the Time of Coke}, 6 U. MIAMI L. REV. 546 (1952); Comment, \textit{supra} note 9 at 1022-1034.

\textsuperscript{12} BEANEY, \textit{op. cit. supra} note 9 at 18.

\textsuperscript{13} For a more complete discussion of this distinction between law and fact see text in note 10 \textit{supra}.

\textsuperscript{14} E.g., Langhorn, himself a barrister, would not have been convicted of treason if he had had the benefit of skillful cross-examination. He had failed to ask the state's witness, Titus Oates, how his chambers were arranged, when such cross-examination would have proven that Oates had never seen the chambers. 2 St. Tr. 874 (1679).

\textsuperscript{15} BEANEY, \textit{op. cit. supra} note 9 at 21.

landmark case of *Powell v. Alabama*\(^1\) cast the die and made *Zerbst* inevitable.

From 1791, the year the sixth amendment was ratified, until 1932, the year *Powell* was decided, the state and lower federal courts saw practically no cases on the right to counsel, and, though the Supreme Court did make reference to the right to counsel in a few cases,\(^2\) it heard no case in which the right to counsel figured prominently. Thus by 1932 no case had emerged dealing with the duty of the court to *appoint* counsel at any stage of the judicial proceedings. But at this time a series of events occurred in Alabama which shocked the nation and led eventually to the famous case of *Powell v. Alabama*,\(^3\) or as it was more popularly called, the *Scottsboro Cases*.

A number of Negro and white boys and two white girls were on a train in Alabama. A fight ensued and the white boys with the exception of one were forcibly removed.\(^4\) They informed the local authorities who wired ahead requesting that the Negroes be removed. At the next town the train was stopped and searched, and the youths were taken in custody to Scottsboro, the county seat. Shortly after the train was stopped the two white girls, in response to a leading question, told a story of being raped by the Negro youths.\(^5\)

The youths were ignorant, illiterate and were surrounded by hostile sentiment, and under these circumstances were put on trial in six days. The trial began a few moments after counsel, charged for the first time with any degree of responsibility in the case, began to represent them. Eight of nine defendants were convicted in trials completed on the same day, and appeals to the Alabama Supreme Court were denied for seven

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1. 287 U.S. 45 (1932).
2. In *Holden v. Hardy*, 169 U.S. 366, 386 (1898), it was pointed out that right-to-counsel procedure in America was much better than in England, and in *Anderson v. Treat*, 172 U.S. 24 (1898) the court upheld the judge's appointment of separate counsel for one co-defendant. Later, in *Frank v. Mangum*, 237 U.S. 309, 344 (1914), Holmes dissenting, the court rejected the claim of a mob dominated trial, holding that the defendant "had a public trial deliberately conducted, with the benefit of counsel for his defense," but nine years later, Holmes writing for the court in *Moore v. Dempsey*, 261 U.S. 86 (1923), asserted that where counsel, apparently through fear, failed to perform even obvious duties, and where mob pressure also affected the jury and judge, there was an obvious departure from due process. Finally in *Cooke v. United States*, 267 U.S. 517 (1925), the Supreme Court reversed a conviction in a contempt action where the lower court had failed to give the condemned an opportunity to retain counsel.
4. The facts narrated here are from *Beaney, op. cit. supra* note 9 at 151, 152. He obtained them from the record presented to the Supreme Court and the court's opinion.
5. In Patterson and Conrad's *Scottsboro Boy* (1950), app. 5 (opinion of Horton, J.), granting a motion for a new trial after one of the defendant's second conviction, is a powerful attack on the truth of the girls' testimony. The girls' stories are also examined in *Reynolds, Courtroom, The Story of Samuel S. Leibowitz* 268 (1950).
of the eight, the exception being a thirteen year-old boy. The Supreme Court reversed, with Justice Sutherland writing for the Court.

If the legal usefulness of Supreme Court decisions were limited to their precise holdings, then Powell's impact on future legal developments would indeed have been small. For the holding in its most restricted sense dealt with the even then uncontroversed proposition that embodied in the right to counsel, retained or appointed, was the right that counsel be given an adequate time to prepare. Here, since there was an insufficient time allowed for counsel to prepare, the defendants were denied their right to retain counsel. The Court further stated that under the special circumstances of this capital case, if counsel was not retained, then the state was under a duty to appoint counsel, and the insufficient time allowed for counsel to prepare constituted an ineffective appointment, and, therefore, a breach of that duty.

But it is not these limited holdings that caused the Powell case to live on, for who in 1932 would have questioned the right of a person to retain counsel or the right of an indigent illiterate Negro youth charged with raping a white girl in Alabama, to have counsel appointed? In addition to these limited holdings, Justice Sutherland presented an eloquent argument for the proposition that a fair hearing, and therefore due process, simply can never exist unless an accused has counsel. He stated that "Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." Indeed, Justice Sutherland's sweeping language indicated that he considered it necessary to have counsel appointed for indigents in all criminal cases in order to have a fair hearing. However, it was not until 1963, thirty-one years later, that his dicta became law.

B. History From 1932 to Present Under the Sixth Amendment and Fourteenth Amendment Due Process Clause

It was six years after Powell before the Supreme Court heard another right to counsel case. In 1938 they were presented with a collateral
attack proceeding brought by a convicted non-capital felon in the case of Johnson v. Zerbst. The Court held that, "The Sixth Amendment withholds from federal courts in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." 

Since the Johnson case involved a non-capital felony, its holding obviously encompassed all capital crimes as well. Although it held that the right to counsel under the sixth amendment was an absolute one, extending to indigents and non-indigents alike in all criminal proceedings, its holding applied only to federal criminal proceedings. This is so because the federal constitutional provision which applied to state criminal proceedings was the fourteenth amendment due process clause, and that provision was not in issue in Zerbst. Furthermore, the court did not offer any indication as to how it would decide the fourteenth amendment question when it arose.

Thus, the right of an indigent to have counsel appointed in state criminal proceedings remained unknown. But not for long, because in 1942 the Supreme Court was confronted with the state non-capital felony case of Betts v. Brady. In a sharply divided court the majority held that the rule of the sixth amendment was not so fundamental and essential to a fair trial that the mere refusal to appoint counsel for an indigent defendant charged with a non-capital crime would necessarily violate the fourteenth amendment due process clause. The court concluded that:

Asserted denial (of due process) 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.

27. Id. at 463 (emphasis added).
28. Even before this case it was generally assumed that the absolute right to counsel guarantee of the sixth amendment included appointed counsel in all capital crimes, however, Johnson v. Zerbst, 304 U.S. 458 (1939), was the first time the Supreme Court made a definitive statement to that effect. See note 15 supra and accompanying text.
29. 316 U.S. 455 (1942).
30. Id. at 462 (Emphasis added). The Betts decision was rendered during World War II and apparently caused a large amount of controversy, especially among legal scholars. Indeed it prompted this passionate article in the New York Times.

Most Americans—lawyers and laymen alike—before the decision in Betts v. Brady would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in Betts v. Brady would not wish their decision to be used to discredit the significance of that right and the importance of its observance.

Yet at a critical period in world history, Betts v. Brady dangerously tilts the scales against safeguarding one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right to counsel to defend him. The right to counsel for the poor as well as the rich, is an indispensable safeguard of freedom and justice under law. Benjamin v. Cohen & Erwin N. Griswold, N.Y. Times August 2, 1942.
COMMENTS

It is interesting to note that the Supreme Court in both the federal sixth amendment Zerbst case and the state fourteenth amendment Betts case relied in part on the Powell decision, which like Betts, was decided under the fourteenth amendment. Yet Zerbst under the sixth amendment held that the right to appointed counsel was absolute, whereas Betts under the fourteenth amendment held that the right was merely discretionary depending upon the "totality of facts in a given case."31

For the next two decades the various courts operated under the Betts totality of facts doctrine, although the Supreme Court seemingly emasculated its own rule as it found a denial of fourteenth amendment due process in almost every case it heard where the indigent had been denied counsel at trial.32 Even in Bute v. Illinois33 where the court did not find any special circumstances requiring the appointment of counsel it stated 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 take some such steps."34 Although

It is interesting to note that the article stated that right to counsel should not be denied simply because a man is poor. This is the very rationale that was used by the Supreme Court in the very recent case of Douglas v. California 372 U.S. 359 (1963). See text accompanying note 42 infra.

31. Id. at 462.
32. This fact was noted by Justice Harlan in Gideon v. Wainwright, 372 U.S. 335, 350-51 (1963) (concurring opinion).
33. 333 U.S. 640 (1948).
34. Id. at 674.
prior to *Bute* there was no case which held that the appointment of counsel in all capital cases was required by the fourteenth amendment, the court now assumed that such a mandate had indeed existed.85

Another interesting development which occurred during this period dealt with the particular point in the proceedings at which lack of counsel would place the indigent defendant at a disadvantage. It occurred in 1961 in *Hamilton v. Alabama*, wherein the Supreme Court for the first time considered the indigent's right to counsel at a time other than trial. The petitioner, who was tried and convicted of a capital crime, was denied counsel at arraignment, which under Alabama law was a critical stage in the criminal proceedings. It was critical because defenses such as insanity and systematic exclusion of one race from grand juries had to be pleaded at or before arraignment or possibly be lost.

The Court cited *Powell v. Alabama*, and held "that an accused in a capital case requires the guiding hand of counsel at every step in the proceedings against him."86 Although it was limited to capital cases, the *Hamilton* Court did affirmatively increase the indigents' right to counsel, as it for the first time established that the right existed prior to trial.

However, notwithstanding the Supreme Court's emasculation of the *Betts* doctrine, the *Bute* dicta regarding capital crimes, and the *Hamilton* expansion of that dicta to all critical stages of the criminal proceedings, in 1961 there were still fifteen states that did not grant an absolute right to indigents to have counsel appointed to aid them in all criminal proceedings.87 But two years later in 1963 the Supreme Court decided *Gideon v. Wainwright*, a state case in which the indigent, who was not represented by counsel at trial, was convicted of a non-capital felony. Though the *Gideon* court agreed with the *Betts* court that only "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,"88 it overruled *Betts* and held that the sixth amendment right to counsel provision was one of those fundamental rights.

The initial impact of *Gideon* was enormous, especially in those states where many convicted indigent felons were not provided with counsel to aid them during the criminal proceedings.89 Yet the Supreme Court was

37. Id. at 54.
40. Id. at 342.
41. For example Florida adopted a new post-conviction remedy to meet the situation. See note 95 *infra*. 
not satisfied with this momentous decision and it decided to take an additional step in favor of indigents.

On the same day that Gideon was decided, the Court in Douglas v. California,43 extended the indigents’ right to have counsel appointed to the first criminal appeal provided by the state as a matter of right. Since then, there have been no significant right to counsel decisions that have emanated from the Supreme Court.

C. Development of the Fourteenth Amendment Equal Protection Clause in State Criminal Cases

The Douglas v. California decision was not unexpected, but it did create interest because it was the first right to counsel case that was predicated on the fourteenth amendment equal protection clause. But it was not the first state criminal case that was based on equal protection; in fact it was not even the first right to counsel case in which it appeared as an argument, for in Justice Black’s dissenting opinion in 1942 in Betts v. Brady,44 after pointing out that Indiana has provided an absolute right to appointed counsel in criminal trials since 1854, he concluded that

most of the other States have shown their argument (that counsel is essential to all accused, to the court and to the public) by constitutional provisions, statutes, or established practice judicially approved, which assure that no man be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.45

In 1956 in Griffin v. Illinois,46 the equal protection argument finally gained majority status in a state criminal case. In a five to four opinion the Supreme Court held that a state with an appellate procedure which made available trial transcripts to those who were able to pay for them was constitutionally required to provide “means of affording adequate and effective appellate review to indigent defendants.”47 Justice Black, this time writing for the majority, argued that “due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.”48 He then stated that “(i)n criminal trials a state can no more discriminate on account of poverty than on account of religion, race or

43. Ibid.
44. 316 U.S. 455, 474 (1942) (dissenting opinion).
45. Id. at 477. (Emphasis added.)
47. Id. at 20.
48. Id. at 17.
color; . . . (p)lainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence. . . ."49

Although he admitted that a state is not required by the Federal Constitution to grant appellate review, he unequivocally declared “that is not to say a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.”50 Thus, if appellate review is made an integral part of the criminal process, the due process and equal protection clauses protect against invidious discriminations at that stage of the proceedings as well.

Two years later in *Eskridge v. Washington Prison Board*51 the court struck down another state appellate procedure, which had granted power to the trial judge to withhold a trial transcript from an indigent upon the finding that “justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein.”52 In a per curium decision the court held that “the conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants . . . who can afford the expense of a transcript.”53

The court extended the *Griffin* doctrine in *Burns v. Ohio*,54 involving a twenty dollar fee for filing a motion for leave to appeal a felony conviction to the Ohio Supreme Court. The granting of leave to appeal was discretionary with the Ohio Supreme Court. Chief Justice Warren’s opinion held that “(The *Griffin*) principle is no less applicable where the state has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.”55 The holding clearly indicated that the fact that this second appeal was discretionary did not negate the applicability of the equal protection clause.

Then in *Smith v. Bennett*,56 the Supreme Court was faced with a state procedure that required an indigent prisoner to pay a filing fee of four dollars before his application for a writ of habeas corpus would be allowed. The court made it clear that the *Griffin* principles extended beyond direct appeals from criminal convictions to state post-conviction proceedings such as habeas corpus. Thus, the post-conviction filing fee

49. *Id.* at 17-18.
50. *Id.* at 18.
52. *Id.* at 215.
53. *Id.* at 216.
55. *Id.* at 257.
requirement was a violation of equal protection, since it would preclude indigents from using post-conviction remedies solely because of their poverty.

Finally in *Lane v. Brown*,\(^{57}\) decided the same day as *Douglas*, the court considered the Indiana Public Defender Act. Under the act, if an indigent prisoner was denied relief at a corum nobis hearing and if the public defender refused to appeal because he believed it would be unsuccessful, then the act precluded the indigent from procuring a transcript of the hearing and having other counsel appointed to perfect an appeal. In short, because of the public defender’s refusal to represent him, the indigent was precluded from appealing.

The Court first noted that “in *Eskridge* . . . a provision which permitted a trial judge to prevent an indigent from taking an effective appeal”\(^{58}\) was held violative of the fourteenth amendment. It then held that “[T]he provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone, does not meet constitutional standards.”\(^{59}\)

To summarize, the equal protection rational, as enunciated by the cases, prevents the state from invidiously discriminating, and in criminal cases discrimination on account of poverty is deemed to be invidious discrimination. Thus, a procedure to which equal protection applies and to which the indigent is precluded, solely because of his poverty, is constitutionally invalid.

Though equal protection has been applied to the right to counsel procedure only once, where the appeal was the first and only one as a matter of right,\(^{60}\) it has not been so limited with respect to other state criminal procedures. Indeed, it has been applied to declare invalid a filing fee in both a state post-conviction proceedings,\(^{61}\) and in a second appeal even though the state had already provided one review on the merits as a matter of right.\(^{62}\) Furthermore, equal protection has invalidated procedures in one jurisdiction which permitted a trial judge\(^{63}\) and in another jurisdiction a public defender\(^{64}\) from effectively precluding the indigent from appealing, where in neither jurisdiction were there similar procedures which applied to non-indigents.

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58. Id. at 485.
59. Ibid.
61. Supra note 56.
62. Supra note 54.
64. Supra note 57.
III. SURVEY OF THE CURRENT STATE OF THE LAW WITH RESPECT TO THE RIGHT OF AN INDIGENT TO HAVE COUNSEL APPOINTED TO AID HIM IN ASSERTING A COLLATERAL ATTACK ON A PRIOR CRIMINAL CONVICTION


Since Douglas v. California was based on the fourteenth amendment equal protection clause, it initiated a constitutional argument for the right to counsel which was not subject to the delimitations of the fourteenth amendment due process clause. In fact, it represented a point of view which if fully developed could substantially increase the scope of the indigents' right to counsel.

This is so because the sixth amendment was expressly limited to criminal proceedings, and the right to counsel under the fourteenth amendment due process clause in criminal proceedings was interpreted to have the same meaning as the right to counsel embodied in the sixth amendment. A fortiori, under the fourteenth amendment due process clause the absolute right to have counsel appointed was limited to criminal proceedings. Furthermore, the fourteenth amendment due process clause was the only constitutional provision that was applicable in dealing with state right to counsel problems. However, the equal protection clause used in Douglas has now made available a new constitutional provision to deal with state right to counsel problems, and it is one which has not been limited to criminal proceedings.

The importance of the Douglas equal protection rationale with respect to post-conviction remedies lies in the fact that they traditionally have been construed to be civil in nature, even when they are used to collaterally attack a prior criminal conviction. Consequently, courts have maintained that indigents asserting such remedies are not within the scope of the absolute right to counsel guarantee of the sixth amendment or the fourteenth amendment due process clause. However, the courts who choose to use it, now have the equal protection clause as a constitutional vehicle to aid the indigent. And it is one which apparently is not precluded simply because an action may be labeled civil in nature.

Although the Douglas rationale represented a possible means of expanding the scope of the indigent's right to counsel, it should be emphasized that the Supreme Court specifically limited its holding to first

67. Cases cited notes 69 and 76 infra.
68. Cases cited note 76 infra.
69. E.g., State v. Weeks, 166 So.2d 892 (Fla. 1963); State v. Herron, 376 S.W.2d 192 (Mo. 1964); Jones v. State, 142 Mont. 619, 386 P.2d 74 (1963).
appeals as a matter of right. Thus state and lower federal courts which choose to ignore *Douglas*, would not be incorrect in asserting that its holding was neither expressly nor impliedly binding in post-conviction proceedings.

This is true even considering that the Supreme Court has now construed the indigents' right to counsel as absolute in federal criminal trials, federal criminal appeals, state criminal trials involving serious crimes and state criminal appeals where the appeal is the first and only one as a matter of right. For notwithstanding the above guarantees, the Supreme Court has not indicated any policy regarding the right to counsel in collateral attack proceedings.

**B. The Views Expressed by Various Jurisdictions**

Although the Supreme Court has not yet made any pronouncements in this regard, the lower federal courts and many state courts have not been silent. Indeed no less than twenty-five jurisdictions have passed on the issue, of which fourteen have held, like Florida and the lower federal courts, that the indigents' right to counsel while collaterally attacking a prior criminal conviction is discretionary. This position has been enunciated as follows:

> Whether counsel should be appointed will turn on the decision of the trial court regarding the presence of substance in the movant's claims and the need for legal assistance in view of the complexities that might arise in the course of a hearing, if a hearing is found necessary.

In other words, the jurisdictions with this point of view hold that the

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71. *Johnson v. United States*, 352 U.S. 565 (1957). This right to counsel is a statutory one, granted under *In Forma Pauperis*, 28 U.S.C. § 1915(b) (1957). If the appeal is frivolous and in bad faith counsel may be denied, but then the indigent has a right to counsel to present and argue the good faith and frivolous issues. Thus, the right to counsel is absolute on appeal. *Coppedge v. United States*, 369 U.S. 438 (1962).
72. *Note* 65 *supra*.
74. For the federal court citations, see cases cited note 76 *infra*; *Ex parte Norris*, 168 So.2d 242 (Ala. 1964); People v. Shipman, 33 U.S. L. Week 2401 (Cal. Feb. 15, 1965); *State v. Weeks*, 166 So.2d 892 (Fla. 1964); Freeman v. State, 392 P.2d 542 (Idaho 1964); *McCary v. State*, 241 Ind. 518, 173 N.E.2d 300 (1961); *Loftis v. Amrine*, 152 Kan. 464, 105 P.2d 890 (1940); *Sherrill v. Commonwealth*, 323 S.W.2d 586 (Ky. 1959); *Brine v. State*, 205 A.2d 12 (Me. 1964); *State v. Perra*, 262 Minn. 572, 115 N.W.2d 680 (1962); *State v. Herron*, 376 S.W.2d 192 (Mo. 1964); *Jones v. State*, 142 Mont. 619, 386 P.2d 74 (1963); *People v. Breslin*, 4 N.Y.2d 12 (Me. 1964); *State v. Weeks*, 166 So.2d 892 (Fla. 1963).
75. *State v. Weeks*, 166 So.2d 892 (Fla. 1963).
76. *E.g.*, *Baker v. United States*, 334 F.2d 444 (8th Cir. 1964); *Barker v. Ohio*, 330 F.2d 594 (6th Cir. 1964); *Gresham v. United States*, 329 F.2d 779 (10th Cir. 1964).
77. *State v. Weeks*, *supra* note 75 at 896.
right to have counsel appointed is discretionary even when the collateral attack movant has been granted a post-conviction hearing.78

These jurisdictions seem to base their position on the rationale that all post-conviction proceedings are civil, not criminal in nature and therefore do not fall within the absolute right to counsel guarantee of the sixth amendment or fourteenth amendment due process clause.79

Furthermore, six of these jurisdictions have decided the question post-Douglas, and four either positively or by negative implication have asserted that the absolute right to counsel under the equal protection clause is also limited to criminal proceedings, and, therefore, does not encompass post-conviction remedies, even when they are used to collaterally attack a prior criminal conviction. The other two post-Douglas jurisdictions have extended this discretionary right to counsel to a point where it is almost absolute. They hold that once a collateral attack hearing has been granted, the state is under an absolute duty to appoint counsel to represent the indigent, but before that point no absolute right exists.80 Thus, in these states the right to counsel is discretionary only in the sense that the court may deny the petitioner’s motion for a hearing, if for example, the petition is frivolous.

The remaining eleven jurisdictions that have passed on the issue are composed of two minority views, each diametrically opposed to the other. At one end of the spectrum six jurisdictions refuse to permit to their indigents any constitutional right to counsel. They seem to hold that post-conviction proceedings are civil in nature and, therefore, the indigents have no constitutional right to have counsel appointed. Two courts indicated that because the proceedings were civil in nature it not only had no power to appoint counsel, but it also was powerless to direct payment of fees for such counsel out of public funds.82

At the other end of the minority spectrum five jurisdictions, all by statute, have extended the absolute right to have counsel appointed to

78. For those jurisdictions which hold that the indigents' right to counsel becomes absolute once a hearing is granted, see cases cited note 80 infra.
82. McGrath v. Tinsley, supra note 81; In re Mears, supra note 81.
83. ILL. REV. STAT. ch. 38, § 122-4 (1963); MD. ANN. CODE, art., § 645(e) (1964); N.C. GEN. STAT. ch. 15, § 15-219 (1953); ORE. REV. STAT. ch. 138, § 138, 590(2) (1963); Wyo. STAT. ANN. § 7-408-4 (1963). The Maryland act is typical:
The petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the Court is satisfied that the allegation is true, it shall order that the petitioner proceed as an indigent, and appoint counsel for him.
all collateral attack proceedings, and in one jurisdiction it was ruled that
the appointment was mandatory even when the petition submitted ap-
peared frivolous.  

The recent *Gideon v. Wainwright* and *Douglas v. California* decisions have demonstrated the awareness of the Supreme Court to the
problems of indigents. But this has not resulted in any wholesale change in attitude in the states—especially in those where the right of an indigent
to have counsel appointed has been declared discretionary. A few states,
however, which previously declared that the indigent has no constitutional	right to appointed counsel at post-conviction proceedings have altered
their position. Illinois did it by statute, and now grants an absolute
right to the indigent. In Idaho, Montana and Pennsylvania it was
done by judicial fiat, but the right granted in each case was a discretion-
ary one to be determined on an ad hoc basis.

IV. THE FLORIDA POSITION WITH RESPECT TO THE RIGHT OF
AN INDIGENT TO HAVE COUNSEL APPOINTED TO AID HIM IN
ASSERTING A COLLATERAL ATTACK ON A PRIOR CRIMINAL
CONVICTION

Florida is the state in which Clarence Earl Gideon was convicted of a crime without the benefit of counsel, and, consequently, was the
birthplace of the famous *Gideon v. Wainwright* case which held that the
absolute right to counsel guaranteed by the sixth amendment in all criminal proceedings was so fundamental and essential to a fair trial that it was made obligatory upon the states by the fourteenth amendment due process clause.

Since Florida was one of those states which did not provide counsel for all of its indigent defendants, the *Gideon* decision immediately gave
rise to an important new ground for collateral attack relief. To meet its

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87. But see cases cited note 80 supra.
88. This footnote sets forth the authority for the former position and the number of each footnote containing the authority for the new position. Ross v. Ragen, 391 Ill. 419, 63 N.E.2d 874 (1945); Contra, note 89 infra; Cobas v. Clapp, 79 Idaho 419, 319 P.2d 475 (1957); Contra, note 90 infra; In re Pelke's Petition, 139 Mont. 620, 365 P.2d 932 (1961); Contra, note 91 infra, Johnson v. Burke, 173 Pa. Super. 105, 93 A.2d 876 (1953), Contra, note 92 infra.
93. The Florida position is examined in detail because it represents a typical point of view, and because it is our obligation to do so, this being a Florida law review.
94. Note 85 supra.
potentially enormous impact the Supreme Court of Florida promulgated Criminal Procedure Rule 1, the Florida adaptation of Title 28, Section 2255 U.S.C.A., to provide an effective post-conviction remedy coequal with, but actually more expeditious than, post-conviction habeas corpus.

It was evident that the Florida courts would soon be faced with a multitude of Rule 1 petitions, and that among them would be lurking the question of what right an indigent has to appointed counsel to aid him in a collateral attack proceeding. Indeed within a short period of time all three of the Florida intermediate appellate districts were faced with that very question. They were uniform in holding that an indigent has an absolute right to the assistance of counsel in a post-conviction proceedings, and all seemed to base their decision on the broad implications in the recent cases of the Supreme Court dealing with the right to counsel, such as Gideon and Douglas.

95. Criminal Procedure Rule No. 1, hereinafter to be cited as-Rule 1-was approved and adopted by the Supreme Court of Florida in 1963. In Re Criminal Procedure Rule 1, 151 So.2d 634 (Fla. 1963). It provides as follows:

Rule No. 1. Motion to vacate, set aside or correct sentence; hearing; appeal

A prisoner in custody under Sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

This rule shall not apply to municipal courts.

The foregoing rule shall become effective upon the filing of this order.

[Order filed April 1, 1963.]
Their position was well stated in *Weeks v. State*, a third district case in which the court declared in a per curium opinion:

We are reluctant to add to an already onerous burden thrust upon the taxpayers of Florida. At the same time we would be less than discerning if we did not recognize the broad implications in the decisions of the Supreme Court of the United States treating this subject.

Since it has been decided that a failure to provide counsel for an indigent on a direct review of his conviction is a violation of his constitutional rights, *we think it reasonable to conclude that it would be no less a violation of those rights to deny him counsel on appellate review of collateral proceedings attacking his conviction on constitutional grounds.*

The state apparently was not pleased with the holding of the three District Courts of Appeal, and decided to appeal third district's order to the Supreme Court of Florida; the order had granted the indigent's request that counsel be appointed to assist him in the Rule 1 proceedings.

The order of The Third District Court of Appeal was quashed and the Supreme Court of Florida in *Weeks v. State* held what is now the rule of Florida: The indigent who is unable to retain counsel has no absolute right to the assistance of appointed counsel at a hearing on a Rule 1 motion or on appeal from an adverse ruling thereon, but fifth amendment due process requires the assistance of appointed counsel if under the circumstances such assistance would be essential to accomplish a fair and thorough presentation of the prisoner's claims.

The holding of the court in *Weeks* was based on the premise that Rule 1 and all other post-conviction proceedings "are in the nature of independent, collateral civil actions which are not clothed with the aspects of a 'criminal prosecution' under the sixth amendment."

In reaching its decision the court relied on the traditional rationale

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99. 166 So.2d 892 ( Fla. 1964).
100. Since the *Weeks* case dealt with a state procedure, it is interesting to note the court's reference to the fifth amendment due process clause. It seems that reference to the fourteenth amendment due process clause would have been more appropriate as the fourteenth amendment is applicable to the states, whereas the fifth amendment is applicable only to the federal government. This would be true even if the court was a proponent of the incorporation school, i.e., a proponent of the theory that the entire Bill of Rights, including the fifth amendment due process clause, was incorporated into the fourteenth amendment.
used by many courts when faced with this problem. First, it pointed out that Rule 1 was simply a Florida adoption of Section 2255, a federal post-conviction remedy. Therefore, the court concluded, it was justified in applying the federal post-conviction remedy precedents to the situation at hand, and these precedents have unanimously held that post-conviction proceedings are civil in nature, even though they involve attacks upon criminal convictions. Thus Rule 1 is civil in nature, and as such is not a step in a criminal prosecution; therefore, it does not fall within the absolute right to counsel guarantee of the sixth amendment.

The court then faced the third district's rationale that the broad implications of Gideon and Douglas negated these prior federal post-conviction remedy precedents and required an absolute right to counsel at all post-conviction proceedings. The higher court rejected that point of view as follows:

(The District Court of Appeal) had the view that the right to counsel announced in . . . (Gideon and Douglas) modified the holdings of the prior federal cases governing Section 2255, post-conviction remedies. We think this distinction is not valid in view of the fact that when the prior federal decisions announced the federal post-conviction rule there was a constitutional entitlement to counsel in all criminal prosecutions in the federal courts.

From this the court found no difficulty in concluding that "Gideon and Douglas changed the rule for state courts in regard to direct criminal proceedings only." The court then stated another basis for its holding. In doing so it took a positive approach and asserted that not only were neither Gideon nor Douglas applicable, but in addition the Supreme Court had actually declared itself against granting an absolute right to appointed counsel at collateral attack proceedings. To support this assertion the Florida court looked to Sanders v. United States, a case decided about one month after Gideon and Douglas. The right to counsel was not in issue in Sanders, but it did contain the following statement.

However, we think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing. In this connection, the sentencing court might find it useful to appoint counsel to represent the applicant.

102. Note 96 supra.
103. Note 101 supra.
104. Ibid. (Emphasis added.)
105. 373 U.S. 1 (1963). The question involved was whether a Section 2255 movant was entitled to a hearing on a second Section 2255 motion regarding an issue he could have raised on his first Section 2255 motion.
106. Id. at 21. (Emphasis added.)
From this the Florida court concluded that the United States Supreme Court held that the indigent was not entitled to the assistance of counsel as a matter of absolute right.

Though the holding of the Supreme Court of Florida may be contrary to one's sense of justice, it cannot be criticized as legally wrong.\(^{107}\) For the court obviously believed that its decision would serve society best and it did have a multitude of precedent in its favor. Moreover, the United States Supreme Court had not issued any mandate which would require a different result. In fact, in its latest and most closely related right to counsel decision, \textit{Douglas v. California},\(^{108}\) the Supreme Court expressly limited its holding to first appeals as a matter of right.

Indeed it is this express limitation in \textit{Douglas} which gives rise to the major criticism of the \textit{Weeks} case. And that is the Florida court's use of \textit{Sanders v. United States}\(^{109}\) as representing a policy statement by the Supreme Court regarding the right to counsel at collateral attack proceedings. It seems unreasonable that the Supreme Court in \textit{Sanders}, a case where right to counsel was not even in issue, would make a major policy decision regarding the right to counsel, when in \textit{Douglas}, a case where right to counsel was directly in issue, it expressly refused to do so.

V. THE IMPORTANCE OF COLLATERAL ATTACK PROCEEDINGS AND THE NEED FOR COUNSEL TO INSURE THEIR EFFECTIVE USE

The need for collateral attack proceedings is great. Obviously the incarcerated victim of an illegal conviction should be permitted a remedy to enable him to remain alive or regain his freedom. Likewise, the victim who has “paid his unjust debt to society” and who is now a free man is also entitled to relief. He, in addition to being labeled an ex-convict, will probably have to face various social and economic consequences if the illegal conviction stands, even though he has served his sentence. He may lose the right to vote or hold office and he may be barred from the practice of such professions as law or medicine.\(^{110}\) Furthermore, his conviction may subject him to stiffer penalties under habitual criminal statutes for any subsequent convictions. And it may even lead to additional imprisonment, as after his release another jurisdiction may incarcerate him on the ground that the prior criminal act for which he was convicted violated an earlier parole or prohibition.\(^{111}\)

Since collateral attack proceedings are so important, it seems that

\(^{107}\) Indeed it is contrary to the writer's sense of justice as indicated in sections V and VI of this paper.


\(^{109}\) \textit{Supra} note 105.

\(^{110}\) See Note, 57 NW. U.L. REV. 467 (1962); Note, 63 YALE L.J. 115 (1953); Note, 37 VA. L. REV. 105 (1951); Note, 59 YALE L.J. 786 (1950).

\(^{111}\) \textit{Ibid}. 
we ought to guarantee their *effectiveness* to all who may need them. To achieve this the writer submits that representation by counsel is required.

In prosecuting his remedy the collateral attack petitioner will have to face complex legal problems concerning the burden of proof and the admissibility of evidence. These seem to be beyond the skill of one without legal training. Moreover, the petitioners, especially the incarcerated ones, will be at a decided disadvantage in building their cases without a lawyer, as they lack the skill and training necessary to discover new evidence and to evaluate facts.

Furthermore, the effectiveness of collateral attack proceedings is not sufficiently guaranteed to all, even in those jurisdictions where counsel is appointed absolutely after a finding by the judge that the alleged claim is not frivolous. For it seems that counsel is just as necessary to aid in determining the validity of the claim as it is in other aspects of the proceedings.

In fact in *Lane v. Brown* the Supreme Court frowned upon conditioning a grant of counsel upon a showing of merit; it stated that this defeats the very purpose for which counsel is sought. The point is correctly made. For conditioning the grant of counsel on merit seems to presuppose that all petitioners know what their rights are and how to assert them, at least to the extent that each can prepare an unfrivolous petition. Empirical data has not been found to support that supposition.

Most jurisdictions have refused to appoint counsel for all collateral attack movants. They seem to base their refusal upon two arguments. First, that to do so would cause a substantial increase in costs, and secondly that collateral attack proceedings are civil in nature and, therefore, outside the absolute right to counsel guarantee of the sixth amendment and fourteenth amendment due process clause.

The first argument, that appointing counsel for all collateral attack movants would cause a substantial increase in costs, is not necessarily true. In fact the ultimate result may be a savings to the state of time and money. By appointing counsel both poorly pleaded and difficult to understand petitions would disappear, and an attorney would be more likely than an indigent convicted felon to bring all available grounds to the attention of the court at one time. This, of course, would result in a reduction of the number of collateral attack *hearings* that would have to be held.

Furthermore, the presence of an attorney would give the post-conviction judgment a greater degree of finality, as without counsel it would

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112. See cases cited note 80 *supra*.
114. See cases cited notes 74, 76 and 81, and accompanying text *supra*. 
be very difficult to find that the indigent has lost or waived some of his rights by his failure to present facts known to him. Thus, without counsel, especially in light of two recent Supreme Court decisions, any new claim even if based on previously known facts, may receive a full evidentiary hearing. The necessity of these subsequent hearings could be substantially reduced if attorneys were appointed to make sure that all issues were adequately presented.

The other major reason why the absolute right to counsel has not been guaranteed to indigents asserting collateral attacks is because they have been categorized as civil in nature. Therefore they have been held to be without the scope of the absolute right to counsel guarantee of the sixth amendment and the fourteenth amendment due process clause.

Though collateral attack proceedings have been classified as civil in nature, they actually are a very important part of criminal procedure. They are no less an important part of the proceedings than arraignment, trial or first appeal as of right, all of which are stages of the proceedings at which the absolute right to counsel is guaranteed.

Indeed, at the collateral attack stage of the proceedings federal constitutional rights may be raised and ruled upon, perhaps for the first time. Furthermore, the collateral attack stage is similar to the appeal stage of the proceedings in that the function of both is to cause a reversal of the prior criminal conviction.

The importance of collateral attack proceedings and their close relationship to other stages of criminal proceedings was even recognized in a decision by the Comptroller General of the United States. The United States Attorney General wanted to know if habeas corpus petitioners bringing suit under the federal in forma pauperis statute could have their expenses paid from funds authorized for criminal proceedings only. The Comptroller General answered as follows:

115. In Fay v. Noia, 372 U.S. 391 (1963), the court held that even the unexcused failure of a state prisoner to make timely use of state post-conviction remedies does not bar relief under the federal habeas corpus statute 28 U.S.C. § 2254 (1958); and in Townsend v. Sain, 372 U.S. 293 (1963), Warren, Ch. J., writing for the court held, inter alia, that in federal habeas corpus proceedings instituted by a state prisoner, the district court must hold an evidentiary hearing if the petitioner did not receive a full and fair evidentiary hearing in a state court, wherein the state court decided the issues of fact alleged by the petitioner. See generally Comment, 40 N.Y.L. Rev. 154, 170-172 (1965).


117. E.g., Baker v. United States, 334 F.2d 444 (8th Cir. 1964); Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964); Gresham v. United States, 329 F.2d 779 (10th Cir. 1964).

118. E.g., State v. Weeks, 166 So.2d 892 (Fla. 1963); State v. Herron, 376 S.W.2d 192 (Mo. 1964); Jones v. State, 142 Mont. 619, 386 P.2d 74 (1963).


That habeas corpus proceedings are civil actions is well settled... While we know of no basis upon which the United States may be charged witness costs in civil proceedings, the writ of habeas corpus is so related to the protection of constitutional rights afforded indigent defendants by Rule 17(b), that to ignore that rule in a habeas corpus proceeding under the pauper's statute may well raise grave questions of constitutionality.\footnote{125. 39 Decs. Comp. 133, 138-39 (1959).}

Thus, the federal government has agreed to pay the costs incurred by an indigent bringing "civil proceedings" out of a fund authorized for criminal proceedings only.

**VI. Conclusion**

There are two avenues open to the Supreme Court to bring collateral attack proceedings within the absolute right to counsel guarantee of the federal constitution. It could be done by use of the sixth amendment and fourteenth amendment due process clause or by use of the fourteenth amendment equal protection clause.\footnote{126. The equal protection clause of the fourteenth amendment is applicable only to the states. The constitution does not by its terms require the federal government to observe a general rule of equal protection. But the Supreme Court has stated that the due process clause of the fifth amendment "tends to secure equality of law in the sense that it make a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the Legislature may not withhold." Truax v. Corrigan, 257 U.S. 312, 331 (1921).}

If the sixth amendment approach is used, collateral attack proceedings would have to be labeled criminal in nature, at least for right to counsel purposes, because the sixth amendment is expressly limited to criminal proceedings. This could be done by expanding the critical stage of the proceedings doctrine enunciated in Hamilton v. Alabama.\footnote{127. Note 119 supra.}

In that case counsel was held to be absolutely necessary at arraignment because it was a critical stage of the proceedings. It was held to be critical because, *inter alia*, the indigent could lose certain defenses if not then pleaded.

How can collateral attack proceedings be considered any less critical than arraignment? At both stages the concern is to insure that the indigent has the ability to be able effectively to assert his rights. The major difference between the two is that at arraignment the inability to assert all defenses may result in a loss of life or liberty, whereas at a collateral attack proceedings the indigent has already lost his liberty and may be faced with the possibility of losing his life.\footnote{128. Of course it can be argued that at arraignment he has not yet had his day in court,} What is more critical than that?
The fact that collateral attack proceedings have been categorized as civil in nature does not constitute a bar to this line of reasoning. For the Supreme Court has never held them to be civil in nature for right to counsel purposes. Thus, collateral attack proceedings, though civil in nature for some purposes, could be held as criminal in nature to extend to them the absolute right to counsel guarantee of the sixth amendment and fourteenth amendment due process clause.

The other constitutional avenue open for use in this area is the fourteenth amendment equal protection clause. It was used in *Douglas v. California*\(^{180}\) to guarantee an absolute right to counsel at first and only appeals as of right, and it was used in *Smith v. Bennett*\(^{181}\) to declare invalid a collateral attack filing fee that precluded indigents from using the collateral attack procedure solely because of their poverty. If we combine *Douglas* and *Smith* we can make equal protection applicable to right to counsel problems at collateral attack proceedings as well.

Indeed, equal protection can be used to answer the contention that an absolute right to counsel should not be granted because the indigent has had his day in court. Because the fact remains that the indigent has an absolute right to assert his collateral attack petition, and the only reason why he does not have counsel to aid him is because of his poverty. This is the very type of situation that has been labeled as discriminatory because of poverty, and therefore, invidiously discriminatory and violative of the fourteenth amendment equal protection clause.\(^{182}\)

It seems that Justice Douglas' rationale in *Douglas v. California*, though dealing with right to counsel on appeal is applicable also to collateral attack proceedings:

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. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.\(^{183}\)

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129. See note 126 *supra*.
130. *Supra* note 121.