

## THE RIGHT TO COUNSEL: SUPREME COURT DEATH ROW PETITIONERS

Thirty-two states provide for the penalty of death for persons convicted of homicide.<sup>1</sup> In the face of several Supreme Court decisions which have declared certain types of death penalty statutes unconstitutional, these states have been quick to respond by re-enacting capital punishment legislation in order to conform to the high court's guidelines.

Within two years of the Supreme Court's 1976 decisions invalidating mandatory death penalty statutes,<sup>2</sup> nineteen state legislatures passed new statutes to keep the death penalty constitutionally alive in their jurisdictions.<sup>3</sup> This same type of response is expected in states whose statutes would be considered unconstitutional in light of the Court's recent decisions invalidating the Ohio death penalty statute.<sup>4</sup> These cases, decided in July of 1978, held that death penalty statutes which do not allow the sentencing judge to consider all mitigating factors violate the eighth and fourteenth amendments.

Each year, there is a substantial growth in the population of death row inmates. The present population on death row throughout the country is 487,<sup>5</sup> one hundred more than a year ago.<sup>6</sup> Since this population keeps rising, it is becoming harder to find counsel who will voluntarily assist the prisoners to prepare their Supreme Court petitions. Once legally mandated representation by an appointed attorney expires, many of the attorneys "bail out," leaving the petitioner and his family in the precarious position of having to prepare a complex petition for a writ of certiorari without funds or the aid of counsel.<sup>7</sup> Under the Supreme Court Rules,<sup>8</sup> the petition must be filed within ninety days from the entry of the lower court judgment or else it will be deemed out of time. The petitioner's problems are multiplied if he must also file a motion for stay of his execution pending disposition of his certiorari

1. Ala. Code § 13-11-1 *et seq.* (1975); Ariz. Rev. Stat. Ann. §§ 13-453, 13-454 (Supp. 1977); Ark. Stat. Ann. § 41-1301 *et seq.* (1977); Cal. Penal Code Ann. § 190 *et seq.* (Supp. 1978); Colo. Rev. Stat. § 16-11-402 *et seq.* (Supp. 1976); Conn. Gen. Stat. Ann. § 53a-54b (1977); Del. Code Ann. tit. 11 § 4209 (Supp. 1977); Fla. Stat. Ann. § 921.141 (Supp. 1978); Ga. Code Ann. § 27-2534.1 (Supp. 1978); Idaho Code §§ 18-4004, 19-2515 (Supp. 1977); Ill. Rev. Stat. ch. 38, § 9-1 (Smith Hurd Supp. 1978); Ind. Code Ann. §§ 35-50-2-3, 35-50-2-9 (Burns Supp. 1977); Ky. Rev. Stat. §§ 507.020, 532.025 to .075 (Supp. 1977); La. Code Crim. Proc. Ann. art. 905 *et seq.* (West Supp. 1978); 1978 Md. Laws, Part 1, ch. 3; Miss. Code Ann. §§ 97-3-21, 99-19-101 *et seq.* (Supp. 1977); Mo. Ann. Stat. §§ 565.001, 565.006-16 (Vernon Supp. 1978); Mont. Rev. Codes Ann. § 94-5-105 (Supp. 1974); Neb. Rev. Stat. §§ 29-2519 *et seq.* (Supp. 1974); Nev. Rev. Stat. § 200.030(4)(a), 200.033 *et seq.* (1977); N.H. Rev. Stat. Ann. § 630.1 *et seq.* (1977); N.Y. Penal Law §§ 60.06, 125.27 (c) (a) (iii) (Supp. 1977); 19 N.C. Sess. Laws ch. 406; Okla. Stat. Ann. tit. 21, §§ 701.9 *et seq.* (Supp. 1978); R.I. Gen. Laws § 11-23-2 (Supp. 1977); S.C. Code § 16-3-20-28 (Supp. 1977); Tenn. Code Ann. §§ 39-2402 *et seq.* (Supp. 1977); Texas Crim. Pro. Code Ann. tit. 37.071 (Vernon 1978); Utah Code Ann. § 76-3-206 *et seq.* (1977); Va. Code § 19.2-264.2 *et seq.* (Supp. 1977); Wash. Rev. Code Ann. § 9A32.045 (Supp. 1977); 1977 Wyo. Sess. Laws, ch. 122.
2. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
3. Legal Defense Fund, *Death Row USA* at 2 (June 20, 1978).
4. Lockett v. Ohio, 98 S. Ct. 2954 (1978); Bell v. Ohio, 98 S. Ct. 2977 (1978).
5. Legal Defense Fund, *supra* note 3, at 1.
6. Legal Defense Fund Amicus Curiae Memorandum for Motion for Appointment of Counsel at 5, Hughes v. Texas, 46 U.S.L.W. 3765 (1978).
7. Team Defense Project Amicus Curiae Memorandum for Motion for Appointment of Counsel at 3, 4, Hughes v. Texas, 46 U.S.L.W. 3765 (1978); Legal Defense Fund Amicus Curiae Memorandum, *supra* note 6, at 7.
8. Sup. Ct. Rule 22(1) (1970). While the Court Rules pertaining to the time for filing are jurisdictional (*See Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959)), untimely filing can be grounds for refusal to entertain the petition.

petition.<sup>9</sup> Aside from trying to obtain a discretionary appointment of counsel from the state court, an abandoned petitioner has two choices: to prepare and file his petition *pro se* or to seek out the voluntary services of an attorney.

If the petitioner decides to prepare the petition himself, he is confronted not only with the ninety-day time limitation,<sup>10</sup> but also with the task of comprehending complex legal issues which had previously been handled by his attorney. According to Justice Brennan, "the applicant's most difficult task is to persuade at least four of us<sup>11</sup> that his case qualifies for and warrants review . . . [b]ut those votes are hard to come by - only the exceptional state case raises a significant federal question demand[ing] review."<sup>12</sup>

Other justices and scholars have repeated that in the highly specialized work of preparing a certiorari petition, the unskilled layman is at a distinct disadvantage if he must file his petition without the assistance of an attorney.<sup>13</sup> The sophisticated art of preparing a certiorari petition has been considered such a specialty in the field of law that there has been a debate in legal circles of whether the petitioner's trial attorney is qualified enough to prepare the petition or whether he should turn the case over to an appellate specialist.<sup>14</sup>

Many of the *pro se* petitions which the Clerk's Office of the Supreme Court receives are mere ramblings of alleged violations of vague and unspecified constitutional rights which fail to clarify the key legal issues which would move the Court to grant certiorari.<sup>15</sup> Three out of five *pro se* pleadings are returned for failure to comply to any extent to the Court Rules.<sup>16</sup> Thus, in a practical sense, the *pro se* petitioner is at a considerable disadvantage in comparison to the litigant who can afford the professional skills of an attorney.

The second option open to the abandoned litigant is to secure the voluntary services of an attorney. One organization which attempts to locate counsel for death row petitioners who are victims of "bail-outs" is the NAACP Legal Defense Fund. The Fund has been finding it increasingly difficult to locate volunteers to represent these inmates before the Supreme Court.<sup>17</sup> The Team Defense Project, an organization established to help represent death row inmates in Georgia, has also shown that it is becoming increasingly difficult to obtain attorneys to represent death row inmates because the "market of attorneys

9. Some state courts refuse to grant such stays of execution pending disposition of a certiorari petition (e.g., Texas and Florida).
10. The ninety-day rule for filing may be extended up to a maximum of sixty days under Supreme Court Rule 22(1). But this also requires time and effort to prepare such a motion and to convince a Justice to grant the extension.
11. It requires the vote of four justices in order for the Court to grant a petition for a writ of certiorari.
12. Brennan, J., *State Court Decisions and the Supreme Court*, 31 Pa. Bar Assoc. Q. 393, 400 (1960).
13. Johnson v. Zerbst, 304 U.S. 458, 463 (1938); Douglas, J., *Right to Counsel: A Forward*, 45 Minn. L. Rev. 693 (1961); Stewart, J., *The Indigent Defendant and the Supreme Court of the United States*, 58 Legal Aid Rev. 3, 4 (1960); Boskey, *Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783, 789 (1961); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in Federal Courts*, 47 N.Y.U. L. Rev. 159 (1972); Note, *Indigent Criminals and the Supreme Court*, 27 Rutgers L. Rev. 937 (1974).
14. Carrington, Meador & Rosenberg, Justice on Appeal 83-5 (1976).
15. See, e.g., Stewart, J., *The Indigent Defendant and the Supreme Court of the United States*, 58 Legal Aid Rev. 3, 60 (1960); Lewis, *The Supreme Court and How It Works: The Story of the Gideon Case* 4-10 (1966); Stern & Gressman, *Supreme Court Practice* 372-73 (1969); Note, *Indigent Criminals and the Supreme Court*, 27 Rutgers L. Rev. 937 (1974).
16. Letter from Edward C. Schade of the Clerk's Office, United States Supreme Court, to author (Aug. 29, 1978) (on file with the *Journal of Legislation*).
17. Letter from Joel Berger of the Legal Defense Fund to author (Aug. 4, 1978) (on file with the *Journal of Legislation*).

who might act for death row clients is, in 1978, saturated."<sup>18</sup> The Team Defense Project indicates that a very small percentage of lawyers do any criminal work and these lawyers already have all the pro bono work they can handle.<sup>19</sup> Although these organizations have indicated how serious the present problem is of obtaining counsel to represent capital inmates, the current growth rate of the population on death row will only exacerbate the problem of finding a volunteer attorney to the point of hopelessness.

### THE RIGHT TO COUNSEL: THE HISTORY OF THE INDIGENT'S RIGHT IN COURT

#### The Growth of Constitutional Protection: Pre *Ross v. Moffitt*

In 1938, the Supreme Court clarified that indigent criminals in federal trial courts were guaranteed the right to counsel under the sixth amendment.<sup>20</sup> The constitutional right to counsel in state trial courts, however, has had a slow development until the recognition [in *Gideon v. Wainwright*<sup>21</sup>] that the sixth amendment right applied to the states. Prior to *Gideon*, the constitutional right to counsel in state courts had been found only when there was a violation of due process as a result of an indigent having been deprived of counsel. *Powell v. Alabama*<sup>22</sup> was the first case to recognize that it was the duty of the state court to assign counsel for the trial of a defendant who is accused of a capital crime and "is unable to make his own defense because of ignorance, feeble-mindedness, illiteracy or the like."<sup>23</sup> After *Powell*, a test was developed in *Betts v. Brady*<sup>24</sup> to determine whether due process was denied if, in a trial for a noncapital crime, a defendant was deprived of the assistance of counsel. This test of whether "it is offensive to common and fundamental ideas of fairness and right"<sup>25</sup> was the determining factor in noncapital cases before *Betts* was overruled by *Gideon*.<sup>26</sup>

On the same day the Court held that Clarence Gideon should be guaranteed the right to counsel at his state trial, the Court approached the question of whether the indigent criminal has the right to an attorney on his first appeal of right. The Court found that this right to counsel existed under the Constitution in *Douglas v. California* by reasoning that "there can be no equal justice where the kind of appeal a man has depends upon the amount of money he has."<sup>27</sup> In *Douglas*, the Court reserved the question of whether one had the right to an attorney in a discretionary appeal. Later in the 1962 October Term, the Court turned down seven motions for appointment of counsel to prepare petitions for certiorari by indigents seeking to have their cases re-

18. Team Defense Project Amicus Curiae Memorandum, *supra* note 7, at 2.

19. *Id.* at 2-3.

20. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

21. 372 U.S. 335 (1963).

22. 287 U.S. 45 (1932).

23. *Id.* at 71. Two other capital cases decided before *Gideon* recognized the right to counsel at trial: *Tomkins v. Missouri*, 323 U.S. 485 (1945); *Williams v. Kaiser*, 323 U.S. 471 (1945).

24. 316 U.S. 455 (1942).

25. *Id.* at 473.

26. It is not insignificant that many states, independent of the United States Constitution, provided counsel for indigent defendants in varying degrees in 1942. The scope of this note forbids a detailed analysis.

27. 372 U.S. 353, 355 (1963).

viewed.<sup>28</sup> Immediately after these denials, the prospect of extending the sixth amendment to include the right to counsel on discretionary appeal dimmed when there was an instruction to the Clerk of the Supreme Court to advise litigants that the Court would not appoint counsel to assist indigents in the preparation of their certiorari petitions.<sup>29</sup>

### **Ross v. Moffitt: The Limit of the Constitutional Right**

After the decision in *Douglas*, four U.S. Courts of Appeals rendered conflicting judgments on whether the Constitution required that an indigent defendant has the right to counsel on discretionary appeals.<sup>30</sup> The Seventh and Tenth Circuits found no authority upon which to base such a right and therefore denied assistance of counsel.<sup>31</sup> Two later decisions in 1973 by the Fourth and Sixth Circuits broke new ground to find that the due process and equal protection clauses protect the indigent's right to counsel on discretionary review.<sup>32</sup> The Fourth Circuit reasoned that there was no logical basis for any differentiation between appeals of right and those of permissive review and found, furthermore, that since legal resources have grown, so has the court's ability to implement basic notions of fairness.<sup>33</sup> In more sweeping rhetoric, the Sixth Circuit extolled, "[t]he temple of criminal justice does not have three stories for the affluent and only two for the indigent."<sup>34</sup>

It was the Fourth Circuit's judgment which the Supreme Court granted review on certiorari. Claude F. Moffitt had been convicted of forgery in two separate counties of North Carolina. In one conviction, the North Carolina courts refused to appoint counsel to prepare a petition for a writ of certiorari to the state supreme court. On appeal from the other conviction, he was denied a similar request by the state to prepare a petition to the United States Supreme Court. The Fourth Circuit reversed the North Carolina courts on both requests.

In an opinion written by Justice Rehnquist, the Supreme Court rejected the argument that either the due process or the equal protection clauses of the Constitution require a state to provide an attorney for an indigent defendant on a discretionary appeal.<sup>35</sup>

Since the right to review a conviction in the U.S. Supreme Court is granted by Congress, wrote Justice Rehnquist, a state should not be required to appoint counsel for a review which exists without the consent of the state whose judgment is sought to be reviewed.<sup>36</sup> Three dissenting Justices agreed with the Fourth Circuit's opinion and found only a minor burden on the state to provide such assistance of counsel.<sup>37</sup>

28. *Drumm v. California*, 373 U.S. 947 (1963); *Mooney v. New York* 373 U.S. 947 (1963); *Womack v. Oregon*, 373 U.S. 947 (1963); *In re Jacobs*, 373 U.S. 947 (1963); *In re Diaz*, 373 U.S. 947 (1963); *In re Turner*, 373 U.S. 947 (1963); *Oppenheimer v. California*, 374 U.S. 819 (1963).

29. 1962 Supreme Court Journal iv.

30. One Court of Appeals had approached the question prior to *Douglas* and held that it was not a violation to refuse counsel to a death row indigent during post-appellate and federal court proceedings. *United States v. Denno*, 313 F.2d 757 (2d Cir. 1963).

31. *Peters v. Cox*, 341 F.2d 575 (10th Cir. 1965); *United States v. Pate*, 409 F.2d 757 (7th Cir. 1969).

32. *Moffitt v. Ross*, 483 F.2d 650 (4th Cir. 1973) *rev'd* 417 U.S. 600 (1974); *Mitchell v. Johnson*, 488 F.2d 349 (6th Cir. 1973).

33. *Moffitt v. Ross*, 483 F.2d 650, 653, 655 (4th Cir. 1973), *rev'd* 417 U.S. 600 (1974).

34. *Mitchell v. Johnson*, 488 F.2d 349, 353 (6th Cir. 1973).

35. *Ross v. Moffitt*, 417 U.S. 600 (1974).

36. *Id.* at 617.

37. *Id.* at 619-621 (Douglas, J., dissenting).

It is important to note that the *Ross* appeal was from a conviction of forgery and not a capital crime. One of the first questions from the bench during oral argument clarified that North Carolina indigents under the sentence of death or life imprisonment had the right to direct appeal to the state supreme court and therefore had the right to counsel in the entire North Carolina court system.<sup>38</sup> The opinion of the Court also noted this distinction.<sup>39</sup> Indeed, one district court in 1975 has distinguished the application of *Ross* in capital cases.<sup>40</sup>

Even though the *Ross* decision has been widely criticized,<sup>41</sup> the Court has not indicated that there will be any change in its holding or that it will make any exception in capital cases. The Court has denied, without comment, the only two motions for appointment of counsel in such cases since *Ross*.<sup>42</sup> The second of these motions had been filed by a death row inmate to which the respondent had no serious objection to the use of the Court's power to appoint counsel.<sup>43</sup>

### Statutory Provisions and Policies

Even though the right to counsel on discretionary review did not warrant constitutional protection, it remains an issue of great importance. Since the Supreme Court vows only to enforce the constitutional minimum, it leaves the legislatures to protect other rights which the Constitution does not ensure.<sup>44</sup> Following this policy, the concluding paragraph of Justice Rehnquist's *Ross* opinion suggests that the states develop policies to provide counsel at stages in the appellate process when it is not required by the Constitution.<sup>45</sup>

The only legislature which has enacted laws to grant an indigent criminal the right to an attorney on discretionary appeal has been Congress. The Criminal Justice Act of 1964 provides that all indigent defendants accused of a felony or misdemeanor are to be given the assistance of counsel in federal courts at every stage of the proceedings through appeal.<sup>46</sup> This statute has been interpreted to include the preparation of petitions for writs of certiorari for review by the Supreme Court.<sup>47</sup> Since the apparatus for appointment of counsel under this act is placed into operation by the U.S. District Courts, this law has never been held to apply to indigents appealing to the Supreme Court from state judgments.

Presently, in the states which have capital punishment, not one legislature has enacted laws which would explicitly provide for the assistance of counsel to prepare certiorari petitions to review cases before the Supreme Court of the United States. Many states, by court decision or by statute, only abide

38. Oral Arguments, Vol. 13, 73-786 at 5, *Ross v. Moffitt*, 417 U.S. 600 (1974).

39. *Ross v. Moffitt*, 417 U.S. 600, 613 (1974).

40. *Carey v. Garrison*, 403 F. Supp. 395 (W.D.N.C. 1975).

41. Note, *No Requirement to Provide Counsel for Indigents on Discretionary Appeals*, 29 Minn. L. Rev. 153 (1974); Note, *The Indigent's Right to Counsel on Discretionary Appeals*, 28 Sw. L.J. 1051 (1974); Note, *Criminal Procedure - No Right to Counsel on Discretionary Appeal*, 53 N.C. L. Rev. 560 (1975).

42. *Ray v. Rose*, 429 U.S. 809 (1976); *Hughes v. Texas*, 46 U.S.L.W. 3765 (1978).

43. Respondent's Memorandum to Motion for Appointment of Counsel at 2-3, *Hughes v. Texas*, 46 U.S.L.W. 3765 (1978).

44. As to the Supreme Court's enforcement of the minimum requirements of the Constitution, see Stewart, J., *The Indigent Defendant and the Supreme Court of the United States*, 58 Legal Aid Rev. 3, 4 (1960).

45. *Ross v. Moffitt*, 417 U.S. 600, 618 (1974).

46. 18 U.S.C. § 3006A(c) (1976).

47. *Doherty v. United States*, 404 U.S. 28 (1971).

by the constitutional minimum mandated by *Douglas*: the right to counsel only on the first appeal of right.<sup>48</sup> One state, Tennessee, has even rescinded legislation which provided for counsel to assist a pauper petitioning to the Supreme Court once it was instructed that the Constitution did not mandate such legislation.<sup>49</sup>

The California Supreme Court recognized the need to provide the right to counsel for a special category of defendants to prepare their certiorari petitions. In order to "protect the interests of the defendant and promote the interests of justice," this court appoints counsel to represent indigent defendants in capital cases on review to the Supreme Court of the United States.<sup>50</sup> The California court is the only court in the nation to recognize this right.

### THE ARGUMENTS AGAINST NEW LEGISLATION: A REBUTTAL

The reasons for opposing new legislation providing counsel for death row indigents petitioning the Supreme Court have failed to justify the deprivation of the inmates' right. The denial of assistance of counsel in any criminal proceeding is a grave consequence, since, in the words of former Chief Justice Warren, when "a society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps."<sup>51</sup> A society which has either enacted laws by which persons can be prosecuted and by which that conviction can be reviewed should also provide that these persons' rights are protected against the skill of the states' attorneys.

The major argument against the passage of a law to provide the Supreme Court petitioner with counsel is the added public expense to pay for the attorney. The expense to the public would not be great if laws were passed to provide for counsel only for death row inmates since the number of these petitioners is only a tiny fraction of the *in forma pauperis* petitions filed each year. In the October Term of 1977, there were only fifty-three capital cases of the total 2015 pauper cases on the Court's docket.<sup>52</sup> If the same attorney who had filed the petitioner's first appeal prepared his petition, the time which the attorney would have to expend in preparing the new document would be minimal since, at that point, he would be thoroughly familiar with the issues of the case. Another factor mitigating the public expense of providing appointed counsel to the indigent litigants is the reduction of time which government paid law clerks and other members of the Supreme Court staff would have to spend to sort through the rambling petitions of many *pro se* filings and to

48. See, e.g., Alabama: *Martin v. State*, 277 Ala. 153, 167 So. 2d 912 (1964); Arkansas: Ark. Rules of Crim. Pro. 8.2(b) (1977); Florida: *Cox v. State*, 320 So. 2d 449 (1975); Louisiana: *State v. Graves*, 246 La. 460, 165 So. 2d 285 (1964), see also, La. Code Crim. Pro. Ann art. 516 (West 1967); Montana: Mont. Rev. Codes Ann. § 95-1003 (1969); Ohio: Ohio Rules of Crim. Pro. 44(a) (1976); Oklahoma: *Jewel v. Tulsa County*, 450 P.2d 833 (1969); South Carolina: Defense of Indigents Act, Rule 5 (1976); Texas: *Ex parte Perez*, 479 S.W.2d 283 (1972), see also, Tex. Code Crim. Proc. Ann. art. 26.04 (comment) (Vernon 1966).

49. This interesting development in Tennessee resulted from the following chronology of Statutes and court decisions: 1965 Tenn. Pub. Acts ch. 217, § 5; *Hutchins v. State*, 504 S.W.2d 758 (Tenn. 1974); *State v. Williams*, 529 S.W.2d 714 (Tenn. 1975); Tenn. Code Ann. § 40 - 2018 (Supp. 1977).

50. *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), *cert. denied*, 406 U.S. 971 (1968).

51. *Coppedge v. United States*, 396 U.S. 438, 449 (1962).

52. Letter from Edward C. Schade, *supra* note 16.

present the issues in a coherent format.<sup>53</sup> The fears that there would be an onslaught of frivolous petitions are lessened by the fact that issues in capital cases are less likely to be frivolous in view of the nature of the crime and the punishment sought to be reviewed.

Another argument against providing *pro se* indigents the right to counsel on review by the Supreme Court is that the petitioner can always seek a remedy in a habeas corpus proceeding. This argument does not recognize that prisoners are not constitutionally guaranteed counsel in their habeas corpus actions.<sup>54</sup> Furthermore, in habeas corpus proceedings where the defendant has raised fourth amendment violations and has received no relief from the state courts, the certiorari petition to the Supreme Court is the only relief in a federal court by which he can have the state decision reviewed.<sup>55</sup> The additional time and public expense of a new habeas corpus action is not a feasible alternative to providing a litigant a meaningful review of his initial conviction.

The artificial line between appeals of right and discretionary appeals which the Supreme Court made in *Ross* is a convenient limit to measure how far the minimal constitutional protection extends. This line should not prevent legislatures from providing counsel in discretionary appeals. Since the Supreme Court is still the ultimate arbiter of a citizen's rights, counsel should be provided at this critical phase of a defendant's cause. As previously noted, Judge Haynesworth of the Fourth Circuit found no logical basis for providing counsel in appeals of right and denying counsel in discretionary appeals. He noted further that, in some cases, it is in discretionary appeals that a case receives its most meaningful review.<sup>56</sup>

A final argument against providing the right to counsel to death row petitioners is that, as a practical matter, these inmates have been fortunate enough to find voluntary counsel to assist them in the past. As the increase in death row populations continues, however, the number of attorneys who are available to take pro bono cases reaches the saturation point, the prospects for voluntary assistance in the future appears bleak. The petitioner who frantically tries to find an attorney to help present his claims within the ninety-day time period takes no solace in the fact that others have been fortunate. When a society provides for a review of its judgment to take the life of one of its citizens, the preparation of the petition to review should not involve a chaotic search for assistance but rather a sober process in which counsel is secured and the issues properly presented.

### CONGRESSIONAL OR STATE RESPONSIBILITY?

There has been much support from the jurists and legal writers for the idea that indigents should be provided with the assistance of counsel in all

53. This position was advanced by Thomas Anderson, Jr., counsel for Clarence Moffitt, during oral argument. Oral Arguments, *supra* note 38, at 37.

54. *Vandenades v. United States*, 523 F.2d 1220 (5th Cir. 1975); *Dorsey v. Gill*, 148 F.2d 857 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 890 (1945); *Shum v. Fogliana*, 82 Nev. 156, 413 P.2d 495 (1966); *Sykes v. Warden of Maryland Penitentiary*, 201 Md. 662, 93 A.2d 549 (1953). The Criminal Justice Act provides for appointment of counsel in habeas corpus actions upon the discretion of the judge. See 18 U.S.C. § 3001A(g) (1976).

55. *Stone v. Powell*, 428 U.S. 465 (1976).

56. *Moffitt v. Ross*, 483 F.2d 650, 653 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974).

proceedings of appeal from the original conviction.<sup>57</sup> Additional recommendations for the implementation of this protection of a pauper's right have been put forth by the American Bar Association and the National Commission on Criminal Justice.<sup>58</sup> Some states have already recognized the "awesome step" of taking the life of one of its citizens and have special provisions for the qualifications and number of appointed attorneys who represent such persons accused of a capital crime.<sup>59</sup> When these inmates have exhausted the state court remedies, their right to counsel vanishes since both Congress and the states shirk the responsibility for ensuring fair review on a writ of certiorari. To justify their neglect of the death row inmate, the states could argue that they should not have to provide counsel for a review of a state conviction in a federal court. Congress, on the other hand, could argue that the federal government did not initiate the prosecution and should, therefore, not have to protect the inmate's right. There are, however, reasons for both Congress and the states to take action to provide for this right of representation.

The federal government has a responsibility to provide counsel for indigent Supreme Court petitioners since the origin of the right to seek review by certiorari stems from federal law.<sup>60</sup> Since Congress has provided for this right, it should make the review meaningful by providing for the assistance of counsel in the Court. If Congress was to fulfill the proposed purpose of the Criminal Justice Act of 1964, it should have provided counsel for all indigent petitioners to the Supreme Court. The Congressional purpose was to "[p]rovide legal assistance for indigent defendants in criminal cases in the courts of the United States."<sup>61</sup> The absence of a provision for appointment of counsel for an indigent seeking to have a state judgment reviewed by the Supreme Court is a serious oversight in the provisions of the Criminal Justice Act. Even if Congress does not want to provide counsel for all indigents appealing from the judgment of the state court of last resort, it should at least provide counsel for death row petitioners.

The state legislatures also have an obligation to enact legislation to provide counsel for Supreme Court petitioners sentenced to death under their laws since it is the state which exercises the power to deprive the person of his life.<sup>62</sup> The California Supreme Court's appointment of counsel recognizes this fundamental obligation of the state to provide counsel for such indigents "in the interest of justice."<sup>63</sup> More states should follow California's lead and eliminate the frantic search for counsel so that its citizens can argue their federal rights in a meaningful petition before the Supreme Court.

57. Douglas, J., *Right to Counsel: A Forward*, 45 Minn. L. Rev. 693 (1961); Stewart, J., *The Indigent Defendant and the Supreme Court of the United States*, 58 Legal Aid Rev. 3, 4 (1960); Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd* 417 U.S. 600 (1974); Ross v. Moffitt, 417 U.S. 600, 616 (1974); Mitchell v. Johnson, 488 F.2d 349 (6th Cir. 1973); Boskey, *Right to Counsel in Appellate Proceedings*, 45 Minn. L. Rev. 783 (1961).

58. ABA Standards on the Administration of Criminal Justice, No. 3.2 at 439 (1974); ABA Standards Relating to Defense Services, No. 5.2 at 46 (1968 Approved Draft); National Advisory Commission on Criminal Justice Standards and Goals: Report on the Courts, No. 13.1 at 283 (1973).

59. See, e.g., Ill. Sup. Ct. Rule 607(a) (1976); Miss. Code Ann. § 99-15-17 (Supp. 1977); Nev. Rev. Stat. § 171.151 (1977)(appointment of two counsel on appeal in capital cases); Okla. Stat. Ann. tit. 22 § 835 (West 1951)(three counsel for capital defendants); La. Code Crim. Pro. Ann. art. 512 (West 1978)(attorney of at least five years experience to be appointed in capital cases); S.C. Code § 16-3-26 (Supp. 1977)(capital defendant is appointed two counsel, one with at least five years experience).

60. 28 U.S.C. § 1257(3) (1976).

61. H.R. Rep. No. 804, 88th Cong., 1st Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News 2990.

62. *Carey v. Garrison*, 403 F. Supp. 395 (W.D.N.C. 1975), supports this reasoning.

63. *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), *cert. denied*, 406 U.S. 971 (1968).

Whether it is Congress or the states which pass this needed legislation, it is recommended that, whenever practical, the attorney appointed to prepare the certiorari petition should be the same attorney who represented the indigent in the lower courts. By appointing the same counsel, time and public expense would be saved since the appointment of a new attorney would require him to familiarize himself with the entire record before drawing up the certiorari petition. If state legislatures provide for the right to counsel, the procedure through which an attorney is appointed can be exercised through the apparatus which the state uses to appoint counsel in the lower courts. If Congress amended the Criminal Justice Act to provide indigents with counsel for appealing state judgments to the Supreme Court, the procedure for appointment could be arranged (1) by federal cooperation with the state court which appoints counsel or (2) by the Supreme Court appointing counsel upon the indigent's request.

### CONCLUSION

The absence of the right to counsel for an indigent's review of a state court judgment by the Supreme Court is an unfortunate gap in our criminal justice system. Several factors show the need for legislative action at this time. The growing number of death row petitioners coupled with the decreasing number of volunteer criminal attorneys create realistic doubts as to whether death row inmates will be adequately represented in the future. The Supreme Court's refusal to find that the right to counsel attaches on a discretionary review coupled with the acknowledgement by several justices that appointment of counsel would greatly help the Court and the petitioner leaves the obligation to the legislature to provide the right to counsel for such petitioners. Since the cost of providing counsel for only death row petitioners would not have a substantial effect on public expenses, the interests of justice demand legislative action. When a society plans to take the life of one of its members, it should not take away legal counsel once the issues of the case reach the threshold of the nation's highest court.

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