Judicial Safeguards of the Rights of Indigent Defendants

Alvin J. McKenna

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.nd.edu/ndlr/vol41/iss6/10

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
JUDICIAL SAFEGUARDS OF THE RIGHTS OF INDIGENT DEFENDANTS

I. Introduction

With the decision in Brown v. Board of Educ., the United States Supreme Court began what realistically may be called the era of decisions for protection of the rights of underprivileged groups. The Brown ruling dealt with rights in the basic social structure of our federal community, and it opened the way for what seems to be an endless line of rulings involving the rights of individuals in particular facets of our way of life from privacy to public accommodations.

While not specifically dealing with indigent persons, Brown can be looked to as the bedrock decision in the topic area of this writing—the rights of the indigent in a criminal proceeding. Since the ignorant are those who inevitably cannot rise above the status of indigence, the guarantee of equal and competent education is one step in the direction of erasing the class of indigents and its concurring burdens. If a man receives a suitable basic education he will either be able, financially, to secure devices protective of his rights or at least be possessed of sufficient knowledge to ask for those protections which will be granted to him at the expense of the government.

This note seeks to report the courts' answer to the query, what must the government do to protect the rights of those who do not know enough to request or who are otherwise unable to secure the same protections in a criminal law enforcement proceeding as those available to the learned and those with sufficient finances? The cases discussed in this note—all revealing acute judicial concern for the rights of the indigent—enunciate the underlying rationale and spirit which has been adopted by the contemporary legislation designed to afford justice to the poor, to provide the financial and organizational structure which insures that justice for the poor is an effective legal reality.

II. Rights of the Indigent Criminal Defendant in Situations before the Formal Trial

The initial encounter of an individual with the criminal law process occurs when he is “picked up for questioning.” It is this situation which serves as the formative process in a prospective prosecution, since statements made at this time may in effect be determinative of the defendant's fate. For this reason the Supreme Court of the United States decided, in Escobedo v. Illinois, that, when the police investigation ceases to be a general inquiry into an unresolved crime and becomes an inquiry which focuses on a particular suspect who has been taken into custody, such suspect has a right to the assistance of counsel. The denial of this right was held to be violative of the sixth amendment to the United States Constitution.

2 More specifically the emphasis will be on the cases decided since 1960, since these decisions represent the finished product of the building-block decisions of prior years.
4 Id. at 490. This has been held to apply to matters such as traffic violation investigations. Tacoma v. Heater, 409 P.2d 867 (Wash. 1966) (drunken driving charge).
NOTES

States Constitution as made obligatory on the states by the fourteenth amendment. The decision makers in Escobedo observed that incriminating statements might be elicited under circumstances similar to the fact situation before them and that these statements could effectively determine the outcome of the trial itself. The Court was aware that the right to counsel at the formal trial would be for naught if the defendant had been convicted—in effect—by the procedures before trial.

The remedy for the situation encountered in Escobedo is to hold inadmissible any statement made by a person who has been denied the assistance of counsel at this phase of the proceedings, without inquiry into the voluntariness of the statement. This is the same attitude the Court has taken when faced with confession situations in which there has been no physical coercion, but rather such mental pressures as to cast doubt on the reliability of any statements made by the accused. In these matters the surrounding circumstances so taint the statement that the Court has decreed that there should be wholesale inadmissibility, on the theory that the suspect's mind was overborne by the activity.

Escobedo indeed settles the question of whether the right to counsel exists at the interrogation stage. However, an important matter not given explicit treatment in the Court's opinion is whether a person must be advised of his right to counsel or must request assistance before it can be determined that there has been a denial of the right or a competent waiver. Mr. Justice White, in dissent, assumes that the majority implicitly decided that no request was needed. At present both state and lower federal courts are embroiled in controversy on this question. A majority of the cases on this point hold either that advice as to the right to counsel is not required, or that a request for counsel is necessary, the decisions being based on the rationale that the rule is strictly

5 Id. at 490-91.
6 The right to counsel at trial is granted by the decision in Gideon v. Wainwright, 372 U.S. 335 (1963), treated infra.
7 378 U.S. at 487. The Court cites as part of its reasoning a statement in a dissenting opinion of Mr. Justice Black in In re Groban, 352 U.S. 330 (1957): "The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by a pretrial examination." 352 U.S. at 344.
8 378 U.S. at 490-91. However, it has been held that the Escobedo rule does not apply in situations other than those involving statements secured during the period of police interrogations in the absence of counsel. Stovall v. Denno, 34 U.S.L.W. 2423 (2d Cir. Jan. 31, 1966) (no right to counsel during identifications of the suspect); People v. Graves, 49 Cal. Rptr. 386, 411 P.2d 114 (1966) (no right to counsel during taking of handwriting exemplars of the suspect).
9 E.g., Lynumn v. Illinois, 372 U.S. 528 (1963) (woman told that if she did not "co-operate" she would be deprived of her children and of state financial aid); Gallegos v. Colorado, 370 U.S. 49, rehearing denied, 370 U.S. 965 (1962) (fourteen-year-old held for five days without seeing his parents, a lawyer or a friendly adult who could have informed him of his rights and could have helped him to seek them so as to equalize his footing with his questioners); Culombe v. Connecticut, 367 U.S. 568 (1961) (illiterate defendant who was susceptible to intimidation was questioned intermittently for five days without the benefit of counsel); Reck v. Pate, 367 U.S. 433 (1961) (mentally retarded defendant held incommunicado from family and friends and without adequate food).
10 At the very outset Mr. Justice White states that, although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel, . . . or has asked to consult with counsel in the course of interrogation.

378 U.S. at 495.
limited to the factual situation in *Escobedo*. In that case the defendant had retained counsel, and there were requests by both the suspect and his attorney that they be allowed to confer. In the case of *McQueen v. Maxwell*, the court went so far as to decree that application for the assistance of counsel must be made to a court and that an appeal to the police officers does not suffice to invoke the *Escobedo* rule. Such a holding destroys any functional value of *Escobedo*. The police may interrogate the "suspect" without counsel until he is able to get to court. Thus, the defendant is in effect in the same situation as he was before *Escobedo*, i.e., without counsel in the important preliminary stages.

On the other side of the argument are those cases which hold either that advice as to the right is necessary or that a request is not necessary to the existence of the right to counsel in such situations. An illustration of the rationale employed in these cases is found in *People v. Dorado*. The court in that case demonstrated that in order to give proper effect to the *Escobedo* decision, the focus should be on the underlying purposes of the ruling rather than on the factual situation which gave rise to it. The opinion explains that the right is for the protection of the ignorant as well as those learned enough to request legal assistance:

We must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it.

Such a decision looks to the true import of *Escobedo* as a rule to benefit all, not only those learned in the rules of criminal processes. Moreover, this reasoning comports with the rationale underlying the exclusionary rule for

---


12 177 Ohio St. 30, 201 N.E.2d 701 (1964).


15 *Id.* at 369-70.
confessions obtained in, and as the result of, an atmosphere of substantial coercion and inducement as announced in \textit{Haynes v. Washington}.\textsuperscript{16} The exclusionary rule is, according to the \textit{Haynes} Court, a protection for those whose minds may be overborne by the tactics of the police.\textsuperscript{17} It does not take the interposition of much factual data to arrive at a realization that the persons whose minds are more readily influenced are those "ignorant" of their rights and that these people are most in need of the armor of the constitutional right to counsel. Viewed in this light, a decision like \textit{McQueen} appears to be an irrational stricture on \textit{Escobedo}.

Although adherence to the facts in \textit{Escobedo} may dictate the result obtained in those cases which require a request for counsel, the case cannot be looked at as isolated from the cases which have gone before it. If \textit{Escobedo} is examined in the light of decisions such as \textit{Carnley v. Cochran},\textsuperscript{18} and \textit{Massiah v. United States},\textsuperscript{19} it becomes readily apparent that the decision in \textit{Dorado} and like cases — that request for assistance by the accused is not necessary — is the proper concept of the right to counsel at this stage of proceedings. In \textit{Carnley}, the Supreme Court reversed a Florida decision which had held that the right to counsel had been waived because there was nothing in the record to indicate that defendant had requested counsel. The Court stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to furnished counsel does not depend on a request."\textsuperscript{20} \textit{Massiah} dealt with a federal prosecution, and thus the applicability of the sixth amendment was the only question involved. The Government attempted to use statements of the indicted defendant taken secretly and in the absence of counsel. However, it was held that such statements were inadmissible because taken in the absence of counsel and that the right to counsel extends to interrogations away from the police station.\textsuperscript{21} Thus the right was implicitly held to exist without request because it is obvious that when a person is subject to secretive listening he cannot make a request for counsel. If the right to counsel exists without request under the sixth amendment, and if this same right is made obligatory on the states by the fourteenth amendment (the constitutional requirement of \textit{Carnley}), the compelling conclusion is that the right announced in \textit{Escobedo} does not depend on a request for its existence.

The next phase of the criminal proceeding at which there is a necessity for protection of the accused is the arraignment. It was decided in the case of \textit{Hamilton v. Alabama},\textsuperscript{22} that this was such a critical stage of the proceedings in the Alabama system\textsuperscript{23} that rights under the due process clause of the fourteenth

\textsuperscript{16} 373 U.S. 503 (1963).
\textsuperscript{17} Id. at 513.
\textsuperscript{18} 369 U.S. 506 (1962). This case was cited by Mr. Justice White, dissenting in \textit{Escobedo}, as authority for his statement quoted supra note 10.
\textsuperscript{19} 377 U.S. 201 (1964).
\textsuperscript{20} 369 U.S. 506, 513 (1962). The Court in \textit{Escobedo} said that the right to counsel at the police interrogation is such a constitutional right, guaranteed by the sixth amendment and made obligatory on the States by the fourteenth amendment. 378 U.S. at 490-91.
\textsuperscript{21} 377 U.S. 201, 206 (1964). This reasoning has been followed by the states in decisions such as People v. Halstrom, 34 U.S.L. Week 2408 (Ill. Jan. 25, 1966).
\textsuperscript{22} 368 U.S. 52 (1961).
\textsuperscript{23} Under that system arraignment was the only time at which the defense of insanity might
amendment are violated by a lack of counsel at this time. Again *White v. Maryland*, it was held that there was a violation of the fourteenth amendment because defendant was not represented by counsel at a "preliminary hearing" when he entered a plea of guilty which was later introduced at the trial. As a further enforcement measure the Court decided that it was not necessary that a showing of prejudice from the absence of counsel be made. These decisions indicate a reconsideration and acceptance of the idea of Mr. Justice Black's dissent in the case of *In re Groban*. The contention of that dissent was that the right to the assistance of counsel at the trial itself would be a nullity if at a time before trial the defendant has been placed in such a position, by the lack of intelligent guidance, that the trial itself becomes a mere formality for conviction. As to whether or not the right arises only on request, fear that a request requirement would deprive those who do not know enough to ask for counsel of the assistance they need has resulted in the conclusion that request is not necessary for the right to exist. This is a continuance of the recognition that "equal protection" demands that these rights be extended to the ignorant as well as the learned.

A third phase of pre-trial activity in which an indigent defendant is subject to treatment differing from that accorded to a defendant with sufficient finances is in the area of admittance to bail. As yet there has been no Supreme Court decision holding that an indigent must be given the same right to pre-trial freedom as he would have if he were able to meet the financial requirements of bail. The United States Constitution does not confer the right of release on bail. The only requirement of the Constitution is that bail shall not be excessive. In *Stack v. Boyle*, the Supreme Court decided that the purpose of bail is to assure the presence of the defendant at the trial and that any figure set for bail which is higher than the amount reasonably calculated for this purpose is excessive. The feelings of some commentators is that, coupling the Stack case

be pleaded, or at which pleas in abatement or motions challenging the composition of the grand jury might be made.

25 Id. at 60.
27 This was the state of affairs in *Walton v. Arkansas*, 371 U.S. 28 (1962). The decision of constitutional conviction by the state court was vacated and remanded for reconsideration in light of *Hamilton v. Alabama*. In *Walton*, a defendant who was not represented by counsel at the arraignment admitted the voluntariness of a confession which was later introduced at his trial wherein he was ultimately convicted on the basis of the confession. On remand, 236 Ark. 439, 366 S.W.2d 707 (1963), the defendant was granted a new trial because of the reading of the statement he had made at the arraignment.
28 E.g., *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965). This case also decided that the right applied in misdemeanor as well as felony prosecutions.
29 The importance of pre-trial freedom is evident from a consideration of some of the detrimental effects of imprisonment at such a time. Mr. Justice Douglas, sitting as a Circuit Justice in *Bandy v. United States*, 81 Sup.Ct. 197 (1960), points out in his denial of an application for the reduction of bail pending certiorari, the results of inability to meet bail because of indigence, in addition to a denial of freedom, which are incurred by a defendant: "Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal." 81 Sup.Ct. at 198.
31 U.S. Const. amend. VIII.
32 342 U.S. 1 (1951).
with the reasoning in *Griffin v. Illinois*, 33 (denial of due process and equal protection under the fourteenth amendment to fail to provide an indigent with a record of trial proceedings for appeal purposes), it is but a short step to a decision that the fourteenth amendment would demand a release of an indigent who cannot meet bail where there are other factors which would assure his presence at the trial. 34 In other words, it is arguable that if bail is set at a figure which cannot be met by the indigent, and if his presence at the trial is assured by any number of factors besides a monetary bond, the bail is excessive.

Without awaiting judicial directives to the effect that an indigent be released prior to trial although he cannot meet the financial requirements for bail, various projects—both by statute and local agreement—have been instituted which make such pre-trial release possible. On the statutory side, exemplary of the measures undertaken are the recently enacted statutes in Illinois. The first of this series of legislation provides for release on recognizance in the discretion of the court. 36 The penalty for “bail-jumping” under this law is the imposition of additional criminal liability. The express policy basis of the statute is that pecuniary loss is not the sole effective means for compelling appearance at trial after pre-trial release: “This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.” 37 In line with the general tenor of the above section, the Illinois legislature has enacted another statute of benefit to indigents facing the problems of posting bail. Under this new section, release is allowed upon the deposit of 10% of the amount set for bail, and when the defendant complies with the conditions of the bond, 90% of this sum will be returned to him, with 10% being retained for administrative costs. 38 Such a statute requires the defendant in most cases, to secure a lesser amount of money than would be necessary for payment of a full bail-bond premium to a commercial bondsman. This section has created a predictable furor with the Illinois bondsmen, and has led them to institute a taxpayers’ suit to declare

---

33 351 U.S. 12 (1956).
In the federal system the financial resources of the defendant and his character are two matters to be considered in determining the amount of bail. Fed. R. Crim. P. 46(c).
35 For a comprehensive study of the many alternatives to bail which are being used in various parts of the United States and other countries, see Goldfarb, *Ransom, A Critique of the American Bail System* (1965).
36 Ill. Rev. Stat. ch. 38, § 110-2 (1964), provides in part:

> When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32-10 of the “Criminal Code of 1961,” . . . for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected.

37 Ibid.
38 The pertinent provisions of Ill. Rev. Stat. ch. 38, § 110-7 (Supp. 1965) are:

> (a) The person for whom bail has been set shall execute the bail bond and deposit with the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

> (f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the case the clerk of the court shall return to the accused 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.
the law unconstitutional. While this system may not insure appearance by the defendant, it will allow pre-trial release for many who would not otherwise obtain this benefit. An additional incentive to appear under this system is that a defendant knows that upon appearance he will receive a refund of a large part of the security. Contrast this with the situation of a defendant dealing with a bail bondsman; he will have none of the premium returned to him even if he appears.

Perhaps the best known example of the non-statutory projects for the pre-trial release of indigents is the Manhattan Bail Project carried out under the auspices of the Vera Foundation. This system is based on the theory that investigation may reveal other factors which are sufficient deterrents to flight so as to dispense with the necessity of imposing financial requirements for bail. Under this plan defendants are interviewed, and their statements are taken and checked for accuracy. On the basis of these interviews and statements, recommendations are made to the court by the Foundation workers (full-time law students) as to whether an individual is a good release risk. It then remains for the court to determine if the defendant will be released on his own recognizance. If released, the Foundation keeps in touch with each person and reminds him of his time to appear. During its first three years of operation of the Manhattan Project, 98.5% of the defendants released have appeared at the scheduled time. Of the persons released under regular bail procedures during the same period, almost three times as many failed to present themselves.

Such statistics are a testimony to the efficacy of this type of system. Until there is a judicial decree as to whether an indigent must be admitted to bail as he would be if he had sufficient finances, the only hope of combatting the harmful effects of pre-trial incarceration rests in local adoption of such devices as the Illinois statutes and the Manhattan Project, which have proved that the fear of forfeiting a large sum of money is not the only adequate means of assuring that a released defendant will appear at trial.

39 The arguments of the bondsmen were that the state was soliciting bond business at a loss to taxpayers, the state was placed in a preferred position over free enterprise and that the possibility of the state keeping only 10% in case of forfeiture, as opposed to 100% in situations with a bondsman, created a false sense of security in the taxpayers who would believe that the revenue from forfeited bonds would amount to 100% of the amount of the bonds. This last argument is questionable in light of the fact that there is no requirement that the state collect only the 10% deposit upon forfeiture. Goldfarb, op. cit. supra note 35, at 201-02.

40 Goldfarb, op. cit. supra note 35, at 201-03. In substance this bill was introduced in the U.S. Senate during the second session of the 88th Congress. Important in both the Illinois passage and the presentment to Congress was the idea that such a statute not only permits pre-trial freedom for the indigent, but it may also serve to release the stranglehold exercised by commercial bondsmen in determining who is to be freed on bail.

41 Mr. Justice Douglas sitting as a circuit justice in Bandy v. United States, 81 Sup.Ct. 197, 198 (1960), lists among the factors which may be considered: long residence in a locality, the ties of friends and family, the efficiency of modern police. Similar factors are mentioned in McCoy v. United States, 34 U.S.L. Week 2383 (D.C. Cir. Jan. 17, 1966) and Reeves v. State, 411 P. 2d 212 (Alaska 1966). Commentators feel that a consideration of these factors, in addition to conferring the benefits of release on many who might not otherwise enjoy them, will serve to prevent the contamination of youthful and first offenders by association with hardened criminals. Botein, The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes, 43 Tex. L. Rev. 319, 325-26 (1965).

III. Rights of the Indigent Criminal Defendant During Trial

If an indigent does not have counsel at the trial stage of the criminal proceeding, he is denied the guidance necessary to make an effective presentation of his case to those who have the power to deprive him of his life or liberty. The inequality of status of the indigent defendant with those who have sufficient funds to hire an attorney learned in the technicalities of criminal procedure is apparent. It was early decided, in *Johnson v. Zerbst*, \(^{43}\) 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." However, the constitution does not expressly guarantee the same right in a state criminal proceeding, and the Supreme Court decided four years after *Johnson*, in the case of *Betts v. Brady*, \(^{45}\) that this guarantee of the sixth amendment was not made binding on the states by the fourteenth.

The initial decisions subsequent to *Betts* holding that the right to counsel was guaranteed by the fourteenth amendment turned on the particular circumstances of each case. Exemplary of such decisions is *Powell v. Alabama*.\(^{46}\) In that case, seven ignorant and illiterate Negro youths were tried for the rape of two white girls. The crime was one for which capital punishment could have been imposed. The matter of counsel was disposed of in casual fashion by appointing the entire bar to represent the defendants; none of the appointed counsel consulted with them prior to trial. In reversing the conviction, the Court decided that,

in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.\(^{47}\)

Later cases such as *Cash v. Culver*,\(^{48}\) and *McNeal v. Culver*,\(^{49}\) indicated that this reasoning was not to be confined to capital cases. Determining whether the absence of counsel was a violation of due process was a matter of investigating the mental capacity of the defendant and judging whether each case contained "complex and intricate legal questions [which] were . . . 'beyond the ken of a laymen.'"\(^{50}\)

However, such an approach failed to recognize that nearly every case contains legal questions, determinative of guilt or innocence, which are beyond the ken of laymen possessing even superior intelligence. Very few laymen are

\(^{43}\) 304 U.S. 458 (1938).
\(^{44}\) Id. at 463.
\(^{45}\) 316 U.S. 435 (1942). However, the Court did add that lack of counsel in a particular case could lead to a conviction lacking in such fundamental fairness as to violate the due process clause of the fourteenth amendment. Id. at 473.
\(^{46}\) 287 U.S. 45 (1932).
\(^{47}\) Id. at 71.
\(^{49}\) 365 U.S. 109 (1961) (prosecution for "Assault to Murder in the First Degree").
\(^{50}\) Id. at 116.
equipped to know, present, and argue effectively the legal implications of questions such as the denial of due process resultant upon: comment by the court or prosecution as to the defendant’s failure to take the stand in his own behalf as evidence of guilt;51 use of the fruit of testimony in a state (federal) prosecution of a witness, where such testimony was given under a grant of immunity by the federal (state) government;52 compelling a criminal defendant to testify against himself in a state court;53 refusing a request for a change of venue when the people of the locality have previously been exposed to the defendant’s personal confession;54 admitting into evidence a confession which is the result of the defendant’s mind being overborne by the police;55 suppressing evidence favorable to an accused after he has requested it;56 admitting into evidence a confession which is the product of the administration of a “truth serum”;57 or in admitting into evidence in a state court articles obtained by searches and seizures in violation of the federal constitution.58

Recognition of the lack of capacity of the ordinary defendant to act effectively in such matters did come finally in Gideon v. Wainwright.59 In that case an indigent defendant on trial in a state court for a noncapital felony was denied his request for the appointment of counsel. Betts v. Brady60 was reconsidered and overruled on the ground that the right to counsel is such a fundamental right, essential to a fair trial, that it is made mandatory on the states by the due process clause of the fourteenth amendment. The Court returned to the reasoning in Powell and expanded the limited holding of that case. However, two questions remain unanswered by the express language of Gideon: (1) Is this a right which arises only upon request? (2) What degree of aid must be furnished by counsel whom the state is now required to appoint?

As to the initial inquiry, dealing with the necessity of a request, the decision in the pre-Gideon case of Carnley v. Cochran expressly stated that “where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.”61 If there is doubt as to the applicability of this language to a Gideon situation, it is resolved by the Supreme Court’s decision in Doughty v. Maxwell.62 There a right to counsel case had been remanded earlier to the Ohio courts for reconsideration in light of Gideon. Upon remand, the Ohio Supreme Court held that the defendant had not been denied the right to counsel because he had failed to make a request for an attorney when he pleaded guilty to a rape charge.63 However, the United States Supreme Court then reversed in a per curiam decision, simply citing Gideon and Carnley.

In answer to the second question posed above, regarding the type of assistance which must be rendered, the pertinent decisions are both old and new.

60 316 U.S. 455 (1942).
The opinion in *Powell* initially spoke of appointed counsel giving "effective aid." Later in *Ferguson v. Georgia*, the Court repeated that the right to counsel is the right to effective assistance of counsel and extended the effective assistance standard to apply "in the case of an accused tried for a noncapital offense, or represented by appointed counsel."

The decisions in this area either simply state the rule of "effective assistance of counsel" without explanation or give explanations of what is not effective assistance. It is accepted that the judgment of ineffectiveness is not to be made simply by hindsight. Representative of the statements as to what does not constitute "effective assistance of counsel" is the language in *Turner v. Maryland*, that,

to establish a claim of inadequacy it is [not] necessary to show an extreme situation of counsel treacherously conniving with the prosecutor to defraud the client of his rights. Without this feature a trial may still be so lacking in fundamental fairness as to constitute a denial of constitutional rights.

The requirement is not satisfied if a court-designated lawyer makes a merely perfunctory appearance and does nothing whatever before or during the trial to advise his client or protect his rights. . . . Pro forma entry of an appearance without study or preparation for useful participation in the trial is not a satisfaction of the constitutional rights of an accused.

The requirement of "effective assistance of counsel" protects against any attempt at *pro forma* compliance with the constitutional right of representation. However, while this standard aims to equalize status, there is no requirement that a defendant be furnished with the best attorney possible or that he have the unqualified right to select counsel he desires. The constitutional mandate is only that the indigent have the same benefits before the court and jury as he would enjoy if he were financially able to hire a competent lawyer.

One of the important ramifications of *Gideon* is its effect on the application of recidivist or habitual criminal statutes. Because the presence or absence of counsel is thought to go to the fundamental fairness of the trial, the *Gideon* rule has been held to apply retrospectively. Not only does such a retrospective application invalidate prior convictions, but since use of a multiple offender statute depends on the existence of prior convictions, their invalidation necessarily imparts illegality and unconstitutionality to add sentences imposed

---

64 287 U.S. 45, 71 (1932).
65 365 U.S. 570 (1961). This case declared unconstitutional the provision of the Georgia Criminal Code which prohibited the questioning of a defendant by his own attorney even if he wished to testify in his own behalf, on the ground that the provision denied the defendant effective assistance of counsel at a crucial point in the trial.
66 *Id.* at 596. State courts have followed the requirement of "effective assistance." See, e.g., *In re Shuttle*, 214 A.2d 48 (Vt. 1965).
68 *Id.* at 507 (4th Cir. 1962).
69 *Id.* at 510.
70 *Id.* at 511.
72 *Linkletter v. Walker*, 381 U.S. 618, 639 (1965). The Court in *Linkletter* notes that *Gideon* itself was a retrospective application of the rule it announced since the defendant there collaterally attacked the prior judgment by a post-conviction remedy. 381 U.S. at 628 n.13.
IV. Rights of the Indigent Criminal Defendant After Trial

The initial problem of the indigent defendant who has been convicted at the trial is to bring his appeal before the proper court. A number of states, in an effort to allay administrative expenses, and not as an intended discrimination against indigent persons, provide that certain fees must be paid for the docketing of an appeal. Inability to comply with such statutes results in no appeal for those without sufficient finances. The Supreme Court, in *Burns v. Ohio*, decided that, under the fourteenth amendment, a state could not so limit the right to invoke the jurisdiction of its appellate courts. The Court concluded that such fee requirements were based upon the irrational assumption that the motion of an indigent was less meritorious than that of another defendant. Subsequently in *Smith v. Bennett*, it was held that the *Burns* decision extended to post-conviction proceedings other than appeals because "to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." These cases are a recognition of the fundamental fact that the judicial machinery is not infallible and that everyone should be granted an equal opportunity to partake of its corrective measures. Recognition of this same fundamental principle is found in analogous decisions of the Supreme Court to the effect that in the federal judicial system a defendant should not be barred from having his appeal heard when, acting alone, he fails to file a timely appeal although he took all possible steps to do so as well as in decisions holding that a defendant must be provided with counsel and a record of sufficient completeness in an attempt to challenge a district court's denial of his motion to proceed *in forma pauperis* on appeal.

Once a convicted defendant has been given access to the appellate system, the basis of any reversal must be the discovery of error in the proceedings below. Adequate discovery and presentation of trial errors can be made only when a sufficient record of the proceedings is available for examination by appellant's counsel. The burden of competent appellate tactics falls heavily on a defendant who cannot afford to purchase an adequate trial record. The Supreme Court recognized in *Griffin v. Illinois*, that the fourteenth amendment prohibits such

---

75 Id. at 257-58.
77 Id. at 709.
79 *Coppedge v. United States*, 369 U.S. 438 (1962). This opinion also noted that a liberal view has been taken of papers — such as an appeal bond in a district court, notice of appeal given to prison officials for filing, and letters to a district court for leave to appeal *in forma pauperis* — filed by indigent and incarcerated defendants, as equivalents of notices of appeal to preserve jurisdiction in the courts of appeal. Id. at 442 n.5. For a comprehensive treatment of the availability of post-conviction procedures after failure to file timely notice of appeal, see Note, 41 *NOTRE DAME LAWYER* 73 (1965).
inequality of opportunity at this stage of the criminal law enforcement process. The ruling in *Griffin* is based on the conclusion that,

to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.\(^8\)

Therefore, the state is required to supply without cost to the defendant, who cannot afford it, a transcript or other sufficient record of the trial (such as a bystander's bill of exception).

As noted in *Eskridge v. Washington Prison Bd.*,\(^8\) this rule does not require a transcript to be furnished whenever a criminal defendant seeks appellate review; rather it requires that adequate appellate review be afforded to rich and poor alike and this may be assured by various substitutes for a transcript. Although *Griffin* expressly provides for substitutes the one afforded by the state of Washington in *Eskridge* was declared to be inadequate.\(^8\) There a state statute allowed a trial judge to deny a petition for a free transcript if he was of the opinion that justice would not be promoted by the granting of the transcript. This interposition of a government official between an indigent and the appellate courts was likewise the basis for the decision in *Lane v. Brown*,\(^8\) that the Indiana system for supplying free trial records to indigents was unconstitutional. Under the Indiana procedure a public defender could obtain a free transcript on appeal if he deemed the appeal to be meritorious. However, if he concluded against the defendant, there was no provision whereby the latter could obtain the record himself. The constitutional insufficiency of these two systems lies in the fact that rather than granting a substitute for a transcript, as was envisioned by the Court in *Griffin*, those states had provided a substitute for *full appellate review* in the case of an indigent.\(^8\)

The requirements of *Griffin* and *Eskridge* are not that the state place the indigent in the same stead as an affluent appellant. Thus, although financially able defendants might waste money on the purchase of an entire transcript when only a part is sufficient, the duty of the state is merely to furnish an adequate record of those portions of the trial proceedings wherein the claimed errors lie.\(^8\) As an incidental point, it might be noted here that if, as may often be the case when a person convicted prior to *Griffin* now seeks a free trial record on the basis of a retroactive application of that decision, it is presently impossible to

\(^{81}\) Id. at 19. The Court did acknowledge, as it did later in *Smith v. Bennett*, 365 U.S. 708 (1961), that the conclusion here applies only after a state has instituted an appellate system and that establishment of such a process is not obligatory on the states. *Id.* at 18.


\(^{83}\) *Id.* at 216.


\(^{86}\) *Draper v. Washington*, 372 U.S. 487 (1963). This case declared unconstitutional, as used in the instant situation, the Washington system — initiated after *Eskridge* — for granting trial records to indigents. Again the critical factor was that an indigent was given an inadequate substitute for full appellate review.
reconstruct an adequate record for appeal and the defendant had a lawyer for purposes of an appeal which was not pursued, it has been held that the state may with impunity deny him relief. 87

Although a case arising in the federal criminal system, *Hardy v. United States*, 88 contains language which may indicate the probable resolution of the question of whether it is ever necessary to grant an indigent an entire record of the trial. In answer the Supreme Court states that the furnishing of a transcript relevant to the points of error assigned is the minimum which is required and that where a defendant is represented by a different counsel on appeal, no less than a full record suffices. 89 It would seem that if the same situation were presented in the context of a state criminal system, a decision that the entire record is unnecessary in such a case would conflict with the reasoning in *Eskridge* and *Draper v. Washington* 90 that the indigent may not be denied the full appellate review available to the defendant with finances. No matter how complete a transcript may be, if there is no one with sufficient training to discover errors, it is for all practical purposes useless to the appellant. For this reason it was decided in *Douglas v. California* 91 that the fourteenth amendment obligates the states to appoint counsel for indigents in the first appeal which is granted to all as a matter of right. The Court concluded that denial of counsel on the ground that appointment would not be advantageous to the defendant or the court was as invidious a discrimination against the poor as the practice condemned in *Griffin* because,

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. 92

This statement re-emphasizes the concepts which underlie the decision in *Gideon* that counsel must be appointed for trial.

87 Norvell v. Illinois, 373 U.S. 420, rehearing denied, 375 U.S. 870 (1963) (transcript unavailable because of death of court reporter subsequent to 1941 conviction). The Court in *Linkletter* noted that *Eskridge* provided for retroactive application inasmuch as that case dealt with a conviction some twenty years before *Griffin*. 381 U.S. at 628 n.13. However, Mr. Justice Goldberg, in dissent in *Norvell*, says that the Court tacitly approves a peculiar type of retroactivity here in that the inquiry is to whether there is a deprivation of constitutional rights when the defendant, convicted prior to *Griffin* now seeks a free transcript, rather than to whether he was deprived of his constitutional rights when denied a transcript at the time of his original conviction and appeal. 373 U.S. at 424-25. For a comprehensive treatment of the Supreme Court's pronouncements on the retroactive application of various constitutional-criminal law decisions, see Note 41, NOTRE DAME LAWYER 206 (1965).


89 Id. at 280. The Court expressly states, however, that its opinion involves only the statutory scheme provided and does not reach constitutional requirements. Also controlling in *Hardy* is the decision in *Ellis v. United States*, 356 U.S. 674 (1958), cert. denied, 359 U.S. 998 (1959), that the duty of counsel is not to serve as amicus to the court of appeals, but as an advocate for the appellant and the duties of an advocate require full preparation which can be made only with the aid of a full record. 375 U.S. at 281-82.


92 Id. at 357-58.
It must be recognized that the decision in *Douglas* limits the right to counsel to the initial appeal to which the defendant is entitled as a matter of right.93 Hence, while the decision comports with the reasoning of prior cases that equal protection demands equal status of rich and poor alike, it leaves open an important question which hopefully will be answered conclusively by the Supreme Court — is there a right to counsel in post-conviction and habeas corpus proceedings despite the fact that they are civil in nature?94 A possible answer is that the right to counsel does exist in the prosecution of an action for post-conviction relief on the theory, as advanced in *Hamilton v. Alabama*,95 that although technically civil in nature, the post-conviction proceeding, by virtue of the frequency of its use, has become an integral part of the criminal law enforcement process and therefore that counsel must be appointed for an indigent undertaking such a remedy.96

V. Conclusion

The recent pronouncements of federal and state courts indicate an awareness that the ordinary layman is not equipped to defend his rights effectively in the various phases of the criminal law enforcement process. While judicial recognition of the right to counsel under the Constitution may be the answer in the majority of cases, this approach offers no solution for the group of persons who do not know enough to assert this right or who are financially incapable of acquiring the services of competent legal counsel. The remedies of the courts in such situations have been declarations that where such rights exist they must be granted to rich and poor alike and that, if a person is unable to procure such rights through his own resources, the government is obligated to aid him. However, such decisions apparently are not a panacea for the ills of the indigent. Conclusive answers are yet to be supplied to the important questions of whether the right to counsel at the police interrogation arises only on request and whether advice as to the existence of the right is necessary; whether the Constitution requires release of a defendant on pre-trial bail if there are other factors to assure presence at the trial when he is unable to meet the financial requisites of bail; and whether post-conviction proceedings, though civil in nature, have become so critical in criminal judicial process that defendant is entitled to the assistance of counsel. Judging from the tenor of recent Supreme Court decisions, it would appear that discovery of constitutional protective for the indigent in these areas is forthcoming upon presentation of the proper cases for adjudication.

Alvin J. McKenna