

**A LEGISLATIVE CHALLENGE: A PROPOSED MODEL
STATUTE TO PROVIDE FOR THE APPOINTMENT OF
COUNSEL IN STATE HABEAS CORPUS PROCEEDINGS FOR
INDIGENT PETITIONERS**

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INTRODUCTION

The U.S. Supreme Court and most state supreme courts¹ do not require that counsel be provided as a matter of constitutional right to indigent petitioners in habeas corpus² cases. Most courts have rejected a constitutional right to counsel because of the belief that the writ of habeas corpus is technically a civil matter.³ However, a writ of habeas corpus is a major remedy for prisoners, and it may be the first time some prisoners are able to raise legitimate claims.⁴ The state of Mississippi exemplifies the one exception to judicial hesitation to extend the right of counsel to the habeas corpus context.⁵ The Mississippi Supreme Court held that assistance of counsel for capital postconviction petitioners is a constitutional right.⁶

Constitutional rights and fundamental values are implemented by institutions other than courts. Thirty-two states have created a statutory right

¹ The Mississippi Supreme Court is the major exception. *See infra* note 33.

² For the purposes of this Comment, habeas corpus is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 715 (7th ed. 1999). A person can bring a writ of habeas corpus any time she is being detained by the government, but this Comment addresses habeas corpus in the postconviction setting.

³ *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment guarantee of counsel in a criminal trial is incorporated to the states via the Fourteenth Amendment).

⁴ One of the major claims that can first be raised on a petition for a writ of habeas corpus is often ineffective assistance of counsel. *See Letty S. Di Giulio, Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109 (1999) (discussing of the interplay between ineffective assistance of counsel claims and the right to counsel in postconviction relief).

⁵ *See infra* note 33.

⁶ *See Jackson v. State*, 732 So. 2d 187, 191 (Miss. 1999); *see also infra* note 33.

to counsel in habeas corpus cases.⁷ Other states have passed statutes giving courts the discretion to appoint counsel.⁸ This Comment analyzes the legislative efforts to provide counsel for petitioners in habeas corpus cases.⁹ Looking to the courts to implement a right to counsel in habeas corpus proceedings is misguided.¹⁰

This Comment argues that because habeas corpus is in essence a quasi-criminal proceeding, counsel should be provided as in other criminal proceedings. Though courts may not believe that they are bound by a constitutional mandate to appoint counsel for habeas corpus petitioners, legislatures also swear to uphold the Constitution and should honor the constitutional text and spirit through the creation of statutory rights which reflect constitutional principles.

Part I explains the general unwillingness of courts to mandate the appointment of counsel in habeas corpus cases. Part I.A clarifies the U.S. Supreme Court's jurisprudence regarding the right to counsel in habeas corpus proceedings. Part I.B provides a brief account of the Mississippi Supreme Court as the lone state supreme court to articulate a right to counsel for habeas corpus petitioners, highlighting the contrast between the judicial remedy and the legislative remedy. This Section also shows how three states' judiciaries implemented the right to counsel for habeas petitioners through their inherent power to draft court rules.

Part II explains the aspects and history of the writ of habeas corpus, which illuminate the need for the appointment of counsel to indigent petitioners. The history of habeas corpus contrasts greatly with the judicial hesitancy to mandate appointment of counsel in such cases; but more importantly, it emphasizes the urgent need for legislatures to take action. Part II.A provides the history of the U.S. Supreme Court's jurisprudence of the writ of habeas corpus. Part II.B provides a brief overview of the federal statutory right to counsel. Part II concludes with the example of the Dr. Sam Sheppard case of

⁷ See *infra* Appendix A.

⁸ See *infra* Appendix A.

⁹ State governments are the best situated to implement change in this area because Congress has not exhibited a desire to extend the right to counsel to pro se defendants. See 28 U.S.C. § 2254 (2000). Furthermore, the United States Supreme Court explicitly held that there is no federal constitutional right to counsel in habeas corpus proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

¹⁰ See Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 34 (arguing that change must emanate from federal and state legislative branches).

the 1950s, which exemplifies the historic importance of the writ and the necessity for the assistance of counsel in modern times.

Part III provides a description of the current legislative landscape in the states regarding the appointment of counsel for indigent habeas petitioners. This Part highlights how different states have wrestled with the issue of the appointment of counsel in habeas corpus cases and how different states have reached different conclusions regarding the scope of the right to counsel. Part III.A describes the default position in which trial courts maintain the discretion to appoint counsel for habeas corpus petitioners. This section concludes with an examination of judicial review of such discretionary decisions. Part III.B highlights those states which have mandated an absolute right to counsel for all habeas corpus petitioners. Part III.C describes those states that only mandate the appointment of counsel for capital habeas corpus petitioners. Part III.D briefly surveys those states that only provide a conditional right of counsel for habeas corpus petitioners.

Part IV provides state legislative models—and critiques of those models—for implementing a right to counsel in habeas corpus proceedings. While some state models include an absolute right to counsel, others only provide a conditional right to counsel in habeas corpus proceedings. Part IV.A explains the absolute right model while Part IV.B explains the conditional right model. The conditional right to counsel model has two approaches. Part IV.B.1 describes the first approach, which is based upon the type of punishment the habeas corpus petitioner faces. Part IV.B.2 describes the other approach, which is based upon the type of claim the habeas corpus petitioner presents. Part IV.B.2.a describes a model whereby the state legislature determines through its statutory delineations whether counsel should be appointed for the habeas corpus petitioner. Part IV.B.2.b provides a model where the statute leaves the decision to the discretion of the trial judge. Finally, Part IV.B.2.c provides a model of a statute which gives discretion to the state public defense board of whether to appoint counsel for the habeas corpus petitioner.

Finally, Part V proposes a solution for a better legislative approach to implementing a right to counsel in habeas corpus proceedings. Appendix A is a chart describing the right to counsel for habeas corpus petitioners in the fifty states. Appendix B proposes a model statute for legislatures to consider in adopting a right to counsel for indigent habeas corpus petitioners.

I. THE CURRENT LACK OF A CONSTITUTIONAL RIGHT TO COUNSEL IN HABEAS CORPUS PROCEEDINGS VERSUS THE HISTORICAL IMPORTANCE OF THE PROCEEDING

A. *U.S. Supreme Court Jurisprudence*

The text of the U.S. Constitution provides for a writ of habeas corpus: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.”¹¹ Congress has implemented the right to a writ of habeas corpus by statute.¹² All states provide similar constitutional guarantees to the writ of habeas corpus in their state constitutions.¹³ Thus, courts in both the federal and state system provide habeas corpus review.

Despite the explicit constitutional foundation for habeas corpus, there is no federal constitutional right to the assistance of counsel in habeas corpus proceedings.¹⁴ The U.S. Supreme Court considers habeas corpus a civil proceeding, not a criminal proceeding.¹⁵ The Sixth Amendment right to counsel only applies in criminal proceedings and does not apply in civil proceedings.¹⁶ As such, there exists no constitutional right to counsel in a civil case.¹⁷

Refusing to acknowledge the quasi-criminal nature of the habeas corpus proceeding, the U.S. Supreme Court has held that because a petition for a writ of habeas corpus is a civil proceeding, there is no absolute or automatic right to an attorney.¹⁸ In *Pennsylvania v. Finley*, the Court held that neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment require states to appoint counsel on behalf of indigent prisoners seeking state postconviction relief.¹⁹

¹¹ U.S. CONST. art. I, § 9.

¹² 28 U.S.C. § 2254.

¹³ *E.g.*, ALA. CONST. art. I, § 17.

¹⁴ *Finley*, 481 U.S. at 555.

¹⁵ *E.g.*, *id.* Justice Rehnquist explained, “Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.” *Id.* at 556–57.

¹⁶ U.S. CONST. amend. VI.

¹⁷ *See id.*

¹⁸ *Finley*, 481 U.S. at 558.

¹⁹ *Id.* As an aside, *Pennsylvania v. Finley* was a noncapital case. However, the Court did not rest its holding on the nature of the punishment involved. *See generally id.*

Moreover, the U.S. Supreme Court makes no distinction in postconviction habeas proceedings between capital and noncapital cases.²⁰ In capital cases, however, the writ of habeas corpus is extremely important to the prisoner because, aside from an executive pardon, it is his last chance for relief before his execution. Scholars Randy Hertz and James Liebman highlight the importance of the role of habeas corpus in death penalty cases:

If the adverse “custodial” consequences of any misdemeanor or felony conviction, including the consequences accompanying parole, probation, and release on recognizance are sufficient to justify federal habeas corpus review as of right, then such review would seem to be of infinitely greater importance when the adverse consequence is death.²¹

Nonetheless, in *Murray v. Giarratano*,²² a plurality²³ of the Supreme Court refused to find that a sentence of death requires a different standard of review in a federal habeas corpus proceeding.²⁴ In *Murray*, Virginia death row inmates brought a class action suit alleging that the federal Constitution required they be provided with counsel at the state’s expense to assist in their pursuit of collateral proceedings related to their convictions and death penalty sentences.²⁵ The Court rejected the prisoners’ arguments that the uniqueness and severity of the death penalty required a more generous standard of review of state habeas decisions.²⁶ The plurality held that the rule of *Pennsylvania v.*

²⁰ Capital cases are criminal cases in which the death penalty is one of the potential sentences that can be inflicted on the defendant if he is found guilty. The death penalty is not an option for punishment in a noncapital case. Capital is defined as “[p]unishable by execution.” BLACK’S LAW DICTIONARY 200 (7th ed. 1999).

²¹ RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE 100 (4th ed. 2001) (internal citations omitted).

²² 492 U.S. 1 (1989).

²³ Justice Kennedy concurred in the judgment on the grounds that no capital prisoner in Virginia had been unable to secure the assistance of counsel in postconviction proceedings. *Id.* at 13 (Kennedy, J., concurring). Justice Kennedy explained:

[T]his Court lacks the capacity to undertake the searching and comprehensive review called for in this area, for we can decide only the case before us. While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings I am not prepared to say that this scheme violates the Constitution.

Id. at 14–15.

²⁴ *Id.* at 12. For a criticism of this case, see Geraldine Szott Moohr, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 766–67 (1990).

²⁵ *Murray*, 492 U.S. at 3.

²⁶ *Id.* at 12.

*Finley*²⁷ should apply no differently in capital cases versus noncapital cases.²⁸ The Court emphasized that “state collateral proceedings are not constitutionally required as an adjunct to state criminal proceedings”²⁹ Such collateral proceedings serve a different, more limited purpose than both the trial and appeal phases.³⁰ In her concurring opinion, Justice O’Connor emphasized the civil nature of habeas corpus.³¹

B. States That Judicially Mandate the Right to Counsel for Habeas Petitioners

Mississippi’s Supreme Court has found a constitutional right to counsel in habeas corpus cases. Three other state courts have created a conditional right to counsel through the drafting of court rules.³²

1. The Mississippi Example

Only one state supreme court mandates that the Constitution requires a right to counsel for petitioners in habeas corpus proceedings.³³ The Mississippi Supreme Court held that assistance of counsel for capital postconviction petitioners is a constitutional right.³⁴ The court classified habeas corpus as “a unique kind of civil action.”³⁵ The court explained the important historical pedigree of the writ of habeas corpus: “The writ of habeas corpus has been a hallmark in the protection of our individual freedoms since being brought to this country by our forefathers from England. It is a civil action brought to test the legalities of confinement and to enforce the civil right of personal liberty.”³⁶ Justice McRae explained that indigent capital prisoners are unable to engage in this litigation without assistance.

The majority rested its holding on Justice Kennedy’s concurrence in *Murray v. Giarratano*, which joined the plurality’s opinion on the narrow

²⁷ 481 U.S. 551 (1987).

²⁸ *Murray*, 492 U.S. at 10.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 13 (O’Connor, J., concurring). O’Connor pointed out that as a civil action, habeas corpus was put in place to overturn a presumptively valid criminal judgment. *Id.*

³² These states are Kentucky, Colorado, and Idaho. *See* Appendix A, *infra*.

³³ *Jackson v. State*, 732 So. 2d 187 (Miss. 1999).

³⁴ *Id.*

³⁵ *Id.* at 190. The Court reasoned, “The reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level.” *Id.*

³⁶ *Id.*

grounds that Virginia's system did not violate the Constitution.³⁷ The Mississippi Supreme Court noted that unlike Virginia, where prisoners had in fact been able to find attorneys to represent them in the postconviction proceedings, their state prisoners were not so fortunate.³⁸ Justice McRae emphasized that since 1995, inmates in Mississippi had been unsuccessful in their attempts to secure counsel or legal assistance.³⁹ The court explained the necessity of counsel for inmates seeking postconviction relief: "Applications for postconviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend"⁴⁰

In essence, a majority of the Mississippi Supreme Court said it could not wait for the legislature to take action.⁴¹ Justice McRae explained, "The Legislature has been aware of this acute problem. In the 1998 session, it took the first step toward the institution of a statewide public defender system. It is strongly urged that the Legislature proceed toward a solution to this problem We can no longer sit idly by."⁴²

2. *States That Impose Right Through Court Rule*

Rather than finding a state or federal constitutional right to counsel for habeas corpus petitioners, three state courts have created a conditional right to counsel through rules of criminal procedure.⁴³ The Kentucky judiciary provides a good example.⁴⁴ Kentucky's rules of criminal procedure require the court to appoint counsel to a petitioner if the petition raises a material issue of fact that cannot be determined on the face of the record and the petitioner makes a written request for the appointment of counsel.⁴⁵

³⁷ 492 U.S. 1, 14–15 (1989) (Kennedy, J., concurring); *see also supra* note 33.

³⁸ *Jackson*, 732 So. 2d at 191.

³⁹ *Id.*

⁴⁰ *Id.* at 190.

⁴¹ Prior to this landmark case, *Jackson v. State*, the practice in Mississippi was for the courts to deny appellate counsel leave to withdraw from the postconviction stage unless the defendant desired to proceed pro se or substitute counsel could be found. *Id.* Such a practice created issues when the petition for postconviction relief involved a claim of ineffective assistance of counsel and substitute counsel was very hard to find. *Id.*

⁴² *Id.*

⁴³ *See infra* Appendix A (listing Colorado, Idaho, and Kentucky).

⁴⁴ *See* KY. R. CRIM. P. 11.42(5).

⁴⁵ *Id.*

The Colorado judiciary also addresses the right to counsel for habeas corpus petitioners through its court rules. Rather than providing factors for determining appointment, the rule directs the court to refer the petition to the public defender's office for consideration.⁴⁶ Finally, the *Idaho Rules of Criminal Procedure* provide that if a petitioner is sentenced to death, the court shall appoint counsel.⁴⁷ Thus, the Idaho judiciary provides a right to an attorney for indigent petitioners who face capital punishment.⁴⁸

Kentucky, Colorado, and Idaho are unique in their approach to the appointment of counsel for habeas corpus proceedings. Thus, although a few state courts have taken the lead in the appointment of counsel for indigent habeas corpus petitioners, these courts are the exception. The Mississippi Supreme Court provides an exceptionally unusual example of mandating the right to counsel in habeas corpus proceedings.⁴⁹

II. THE HISTORY OF HABEAS CORPUS REVEALS THE NECESSITY FOR THE APPOINTMENT OF COUNSEL IN STATE HABEAS CORPUS PROCEEDINGS FOR INDIGENT PETITIONERS

To explore whether it is necessary that counsel be appointed for indigent habeas corpus petitioners, it is important to understand and appreciate the deep historical roots of the writ of habeas corpus. Habeas corpus is “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal”⁵⁰ Moreover, habeas corpus is a protection for the individual, ensuring that the government cannot illegally hold a “body” in prison.⁵¹ Being held in custody by either the state or the federal government is the basic prerequisite for a writ of habeas corpus.⁵² In essence, the writ provides a judicial check on the federal or state executive branch’s act in imprisoning or detaining a person. The habeas corpus petitioner must show that he is in custody in violation of the U.S. Constitution, federal laws, or treaties.⁵³ Protection of the writ of habeas corpus was written

⁴⁶ COLO. R. CRIM. P. 35(c)(3)(v).

⁴⁷ IDAHO CRIM. R. 44.2(l).

⁴⁸ *Id.*

⁴⁹ *See* Jackson v. State, 732 So. 2d 187 (Miss. 1999).

⁵⁰ BLACK’S LAW DICTIONARY 715 (7th ed. 1999).

⁵¹ *Id.*

⁵² HERTZ & LIEBMAN, *supra* note 21, at 361–62.

⁵³ *Id.* at 403.

into English law by the Habeas Corpus Act of 1679, which was one of the four great charters of English liberty.⁵⁴

The right of habeas corpus derives from both the federal Constitution and Congress. Section A of this Part provides an overview of the U.S. Supreme Court habeas jurisprudence. Section B explores the foundation and judicial interpretation of the federal statutory right to habeas corpus. Finally, the Dr. Sam Sheppard case highlights the modern need for the appointment of counsel in habeas corpus proceedings.

A. *U.S. Supreme Court Jurisprudence*

One of the reasons that habeas corpus jurisprudence can be extremely confusing⁵⁵ is that the Supreme Court has placed such varied, and often somewhat contradictory, labels on the writ of habeas corpus. Although the Court usually refers to a writ of habeas corpus as a “civil” remedy, which is partly governed by the *Federal Rules of Civil Procedure*, it has also referred to the writ as “a clearly appellate procedure”⁵⁶ Furthermore, the Court has called the writ of habeas corpus “an independent civil suit” which provides “collateral” review of the legality of a criminal judgment.⁵⁷ The Court has paradoxically referred to a writ of habeas corpus as both a legal and an equitable remedy.⁵⁸ Historically, the Court defined the writ of habeas corpus as a legal remedy, but in more recent cases, the Court has said that the writ should be “governed by equitable principles.”⁵⁹

Ex parte Siebold was one of the first cases to deal with the writ of habeas corpus in the New World.⁶⁰ The petitioners were a group of judges who had been indicted, tried, convicted, and imprisoned for violating federal law while working at a voting precinct in Baltimore.⁶¹ In essence, the judges were

⁵⁴ For more information on the English heritage of the writ of habeas corpus, see *id.*

⁵⁵ An understanding and an interpretation of federal habeas corpus jurisprudence has baffled scholars throughout the nation’s history. Compare *Fay v. Noia*, 372 U.S. 391 (1963), with Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). See generally Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993)

⁵⁶ HERTZ & LIEBMAN, *supra* note 21, at 7–9.

⁵⁷ *Id.* at 10–11.

⁵⁸ *Id.* at 11–12.

⁵⁹ *Id.*

⁶⁰ 100 U.S. 371 (1879).

⁶¹ *Id.* at 373.

convicted of “stuffing the ballot-box” during an election to determine Maryland’s state representatives to the federal Congress.⁶²

The threshold issue for the U.S. Supreme Court in *Siebold* was whether it had the power itself to entertain the petition for a writ of habeas corpus.⁶³ The Court found that a writ of habeas corpus fell within its appellate jurisdiction, and that it was authorized to exercise such jurisdiction.⁶⁴ Delineating limitations on the writ of habeas corpus as derived from the English common law,⁶⁵ the Court found that the main limitation is that the writ cannot be used as a mere writ of error.⁶⁶ Thus, the Court held that the question presented in the case was proper for judicial consideration, but it denied the writ of habeas corpus because it found the statute to be constitutional.⁶⁷

B. Federal Statutory Right to Habeas Corpus

The birth of the federal statutory right to habeas corpus occurred with the Judiciary Act of 1789.⁶⁸ Congress has amended the law regarding habeas corpus several times in its history. The most recent amendments occurred in the 1996 Anti-Terrorism and Effective Death Penalty Act (“AEDPA”).⁶⁹ The AEDPA has changed habeas corpus practice in several ways. The reduction of the statute of limitations to bring a writ of habeas corpus to one year, the absolute requirement of the exhaustion of state remedies, and the requirement of extreme deference to a state court’s factual findings are examples of changes wrought by the federal legislation.⁷⁰ Thus, regardless of whether one thinks the scope of habeas corpus should be narrow or broad, the right to counsel becomes even more essential when the AEDPA has foreclosed access to the federal courts for many prisoners.⁷¹ Furthermore, although it may seem counterintuitive to argue that counsel is necessary for habeas corpus

⁶² *Id.* at 379.

⁶³ *Id.* at 374.

⁶⁴ *Id.* at 377.

⁶⁵ *Id.* at 376.

⁶⁶ *Id.* at 376–77.

⁶⁷ *Id.* at 399. The Court rejected the argument that the federal legislature had no authority to issue statutes regarding the behavior of judges during state elections, especially when the elections were determining the state’s representatives to the federal Congress. *Id.*

⁶⁸ HERTZ & LIEBMAN, *supra* note 21, at 41.

⁶⁹ 28 U.S.C. § 2254 (2000).

⁷⁰ *See id.*

⁷¹ *See* Jennifer N. Ide, Comment, *The Case of Exzavious Lee Gibson: A Georgia Court’s (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1110 (1998). Ide argues that if a habeas corpus petitioner was provided with no assistance of counsel during his state habeas corpus proceedings, an appointed counsel’s ability and talent will be rendered meaningless at the federal habeas level. *Id.*

proceedings when the scope of habeas has become more narrow in the federal sense, the complexity of habeas and the interrelation between state and federal habeas reveal the need for even greater assistance of counsel for the indigent petitioner. As Justice Kennedy stated in *Murray*, “The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital⁷² defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”⁷³ Although counsel is not mandated, one provision of the AEDPA provides courts with the discretion to appoint counsel for an indigent petitioner.⁷⁴

The U.S. Supreme Court, in line with the views of the federal Congress, has also emphasized the primary role of the state in determining whether its prisoners’ detentions violate the state or federal Constitution. The most recent U.S. Supreme Court habeas corpus decision, *Coleman v. Thompson*, addressed the scope of federal habeas corpus review.⁷⁵ *Coleman* highlights the importance of the exhaustion of state court remedies before a federal court will entertain a petition for a writ of habeas corpus.⁷⁶

Therefore, *Coleman* and the AEDPA reveal the importance that a state habeas corpus petitioner receives assistance of counsel because the state procedures may be the petitioner’s last opportunity to have her conviction reviewed and overturned.⁷⁷ The AEDPA and *Coleman* show the increasing complexity of habeas corpus litigation and the limited likelihood of federal review of state habeas corpus proceedings, and thus illustrate why counsel should be appointed to indigent habeas corpus petitioners.

The Sheppard murder case of the 1950s provides one example of why counsel is so vital to the habeas corpus petitioner. In 1954, Dr. Sam⁷⁸ was convicted in a jury trial of murdering his wife, Marilyn Sheppard.⁷⁹ Marilyn Sheppard’s bludgeoned body was discovered in the early morning on July 4, 1954 in her Ohio home.⁸⁰

⁷² *Murray v. Giarratano* focused on claims brought by capital indigent prisoners. 492 U.S. 1, 1 (1989).

⁷³ *Id.* at 14 (Kennedy, J., concurring) (internal citation added).

⁷⁴ 28 U.S.C. § 2254(h).

⁷⁵ 501 U.S. 722 (1991).

⁷⁶ *See id.*

⁷⁷ *Id.*, *supra* note 71, at 1117–18.

⁷⁸ Dr. Sam Sheppard was fondly known among his small community as “Dr. Sam.” JAMES NEFF, THE WRONG MAN 23 (2001).

⁷⁹ *Id.* at 166.

⁸⁰ For more detail on the infamous Sam Sheppard murder trials, see CYNTHIA L. COOPER & SAM REESE SHEPPARD, MOCKERY OF JUSTICE (1995); JACK P. DESARIO & WILLIAM D. MASON, DR. SAM SHEPPARD ON

After the trial, all of Dr. Sam's appeal efforts had been fruitless. When his original defense attorney died, a young F. Lee Bailey took his case pro bono.⁸¹ On behalf of Dr. Sam, Bailey filed a petition for a writ of habeas corpus in federal court.⁸² The U.S. Supreme Court eventually heard the Sheppard case.⁸³ Bailey enumerated many errors in his brief, but the central issue that caught the Court's attention was the effect that the media coverage had on Dr. Sam's due process right to a fair jury trial.⁸⁴ In an 8-1 decision, the Court threw out Dr. Sam's conviction, opining that the pretrial publicity of the case tainted Dr. Sam's chance for a fair and impartial tribunal.⁸⁵ After being in prison ten years, Dr. Sam was released in 1966 by the U.S. Supreme Court on a petition for a writ of habeas corpus.⁸⁶

The Sheppard murder case provides a perfect example of why the right to counsel is essential in habeas corpus proceedings because without the assistance of counsel Dr. Sam would never have been able to adequately articulate how his confinement violated the federal Constitution. Dr. Sam needed Bailey to argue his legal issues. Dr. Sam was an upper-middle class educated doctor, but he could not have been released on a writ of habeas corpus without the assistance of able counsel. If Dr. Sam Sheppard was in dire need of legal assistance, surely the many indigent defendants who file habeas petitions every year⁸⁷ are also in dire need of the assistance of counsel.⁸⁸

TRIAL: THE PROSECUTORS AND THE MARILYN SHEPPARD MURDER (2003); NEFF, *supra* note 78; SAM SHEPPARD, ENDURE & CONQUER (1966).

⁸¹ NEFF, *supra* note 78, at 214–15.

⁸² *Id.* at 226–27.

⁸³ Sheppard v. Maxwell, 384 U.S. 333 (1966).

⁸⁴ NEFF, *supra* note 78, at 243.

⁸⁵ 384 U.S. at 363. Justice Clark wrote the majority opinion and referred to the trial as a “carnival atmosphere.” *Id.* at 358. For example, the trial judge allowed the jury to be photographed for the newspaper, reserved the majority of the courtroom seats for local and national media, and allowed a microphone to be placed on the witness stand for the benefit of the media. *Id.* at 354–58.

⁸⁶ *Id.* at 363. Dr. Sam was eventually acquitted for the murder of his wife. See NEFF, *supra* note 78, at 281. For more information regarding the Sheppard case after Dr. Sam's release from prison, see *id.*, *supra* note 78.

⁸⁷ In 1996, there were 68,235 petitions for a writ of habeas corpus filed in U.S. courts by both state and federal prisoners. See Press Release, Office of Justice Programs, State and Federal Prisoners Filed 68,235 Petitions in United States Courts During 1996 (Oct. 29, 1997), at www.ojp.usdoj.gov/bjs/pub/press/ppfc96.pr.

⁸⁸ As Justice Sutherland eloquently articulated in *Powell v. Alabama*: “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 . . . [if] that [is] true of men of intelligence, how much more true is it of the ignorant” 287 U.S. 45, 69 (1932).

III. CURRENT LEGISLATIVE LANDSCAPES IN THE STATES

Before exploring various state legislative models, a brief overview of current statutory schemes is necessary to provide a background to better understand the different models.

The issue of the right to counsel in habeas corpus proceedings currently is an active area in state criminal justice jurisprudence.⁸⁹ All states must concede that there is no federal constitutional right to counsel in light of the U.S. Supreme Court's Sixth Amendment jurisprudence.⁹⁰ However, the Court's reasoning has not inhibited some state legislatures and courts from providing a right to counsel in habeas corpus proceedings, recognizing that states can provide its citizens with more safeguards than does the federal government.⁹¹ Appendix A is a chart that summarizes the law regarding the right to counsel for indigent petitioners in the fifty states.⁹²

State laws providing for the appointment of counsel fall into the following categories: discretion left in hands of trial judge; absolute right; absolute right only in capital cases; and conditional right based on whether petitioner presents a colorable claim. Section A discusses the default position of giving the trial judge the discretion to appoint counsel for the habeas corpus petitioner and the standard of review courts might utilize when reviewing the judge's decision.

⁸⁹ One distinction regarding this issue is the right to counsel versus access to counsel. *See* U.S. CONST. amend. VI. No state may constitutionally deny a habeas corpus petitioner the right to have access to counsel if she so desires. The Alabama statute addressing the right to apply for a writ of habeas corpus provides an excellent example of this important distinction. ALA. CODE § 15-9-38 (2003). The Alabama Court of Appeals interpreting the habeas corpus statute stressed the right of access to counsel versus the right to appointment of counsel: The statute "gives a person . . . the right to be represented by legal counsel in a habeas corpus proceeding. This statute does not, however, expressly require that such person be represented by court-appointed counsel if he is unable to employ counsel." *See Sullivan v. State*, 181 So. 2d 518, 520 (Ala. Ct. App. 1965) (interpreting ALA. CODE § 15-57 (1965) (current version at § 15-9-38)).

⁹⁰ *See Pennsylvania v. Finley*, 481 U.S. 551 (1987).

⁹¹ *E.g.*, N.C. GEN. STAT. § 7A-451 (2003); TENN. CODE ANN. § 8-14-205 (2002); VT. STAT. ANN. tit. 13, § 5232 (1998). Although New York has not implemented a right to counsel for postconviction petitioners, it recognizes that states are able to provide more protection than the federal government provides. *See People v. Richardson*, 603 N.Y.S.2d 700, 702 (N.Y. Sup. Ct. 1993).

⁹² Determining the status of the states' law regarding the right to counsel in habeas corpus proceedings, however, is not an easy task because of the inherent difficulty in the nomenclature. Some legislatures have dealt with the right to counsel in habeas corpus proceedings within their criminal procedure statutes because, in fact, it is a remedy for many criminal defendants. *E.g.*, TEX. CRIM. PROC. CODE ANN. § 11.071 (Vernon Supp. 2004). Furthermore, some legislatures have created new statutes concerning postconviction remedies that encompass habeas corpus proceedings. *E.g.*, S.C. CODE ANN. § 17-27-20 annot. 4 (Law. Co-op. 2003). Regardless of the label, the issue is whether counsel should be provided in the collateral attack of a criminal conviction.

Section B provides an overview of states that require courts to appoint counsel for habeas petitioners. Section C explores those states which only mandate the appointment of counsel if the petitioner faces the imposition of the death penalty. Finally, Section D highlights those states which provide only a conditional right of counsel to habeas petitioners.

A. Trial Court Maintains Discretion To Appoint Counsel

While some statutes explicitly provide for the appointment of counsel for indigent habeas corpus petitioners, many leave the determination in the hands of the trial judge. Under many statutes, courts maintain the discretion to appoint counsel in habeas corpus proceedings even though the federal Constitution does not mandate the appointment of counsel.⁹³ In *Nachtigall v. Class*, the Eighth Circuit provided some factors that courts should consider when deciding whether to appoint counsel.⁹⁴ Such factors include: the complexity of the issues, the ability of an indigent prisoner to investigate the facts of his case, the existence of conflicting testimony in the trial record, the ability of the indigent prisoner to present his legal claim, and the complexity of the legal issues.⁹⁵ The court in *Nachtigall* defined the standard for the appointment of counsel in habeas corpus proceedings as being whether both the petitioner and the court would benefit from assistance of counsel.⁹⁶ Petitioner *Nachtigall* appealed his denial of request for counsel in his habeas corpus petition.⁹⁷ The court acknowledged that there is no automatic right to counsel in habeas corpus proceedings, but it postulated that where an indigent pro se petitioner has met his burden of demonstrating that his claim is not frivolous, then an attorney should be appointed.⁹⁸

The standard of review for the nonappointment of counsel in a habeas corpus proceeding is whether the district court abused its discretion in refusing to appoint counsel.⁹⁹ In *Hoggard v. Purkett*, the Eighth Circuit held that the district court did not abuse its discretion in denying appointment of counsel

⁹³ See, e.g., 28 U.S.C. § 2254(h) (2000); *Nachtigall v. Class*, 48 F.3d 1076 (8th Cir. 1995). Congress specifically delegated the decisionmaking authority to appoint counsel to federal courts. 28 U.S.C. § 2254(h). However, it is unclear from the *Nachtigall* court (and other courts) which, if any, of the factors to consider in deciding whether to appoint counsel is dispositive.

⁹⁴ 48 F.3d at 1081–82.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1081.

⁹⁷ *Id.* at 1079.

⁹⁸ *Id.* at 1081.

⁹⁹ *Hoggard v. Purkett*, 29 F.3d 469, 472 (8th Cir. 1994).

because the petition for the writ was not factually or legally complex.¹⁰⁰ Furthermore, courts are less apt to find an abuse of discretion if a lower court refuses to appoint counsel in a habeas corpus proceeding where the issues can be properly resolved on the basis of a state court record.¹⁰¹

State governments are struggling with how to handle the issue of appointment of counsel for habeas corpus petitioners. Many state legislatures have taken the initiative to pass legislation mandating either an absolute or conditional right to counsel. The attached chart shows that nine state legislatures have passed statutes mandating an absolute right to counsel for postconviction or habeas corpus petitioners.¹⁰² Furthermore, twenty-three state legislatures have passed a conditional right to counsel.¹⁰³ Of those twenty-three state legislatures, fifteen mandate the appointment of counsel for only capital habeas corpus petitioners,¹⁰⁴ while the remaining eight state legislatures have conditioned the right on the nature of the claim presented.¹⁰⁵ Seventeen state legislatures have not passed statutes requiring the right to counsel for habeas corpus petitioners.¹⁰⁶ Maine is unclear.¹⁰⁷

¹⁰⁰ *Id.*

¹⁰¹ *See* *Boyd v. Groose*, 4 F.3d 669 (8th Cir. 1993). When abuse of discretion in a trial court's refusal to appoint counsel depends on the basis of a state court record, however, the record is greatly diminished when a defendant pleads guilty because the record is usually a succinct recording of the plea questioning. Thus, the right to counsel in habeas corpus proceedings becomes vitally important for the guilty plea defendant because it is often the defendant's first appearance back in court. *See* Clive A. Stafford Smith & Remy Voisin Starns, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 56–57 (1999) (discussing how postconviction proceedings are often the first opportunity for a court to hear many constitutional claims and how such proceedings permit the expansion of the original record to reflect potential constitutional errors). For a general discussion of these consequences and counsel's importance in guilty pleas, see Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

¹⁰² *See infra* Appendix A (listing Hawaii, Missouri, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Utah, and Vermont).

¹⁰³ *See infra* Appendix A (listing Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Louisiana, Maryland, Montana, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia, and Wisconsin).

¹⁰⁴ *See infra* Appendix A (listing Arizona, Arkansas, California, Colorado, Florida, Kansas, Louisiana, Montana, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Virginia).

¹⁰⁵ *See infra* Appendix A (listing Alaska, Connecticut, Illinois, Indiana, Maryland, Rhode Island, West Virginia, and Wisconsin).

¹⁰⁶ *See infra* Appendix A (listing Alabama, Delaware, Georgia, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Washington, and Wyoming). It is important to note, however, that although no statute has been passed, some of these states have established a right to counsel through their judicial branches. Furthermore, in virtually all of these states the trial court maintains the inherent discretion to appoint counsel for an indigent habeas corpus petitioner.

¹⁰⁷ *See infra* Appendix A.

B. States That Provide an Absolute Right to Counsel

Nine state legislatures have provided a blanket right to counsel for indigent habeas corpus petitioners.¹⁰⁸ For instance, the North Carolina legislature explicitly provides for the appointment of counsel to indigent persons in hearings on petitions for writs of habeas corpus.¹⁰⁹ North Carolina's statute provides: "An indigent person is entitled to services of counsel in the following actions and proceedings . . . a hearing on a petition for a writ of habeas corpus."¹¹⁰ Similarly, the Tennessee legislature has provided for an unconditional right to counsel for the indigent petitioner in habeas corpus proceedings.¹¹¹ Once a court determines that a person is indigent, the statute mandates that the court "shall make and sign an order appointing the district public defender . . . to represent the person."¹¹²

C. States That Provide Counsel Only for Capital Habeas Petitioners

While nine state legislatures have mandated an absolute right to counsel in habeas corpus cases, regardless of the circumstances, fifteen state legislatures have mandated appointment of counsel for indigent defendants who are facing a death sentence.¹¹³ The "death is different" jurisprudence has taken hold in some states.¹¹⁴ The majority of states that do provide for the appointment of counsel in habeas cases do so only in capital cases.¹¹⁵ Most of those states will also allow appointment of counsel in noncapital cases when the trial court believes it would be prudent.¹¹⁶ Even some of the states that most fervently

¹⁰⁸ E.g., TENN. CODE ANN. § 8-14-205 (2002); see also *infra* Appendix A.

¹⁰⁹ N.C. GEN. STAT. § 7A-451 (2003).

¹¹⁰ *Id.*

¹¹¹ TENN. CODE ANN. § 8-14-205. For background and history of postconviction review in Tennessee, see generally Gary L. Anderson, *Post-Conviction Relief in Tennessee—Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act*, 48 TENN. L. REV. 605 (1981).

¹¹² TENN. CODE ANN. § 8-14-205.

¹¹³ E.g., TEX. CRIM. PROC. CODE ANN. § 11.071 (Vernon Supp. 2004).

¹¹⁴ Writing the plurality opinion in *Ford v. Wainwright*, Justice Marshall explained that a death sentence is sufficiently different to require heightened safeguards: "In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties: that death is different." 477 U.S. 399, 411 (1986).

¹¹⁵ E.g., TEX. CRIM. PROC. CODE ANN. § 11.071; VA. CODE ANN. § 19.2-163.7 (Michie 2004). For a complete listing of states that only provide counsel for habeas corpus petitioners in capital cases, see *infra* Appendix A.

¹¹⁶ E.g., MONT. CODE ANN. §§ 46-8-103–104 (2003).

support the death penalty, such as Texas,¹¹⁷ Virginia,¹¹⁸ and Florida,¹¹⁹ mandate that counsel be provided immediately after a defendant is sentenced to death. Texas provides a good model for those states that only mandate the appointment of counsel in capital cases.¹²⁰ The Texas legislature states:

If a defendant is sentenced to death the convicting court, immediately after judgment is entered . . . shall determine if the defendant is indigent and if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus At the earliest practical time . . . the convicting court shall appoint competent counsel¹²¹

Thus, many state legislatures which have refused to mandate appointment of counsel in all cases require counsel to be appointed in death penalty habeas corpus cases.¹²²

Connecticut has tied its right to counsel based on the type of confinement from which the restrained individual seeks relief. A petition for a writ of habeas corpus can be brought to challenge a civil, as well as criminal confinement.¹²³ Connecticut has chosen not to base the determination of whether counsel should be appointed on whether the prisoner faces a death sentence, but rather mandates that counsel be appointed for all habeas corpus petitioners when the relief sought is the result of a criminal matter.¹²⁴ The statute provides,

In any criminal action, in any habeas corpus proceeding arising from a *criminal manner*, in any extradition proceeding, or in any delinquency matter, the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined . . . designate a public

¹¹⁷ Compare TEX. CRIM. PROC. CODE . ANN. § 11.07 (Vernon 1977), with TEX. CRIM. PROC. CODE ANN. § 11.071.

¹¹⁸ VA. CODE ANN. § 19.2-163.7.

¹¹⁹ FLA. STAT. ANN. 924.066 (West 2001).

¹²⁰ See *infra* Appendix A (listing Arizona, Arkansas, California, Colorado, Florida, Kansas, Louisiana, Montana, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Virginia).

¹²¹ TEX. CRIM. PROC. CODE ANN. § 11.071.

¹²² E.g., VA. CODE ANN. § 19.2-163.7.

¹²³ For example, a petition for a writ of habeas corpus can be lodged to challenge a mental commitment. See BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

¹²⁴ CONN. GEN. STAT. § 51-296 (West 1985).

defender, assistant public defender or deputy assistant public defender to represent such indigent defendant.¹²⁵

In interpreting the statute, the Connecticut judiciary has focused on the “arising from a criminal matter” language.¹²⁶ For instance, a habeas corpus action arising from alleged conditions of confinement does not invoke the statutory right to counsel.¹²⁷

D. States That Provide a Conditional Right to Counsel

Finally, eight state legislatures provide indigent habeas corpus petitioners the right to counsel, but require that certain conditions be met before the right attaches.¹²⁸ For example, Wisconsin provides that if the state indigent defense board determines that the habeas corpus petitioner presents a colorable claim, then the court shall appoint counsel.¹²⁹

Another interesting example is Rhode Island, where the legislature has mandated the appointment of counsel for pro se habeas corpus petitioners, but permits the court-appointed attorney to make a motion stating that the petition for a writ of habeas corpus is frivolous.¹³⁰ The Rhode Island statute provides: “An applicant who is indigent shall be entitled to be represented by the public defender. If the public defender is excused from representing the applicant because of a conflict of interest or is otherwise unable to provide representation, the court shall assign counsel to represent the applicant.”¹³¹ If the court-appointed attorney makes a motion contending that his client’s petition for a writ of habeas corpus does not present a colorable claim, the statute mandates that the trial court conduct a hearing on that issue.¹³² After the hearing, if the court agrees with the attorney who alleges that his or her

¹²⁵ *Id.* (emphasis added).

¹²⁶ *See Vines v. Warden*, 858 A.2d 915 (Conn. Super. Ct. 2003).

¹²⁷ *Id.* The court points out that a petition for a writ of habeas corpus is not a criminal action, but a civil action. Therefore if the petitioner is not challenging the underlying order of judgment that led to his confinement, but only to the conditions of his confinement, then no statutory right to counsel attaches. *Id.*

¹²⁸ *E.g.*, KAN. STAT. ANN. § 22-4506 (1995). The statute instructs that if the petition “presents substantial questions of law or triable issues of fact” the court should appoint counsel for the noncapital indigent petitioner. *Id.* Kansas provides an absolute right to counsel for the capital indigent habeas corpus petitioner. *Id.*

¹²⁹ WIS. STAT. ANN. § 974.06 (West 1998).

¹³⁰ R.I. GEN. LAWS § 10-9.1-5 nn.1-2 (Supp. 2004).

¹³¹ *Id.* § 10-9.1-5 (1997).

¹³² *Id.* § 10-9.1-5 nn.1-2.

client has no colorable claims to present in a petition for writ of habeas corpus, then the petitioner must proceed pro se.¹³³

IV. STATE LEGISLATIVE MODELS AND CRITIQUES FOR THE PROVISION OF COUNSEL IN HABEAS CORPUS PROCEEDINGS

As evidenced by the various state statutes listed in Appendix A,¹³⁴ there are many models from which a state legislature could choose to implement a statutory right to counsel for indigent habeas corpus petitioners. Below are five models, and critiques of those models, that state legislatures¹³⁵ should carefully consider when deciding whether and how to implement a right to counsel in habeas proceedings.

A. *An Absolute Statutory Right to Counsel in Habeas Corpus Proceedings*

One possibility is for a state legislature to create an absolute, unconditional right to counsel for indigent habeas corpus petitioners. The legislature could pass a blanket statute mandating that the right to counsel must be given to all indigent habeas corpus petitioners. Although an absolute right to counsel provides broad protection for all petitioners, before establishing such a far-reaching statutory right several factors should be considered such as the possibility of frivolous claims, the impact on the functioning of the current indigent defense system, and the speed with which the right should be implemented.

First, providing an absolute, unbridled right for each and every habeas corpus petitioner to have the assistance of counsel may result in an increase of frivolous claims. Second, mandating a broad scale, absolute right to all habeas corpus petitioners may significantly and severely strain the state's fiscal resources.¹³⁶ The legislature should ensure that the representation of indigent defendants at the trial level does not suffer because of a new absolute right to

¹³³ *Id.* Although the petition for the writ of habeas corpus is not denied or thrown out at this point, the petitioner is left at a distinct disadvantage compared to other petitioners who have the assistance of counsel. Furthermore, another concern is that the indigent prisoner may not have representation at the hearing where he is the opponent of "his attorney" who claims that his petition has no merit.

¹³⁴ See *infra* Appendix A.

¹³⁵ The state legislature is perhaps better equipped than the state judiciary to provide a right to counsel in habeas corpus proceedings.

¹³⁶ Many states are having enough trouble just finding enough funds to properly compensate court appointed attorneys in regular trials, much less postconviction collateral proceedings. See, e.g., Bill Rankin, *Hunt Is on for Indigent Defense Funds*, ATLANTA J.-CONST., Oct. 12, 2003, at E1.

counsel for habeas corpus petitioners. Therefore, a legislature that statutorily mandates such a right to counsel must find a way to pay for such counsel.

Third, as a practical matter, the state legislature might wish to proceed in a more incremental fashion. The legislature can later decide to amend the statute to expand the right to counsel, but it may prove more difficult to restrict the statutory right to counsel once it has been established. For example, it took Indiana a few years to scale back its broad statutory absolute right to counsel for all indigent litigants.¹³⁷

B. A Conditional Statutory Right to Counsel in Habeas Corpus Proceedings

Rather than mandating an absolute right to counsel, a state legislature could provide a conditional right to counsel for indigent habeas corpus petitioners. There are two state models to establish a conditional right to counsel: (1) the right depends upon the type—capital or noncapital—of sentence the petitioner is serving; and (2) the right depends on the nature of the claim the petitioner presents.

1. A Conditional Right to Counsel Based on the Type of Punishment

The state legislature may condition the right to counsel for habeas corpus petitioners on the type of punishment the petitioner is serving: The greater the deprivation of life and liberty, the more likely that counsel will be appointed.¹³⁸ For instance, if the habeas corpus petitioner faces the imposition of a death sentence, the legislature may also wish to automatically appoint counsel for such a petitioner.¹³⁹ And if the petitioner is serving a sentence of life imprisonment, the legislature may also wish to provide the right of counsel. Thus, the condition is not the nature of the claim presented, but the nature of the punishment rendered by the sentencing court. The legislature could also tie the type of punishment with the merits of the claim. For example, a petitioner would only be appointed counsel for less than a death sentence if she presented a colorable claim.

¹³⁷ In 1998, the Indiana legislature passed a statute requiring courts to appoint counsel for all indigent civil litigants. IND. CODE ANN. § 34-10-1-2 (Michie 1998 & Supp. 2004). The statute read: “the court shall . . . assign [to the indigent litigant] an attorney to defend or prosecute the cause.” *Id.* In 2002, the legislature amended the statute to allow for appointment of counsel only in “exceptional circumstances.” *Id.*; see Staci A. Terri, *The Indigent Person’s Rights to Appointed Counsel in Indiana*, 45 RES GESTAE 12 (2001); see also *infra* Appendix A, at note 10.

¹³⁸ See *supra* note 114 for the “death is different” argument.

¹³⁹ *E.g.*, TEX. CODE CRIM. PROC. ANN. § 11.071 (Vernon 2004).

Although “death is different”¹⁴⁰ and therefore a death sentence should require heightened attention, perhaps the right to counsel for indigent habeas corpus petitioners should not be determined solely by the fact that the petitioner has been sentenced to death. The purpose of the writ of habeas corpus is to provide a collateral attack for a prisoner who is being held in violation of the Constitution. If a person is serving a life sentence and the confinement is illegal, the state’s acts are no less illegal than if the petitioner is awaiting execution.

2. *A Conditional Right to Counsel Based on the Nature of the Claim*

Alternatively, rather than create a conditional right to counsel based on the type of sentence imposed, the legislature may want to condition the appointment of counsel on the sole factor of nonfrivolity of the claim. Here, the definition of frivolity becomes vital.¹⁴¹ Moreover, the entity determining whether a particular claim is frivolous is also an important consideration. Many possibilities exist for who or what determines whether a particular habeas corpus petitioner presents a nonfrivolous, colorable claim, but states should consider the following three scenarios: the legislature determines whether appointment is needed by statute, the trial judge determines whether appointment is needed, or the state public defender board determines whether appointment is needed.

a. The Statute Creates the Standards for Appointment

The legislature could create a conditional right to counsel in habeas corpus proceedings and then create an exhaustive list of standards to determine whether the habeas corpus petitioner will receive the assistance of counsel.

However, the state legislature may not be the best equipped body in the criminal justice system to undertake establishing strict standards because, in general, state legislators are not experienced in the criminal justice arena. Although state legislatures should not pass a rigid, inflexible set of standards, it should provide guidelines and factors to consider when deciding whether counsel should be appointed.¹⁴²

¹⁴⁰ See *supra* note 114 and accompanying text.

¹⁴¹ The dictionary defines frivolous as “of little weight or importance; having no basis in law or fact.” WEBSTER’S COLLEGIATE DICTIONARY 468 (10th ed. 1993).

¹⁴² E.g., NEV. REV. STAT. ANN. § 34.750 (Michie 2002).

The legislature does not have the necessary expertise to delineate an exhaustive list of precise standards that must be met in each individual case for counsel to be appointed. Legislators are unable to predict every conceivable situation that could potentially arise in a particular case. Furthermore, precise standards might foreclose some worthy habeas corpus petitioners from receiving the assistance of counsel.

b. The Judicial Branch Maintains Discretion To Determine Whether Counsel Should Be Appointed

The state legislature may allow the judiciary to use its discretion to determine whether a habeas corpus petitioner's claim is frivolous.¹⁴³ The legislature might explicitly grant the judiciary the discretion to make such determinations or it might do so by default by failing to give articulate guidelines for the judicial branch to follow.

The state legislature may find this latter model attractive because it allows the legislature to save political capital and punt to the judiciary for a determination of whether counsel should be appointed.¹⁴⁴ Furthermore, the legislature may respect the doctrine of separation of powers, and believe that the appointment of counsel belongs to the judicial realm because the judiciary is better equipped to understand the nature of legal claims. The legislature, for practical considerations, may be able to pass a bill devoid of standards much more speedily than if the entire body had to agree on each and every standard used to determine frivolity.

Nonetheless, the judicial branch may not be the ideal branch of government to determine whether counsel should be appointed. At first glance, it may seem counterintuitive to postulate that the judiciary may not be the best entity to determine whether a petition for a writ of habeas corpus presents frivolous claims. But leaving total discretion to the trial court might open the door for potential abuse and leave the legislature with no remedy to ensure that petitioners with colorable claims receive counsel.

Naturally, courts are able to set up different internal procedures for determining whether a habeas corpus petitioner deserves the right to counsel.¹⁴⁵ Some courts could decide that once the petition can be summarily

¹⁴³ E.g., KAN. STAT. ANN. § 22-4506 (1995 & Supp. 2002).

¹⁴⁴ The plight of indigent defendants may not be a main concern of the electorate; therefore, the legislature may desire to leave the matter in the realm of the judiciary. See Rankin, *supra* note 136.

¹⁴⁵ E.g., KY. R. CRIM. P. § 11.42.

dismissed, the habeas corpus petitioner is then precluded from further litigation. Other courts could decide that the initial question of whether to appoint counsel would not affect the habeas corpus petitioner's ability to continue the pursuit of his writ of habeas corpus, but require petitioner to proceed pro se.¹⁴⁶ However, such an approach might likely discourage the pro se petitioner from continuing his collateral attack after a court has determined that his petition does not contain colorable claims.

In any event, if a legislature decides to leave the judiciary with the discretion to decide whether to appoint counsel for the indigent habeas corpus petitioner, the legislature, although it should not provide strict standards, can and should provide guidelines for courts to consider in making determinations. These guidelines would help direct the judiciary and ensure that the courts stay close to the legislative goals of the statute. For example, the Nevada legislature provided the following guidelines for courts to consider in their determination of whether to appoint counsel for a petitioner: whether the case involved difficult issues, whether the petitioner has the ability to comprehend the proceedings, and whether counsel is necessary to proceed with discovery.¹⁴⁷

Skeptics have criticized many state statutes allowing for judicial discretion in the appointment of counsel because the statutes are too ambiguous.¹⁴⁸ In his article, Larry S. Di Giulio asserts that the standards are "either overly ambitious or inherently unreasonable."¹⁴⁹ Thus, if legislatures choose to proceed in this direction, they should provide clear guidance for courts while not mandating an exhaustive list of required factors.

c. The State Public Defense Board Determines Whether Counsel Should Be Appointed

Finally, the state legislature may establish a conditional right to counsel in habeas corpus proceedings based on the petitioner's claim being nonfrivolous and grant the state public defender office or indigent defense board the discretion to determine the frivolity of the claim.¹⁵⁰

¹⁴⁶ *E.g.*, *Shatney v. State*, 755 A.2d 130 (R.I. 2000) (holding that if the trial court after a hearing agrees with the appointed counsel that the claim is frivolous, the petitioner must then proceed pro se).

¹⁴⁷ *See* NEV. REV. STAT. ANN. § 34.750.

¹⁴⁸ *See* Di Giulio, *supra* note 4, at 109.

¹⁴⁹ *Id.* at 117.

¹⁵⁰ *See* WIS. STAT. ANN. § 974.06 (West 1998).

This model is creative and unique because it reaches beyond the two most obvious bodies—the legislature and the judiciary—for determination.¹⁵¹ As developed further below, the legislature may believe that a greater degree of independence and impartiality is injected into the decisionmaking process when it gives the state defender office the discretion to determine whether counsel should be appointed for indigent habeas corpus petitioners. Furthermore, the public defense board has the most experience of all the governmental decisionmakers proposed because it assesses the merits of criminal defendants' claims on a regular basis. Nonetheless, although a grant of discretion to the state public defender office is creative, the office may not be the best entity to determine whether counsel should be appointed.

Criticisms of vesting the decision with the state public defense board to appoint counsel for indigent habeas corpus petitioners include the boards' lack of independence and potential to feel pressure with a busy workload, as well as the ethical problem of allowing the board, which represents indigent petitioners, to make the decision.

First, a potential criticism is that the state public defender office is not actually independent and may feel pressure in making determinations of frivolity.¹⁵² Another potential problem is that the public defender office may not be disinterested enough because, if it finds the habeas corpus petition to allege nonfrivolous claims, more than likely, attorneys in that public defender office will be called upon by the judiciary to represent the indigent petitioner. Public defenders are extremely busy trying to represent defendants in criminal trials and appellate matters. Because public defenders are intricately involved with the realm of indigent defense, the danger exists that they may therefore be incapable of maintaining objectivity in their determination of whether a petitioner presents a colorable claim. Furthermore, when a state public defender office is required to make such findings regarding petitions for a writ of habeas corpus, time is taken away from other indigent defendants in the trial or appellate phase who need the office's attention.

¹⁵¹ Naturally, if the public defender's office or indigent defense board has been created by the state legislature, the legislature is still somewhat connected to the entity making the frivolity determination, but such a setup is much further removed than if the legislature itself had determined the criteria for nonfrivolity of claims.

¹⁵² The state public defender office may feel pressure from both the judiciary and the legislature to avoid labeling too many claims nonfrivolous because this would increase the judiciary's caseload and the legislature's expenditures.

Second, a legislature should consider a conflict of interest question: Is it ethically sound that the attorneys who decide whether a particular petitioner has a colorable claim, and thus requires the appointment of counsel, work in the same office as the attorneys who will likely represent that same habeas corpus petitioner? Therefore, a state legislature might consider mandating that those attorneys who decide whether to appoint counsel be precluded from representing that indigent petitioner.

For the above reasons, although states have been innovative with the idea of vesting the state public defender office with making the determination of whether counsel should be appointed for the indigent habeas corpus petitioner,¹⁵³ it may not be the best model for states to adopt. On the other hand, the benefits of the board's depth of both experience and interest in improving indigent defense as a whole might very well outweigh these risks.

In summary, although all of the models above provide some positive answers to the problem of the lack of counsel for habeas corpus petitioners, none are perfect solutions. The absolute model may ensure that all petitioners' rights are protected, but state resources may be wasted in providing counsel for frivolous claims. The conditional model also provides an incomplete solution. The conditional model that only provides for appointment of counsel for those petitioners facing the death penalty fails to recognize that a constitutional violation does not disappear merely because a petitioner is serving less than a death sentence. The conditional models, based on the nature or merit of the claim, also provide the potential for problems based on the governmental entity making the decision. The legislatures that delineate the conditions for the right to counsel in the statute take away judicial discretion and may deprive a petitioner from the needed assistance of counsel, while leaving the decision to the trial judge may not ensure enough checks on the trial court's discretion. Although the state public defense board as decisionmaker is a creative answer, it does not solve all the problems of lack of independence from the political process. Realizing there may be no ideal solution, the remainder of this Comment proposes a statute for legislatures to consider which tries to address and solve some of the problems identified in this Section.

¹⁵³ WIS. STAT. ANN. § 974.06.

V. THE SOLUTION: AN INDEPENDENT AGENCY DETERMINES WHETHER COUNSEL SHOULD BE APPOINTED

An outside agency is the best entity to make a determination of whether a petition for a writ of habeas corpus presents nonfrivolous claims and therefore the petitioner is entitled to the statutory right of counsel. The answer is that state¹⁵⁴ legislatures¹⁵⁵ should create a right to counsel based on the condition that both the court and petitioner would benefit from the assistance of counsel in postconviction review proceedings,¹⁵⁶ and an outside, independent entity is the best suited body to make such determinations. In the context of reviewing alleged police misbehavior, localities have experimented with creating independent boards.¹⁵⁷ State legislatures should examine the success of boards such as these and entertain the idea of establishing an independent board in the context of the appointment of counsel for habeas petitioners.

A state legislature should keep in mind several considerations when establishing this independent agency. Such considerations include the mode of appointment to the agency, the executive and legislative role in the agency composition, the requirement and qualifications of agency members, and the oversight of the agency.¹⁵⁸

¹⁵⁴ Although this Comment focuses on states as the catalysts for change, the federal legislature is not precluded from being an instrument for change. Congress could pass a statute mandating the appointment of counsel not only for federal habeas corpus petitioners, but also for state habeas corpus petitioners. For a proposal of a federal legislative answer, see Moohr, *supra* note 24, at 805–09.

¹⁵⁵ This Comment proposes a state legislative solution as the most feasible and best solution, but the federal judiciary is also not foreclosed from implementing a right to counsel in habeas corpus proceedings. The U.S. Supreme Court, of course, is free to reconsider precedent and hold that the Sixth Amendment right to counsel attaches for habeas corpus petitioners. *See* U.S. CONST. amend. VI. Moreover, the Supreme Court could also find a right to counsel in habeas corpus proceedings via the Due Process Clause of the Fourteenth Amendment applied to the states. *See* U.S. CONST. amend. XIV. For a proposal that the Court should implement such a right via the Due Process Clause, see Di Giulio, *supra* note 4, at 129–31. *See also* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that there is a right to counsel in welfare termination proceedings). Similarly, state judiciaries are also not precluded from finding a constitutional right to counsel. *See supra* note 33. However, state legislatures should not passively wait for either the federal government or the state judicial branch to implement change, but should take action by implementing a statutory right to counsel.

¹⁵⁶ Typically, such a determination would depend upon whether the petition presents colorable, nonfrivolous claims, but the statute should not be so constrained because other exceptional circumstances may arise. Furthermore, the statute should not be based on what type of punishment the habeas corpus petitioner is serving. The purpose of the writ of habeas corpus is to provide a collateral attack for a prisoner who is being held in violation of the constitution. If a person is serving a life sentence and the state used unconstitutional means to try him, the state's acts are no less unconstitutional than if the petitioner is awaiting her execution. *See infra* Appendix B for suggested statutory language.

¹⁵⁷ *See, e.g.*, ST. PAUL MINN. ORDINANCES § 102.01–03.

¹⁵⁸ *See infra* Appendix B.

First, the legislature must determine how the agency members will be selected and who will make the selection. The mode of selection to this agency is important to ensure both that worthy claims do not go unnoticed and that the system is not overwhelmed with meaningless petitions. The members should not be elected because indigent criminal defense is not a popular political cause and the average voter simply does not understand the rigors of habeas corpus proceedings. The members should be appointed and their term should not depend on their appointer maintaining political office. The term should be set by statute and the governor should appoint replacements whenever the term expires. Although the members should not fear the loss of their position with a change in the governorship, the governor should appoint the members because he or she is politically accountable to the voters in the state. This ensures that, although insulation is necessary and important, the members are still indirectly accountable to the voters. Furthermore, the appointments should be subject to the advice and consent of the state senate. The advice and consent component places a check on the executive branch and incorporates all three branches of government in the process at some stage.

Although no entity involved in governmental work is completely free of political pressures and budgetary concerns, an independent agency would likely feel less political heat than the legislature, judiciary, or state public defender office because of its semi-insulation from the political process.¹⁵⁹ For instance, members of the agency would not have to worry about being re-elected.

Second, the legislature should consider requirements and qualifications that agency members must meet to serve on the agency. The legislature should consider whether it wants to have the agency consist of only attorneys or both attorneys and nonattorneys. Once the members have been appointed, the legislature should consider requiring members to attend several hours of training conducted by the state public defense board.¹⁶⁰

Finally, the legislature should ensure that both it and the judiciary maintain proper oversight over the agency. The agency should explain the bases for all of its decisions, in writing, to the judiciary. Furthermore, the agency should make periodic reports to the state legislature and the governor. This reporting

¹⁵⁹ The independent agency also solves the potential conflict of interest problem that could arise when the state public defender board makes the determination. Here, the board members would never later represent those who it determined should have counsel appointed.

¹⁶⁰ The legislature may especially want to consider this option for any nonattorney members of the board.

ensures that all branches of the government remain informed about the progress of the agency.

The determination of whether an indigent habeas corpus petitioner should be appointed counsel is crucial and often dispositive of whether the petitioner will succeed in her efforts to obtain postconviction relief.¹⁶¹ Therefore, an independent agency is the best entity to make such determinations because the agency can focus all its attention, energy, and resources on its decisions of whether a petition merits the appointment of counsel.

CONCLUSION

The great writ of habeas corpus is steeped in a grand and rich tradition. The writ has served throughout the centuries as a bulwark against oppressive government detention. The writ ensures that the government cannot arbitrarily hold a person in violation of the law and Constitution. While the writ is one of the most traditional hallmarks of our legal and political history, it is simultaneously one of the most confusing and complex areas of the law. Therefore, to enable the writ of habeas corpus to continue in its noble tradition, habeas corpus petitioners need the assistance of counsel.

States have served as excellent laboratories of experimentation regarding the right to counsel in state habeas corpus proceedings. One of the benefits of our federal society is that states can learn from each other. Several states have provided models for other states through their implementation of an absolute or conditional statutory right to counsel in habeas corpus proceedings. Those state legislatures which have not yet provided for the appointment of counsel in habeas corpus proceedings should meet the legislative challenge and create a statutory right to counsel.

The legislative branch of government possesses policy and funding options that the judicial branch does not enjoy. Legislatures have greater flexibility and fewer constraints than the judicial branch. Therefore, the state legislatures should not passively stand by and wait for their state courts or the U.S. Supreme Court to take action in this arena. Rather, state legislatures should utilize their resources to implement a statutory right to counsel for indigent habeas corpus petitioners.

¹⁶¹ See *supra* note 23 and accompanying text (discussing Justice Kennedy's concurrence in *Murray v. Giarratano*, 492 U.S. 1, 14–15 (1989)).

In particular, state legislatures should consider the proposed solution of creating a statutory right to counsel with the decision of whether to provide counsel vested in an independent agency. This is the best answer to the problem of ensuring that indigent petitioners with colorable claims are not left to navigate the complexities of habeas corpus proceedings without the assistance of counsel. When a legislature creates and funds an agency to make determinations regarding the appointment of counsel for habeas petitioners, the agency can devote all its energy and resources to resolving these important determinations and yet still answer to the congress and governor if it fails in its endeavors.

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Appendix A: States and the Right to Counsel in Habeas Corpus Proceedings¹

State	Statute	Court Rule	Case
Alabama	NO (discretion) ² ALA. CODE § 15-12-1 (1995)	-----	<i>Ex Parte</i> Norris, 168 So. 2d 242 (Ala. 1964) ³
Alaska	YES (in first petition for post-conviction relief; trial court has discretion for subsequent petitions) ALASKA STAT. § 18.85.100 (Michie 2004)	-----	Grinols v. Alaska, 10 P.3d 600 (Alaska Ct. App. 2000)

¹ This chart illustrates whether states provide a right to counsel in habeas corpus cases and which branch of the state government implemented the right to counsel. The chart includes a column for both case and court rule because courts can implement the right through either case law or court rules. The “YES” or “NO” indicates whether a right to counsel for habeas corpus petitioners has been articulated through a statute, court rule, or case law. When the statute column reads “YES” and the case column reads “NO,” this does not mean that the courts in that state have not affirmed the statutorily-created right to counsel, but that the right to counsel was not first delineated or articulated by the judicial branch through case law.

² Although the Alabama statute does not mandate appointment of counsel for petitioners in postconviction proceedings, it does provide the trial judge some guidance in making the decision of whether to appoint counsel. ALA. CODE § 15-12-21 (1995 & Supp. 2004).

The trial or presiding judge or chief justice of the court in which the proceedings may be commenced or pending may appoint counsel to represent and assist those persons charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person.

*Id.*³ See *also* Sullivan v. State, 181 So. 2d 518 (Ala. Ct. App. 1965).

State	Statute		Court Rule		Case
Arizona	YES (capital)	ARIZ. REV. STAT. § 13-4041 (2001)	YES (capital)	ARIZ. R. CRIM. P. 32.4	NO Powell v. State, 507 P.2d 989 (Ariz. Ct. App. 1973) ⁴
Arkansas	YES (capital)	ARK. CODE ANN. § 16-91-202 (Michie Supp. 2003)	YES (capital)	ARK. R. CRIM. P. 37.5	NO Arkansas v. Roberts, 2003 Ark. LEXIS 509 (Ark. Oct. 9, 2003)
California	YES (capital)	CAL. GOV'T CODE § 68662 (West Supp. 2005)	----		YES (capital) <i>In re Barnett</i> , 73 P.3d 1106 (Cal. 2003)
Colorado	YES (capital)	COLO. REV. STAT. ANN. § 16-12-205 (West 1998)	NO, but mandates referral to public defender office for consideration	COLO. R. CRIM. P. 35	NO (public defender office discretion) People v. Duran, 757 P.2d 1096 (Colo. Ct. App. 1988) ⁵

⁴ See also *Tuzon v. MacDougall*, 671 P.2d 923 (Ariz. Ct. App. 1983).

⁵ See also *Duran v. Price*, 868 P.2d 375 (Colo. 1994) (holding that there is no state constitutional right to counsel in habeas corpus cases).

State	Statute	Court Rule	Case
Connecticut	YES (any habeas proceeding "arising from a criminal matter") ⁶ NO	-----	NO Vines v. Warden, 858 A.2d 915 (Conn. Super. Ct. 2003)
Delaware	NO	-----	NO (trial court discretion) Floyd v. State, 608 A.2d 727 (Del. 1992)
Florida	YES (capital) NO (noncapital)	-----	NO (trial court discretion) ⁷ Russo v. Akers, 701 So. 2d 366 (Fla. Dist. Ct. App. 1997) ⁸
Georgia	NO	-----	NO Croker v. Smith, 169 S.E.2d 787 (Ga. 1969) ⁹

⁶ In *Vines v. Warden*, the court distinguishes between habeas corpus cases that arise from criminal matters and those which do not. 858 A.2d 915 (Conn. Super. Ct. 2003). The court explains that there are three categories of habeas corpus petitions: (1) those that attack the constitutionality or the legality of the conviction; (2) those that attack the computation of sentence; and (3) those that deal with conditions of prisoner's confinement. *Id.* The court notes that the third category is not a habeas corpus proceeding which arises from a criminal matter and therefore, no mandatory right of counsel attaches to a habeas corpus petitioner challenging the conditions of confinement. *Id.* However, the court grants that the trial judge always maintains discretion to appoint counsel. *Id.*

⁷ Florida presents an interesting situation because the legislature and judiciary seem to be in conflict. In *Russo v. Akers*, the court concedes that the legislature passed a statute stating that no defendant in a noncapital case has a right to court-appointed counsel; however, the court points out that nonetheless, the Florida Supreme Court has held that "due process requires that counsel be provided if a postconviction motion presents a meritorious claim and a hearing on the motion is potentially so complex that counsel is necessary." 701 So. 2d 366, 367 (Fla. Dist. Ct. App. 1997). In interpreting the statute, the court notes that it must be interpreted, if possible, not to conflict with the Constitution and thus holds that "there is no statutory right to counsel However, the statute does not preclude the appointment of counsel when constitutionally mandated under *Weeks* and *Graham*." *Id.*

⁸ See also *Graham v. State*, 372 So. 2d 1363 (Fla. 1979); *State v. Weeks*, 166 So. 2d 892 (Fla. 1964).

⁹ See also *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999) (reaffirming that there is no right to counsel in state habeas corpus proceedings).

State	Statute	Statute	Court Rule	Case
Hawaii	YES	HAW. REV. STAT. ANN. § 38-802-1 (Michie 2003)	-----	State v. Levi, 75 P.3d 1173 (Haw. 2003)
Idaho	NO	IDAHO CODE § 19-4208 (Michie 2004)	YES (capital) IDAHO CRIM. R. 44.2	Quinlan v. Comm. for Pardons & Parole, 69 P.3d 146 (Idaho 2003)
Illinois	YES (unless summarily dismissed because frivolous)	725 ILL. COMP. STAT. ANN. 5/122-4 (West 2002)	-----	Tedder v. Fairman, 441 N.E.2d 311 (Ill. 1982)
Indiana ¹⁰	YES	IND. CODE ANN. § 33-40-1-2 (Michie 2004)	YES IND. R. CRIM. P. 24	Douglas v. State, 800 N.E.2d 599 (Ind. Ct. App. 2003)
Iowa	NO	IOWA CODE ANN. § 822.5 (West 2003)	-----	Maghee v. State, 639 N.W.2d 28 (Iowa 2002)

¹⁰ Indiana has an interesting history regarding appointment of counsel for indigent defendants. As recently as 2001, the Indiana legislature mandated the appointment of counsel for indigent defendants in civil cases. *See* Sholes v. Sholes, 732 N.E.2d (Ind. Ct. App. 2000); Staci A. Terri, *The Indigent Person's Rights to Appointed Counsel in Indiana*, 45 RES GESTAE 12 (2001). It seems this legislative decree would encompass habeas corpus proceedings, as well as parental termination proceedings and divorce cases. Thus, Indiana went above and beyond the constitutional right to counsel required in the critical stages of criminal proceedings and broadened the right to the civil context. However, the law was changed so that although an indigent is allowed to proceed *in forma pauperis*, the court in its discretion appoints counsel only in "exceptional circumstances." IND. CODE ANN. § 34-10-1-2 (Michie 1998 & Supp. 2004). Factors to consider are the likelihood of the applicant prevailing on the merits and the applicant's ability to investigate and present his case without the assistance of the attorney, given the complexity of the facts and legal issues. *Id.*

State	Statute	Court Rule	Case
Kansas	YES (only (1) capital and (2) if sentence of imprisonment and substantial questions of law or triable issues of fact)	-----	YES (capital) NO (trial court discretion)
	KAN. STAT. ANN. § 22-4506 (1995)		State v. Andrews, 614 P.2d 447 (Kan. 1980) ¹¹
Kentucky	NO	YES ¹²	NO
	KY. REV. STAT. ANN. § 419.020 (Michie 1992)	KY. R. CRIM. P. 11.42	Commonwealth v. Ivey, 599 S.W.2d 456 (Ky. 1980)
Louisiana	YES (for capital; court discretion for noncapital)	-----	YES (capital)
	LA. CODE CRIM. PROC. ANN. art. 930.7 (West 1997) & LA. REV. STAT. ANN. § 15:149.1 (West Supp. 2004)		Louisiana v. Neal, 2003 La. LEXIS 2606 (Oct. 30, 2003)

¹¹ See also *State v. Nunn*, 802 P.2d 547 (Kan. 1990) (explaining the trial court's role in examining the merits of the petition to determine whether appointment of counsel is necessary); *Holt v. Satya*, 17 P.3d 368 (Kan Ct. App. 2000) (holding there is no state constitutional right to counsel).

¹² But an indigent petitioner must make a written request and show the existence of material issues of fact which cannot be determined on the face of the record. *Ky. R. CRIM. P. 11.42*.

State	Statute	Court Rule	Case
Maine	UNCLEAR ¹³ ME. REV. STAT. ANN. tit. 15 § 2129 (West 2003) ¹⁴	YES (unless dismissed)	ME. R. CRIM. P. 70
Maryland	YES (on first petition)	-----	NO
Massachusetts	NO	NO	MASS. R. CRIM. P. 30
Michigan	NO	-----	NO
Minnesota	NO (unless there has been no direct appeal of the conviction)	-----	NO (unless there has been no direct appeal of the conviction)
Mississippi	NO ¹⁵	-----	YES

¹³ Maine's statute details the procedure for requesting counsel, but does not clearly state whether counsel will be provided. ME. REV. STAT. ANN. tit. 15, § 2129 (West Supp. 2004). However, the court rule provides that a judge may summarily dismiss the petition if "it plainly appears from the face of the petition . . . that the petition fails . . . to state a ground upon which post-conviction relief can be granted" ME. R. CRIM. P. 70. Nonetheless, the rule then proceeds to provide for the appointment of counsel for the indigent petitioner. *Id.*

¹⁴ *See also* ME. REV. STAT. ANN. tit. 15, §§ 2122, 2132 (West 2003); ME. REV. STAT. ANN. tit. 15, § 2129 (West Supp. 2004).

¹⁵ Although the Mississippi state legislature did not establish the right to counsel, it followed the judiciary's orders and directives by passing the Capital Post-Conviction Counsel Act. *See* MISS. CODE ANN. § 99-39-107 (2000).

State	Statute		Court Rule		Case	
Missouri	YES (two counsel in capital cases)	MO. ANN. STAT. § 547.370 (West 2002)	-----		NO	Ringo v. State, 120 S.W.3d 743 (Mo. 2003)
Montana	YES (capital if hearing)	MONT. CODE ANN. § 46-21-201 (2003)	-----		NO (trial court discretion)	State v. Lange, 733 P.2d 846 (Mont. 1987)
Nebraska	NO (discretion)	NEB. REV. STAT. ANN. § 29-3004 (2002)	-----		-----	State v. Craig, 146 N.W.2d 744 (Neb. 1966)
Nevada	YES (capital—first petition)	NEV. REV. STAT. ANN. § 34.820 (Michie 2002)	-----		YES (capital initial postconviction proceeding)	McKague v. Whitley, 912 P.2d 255 (Nev. 1966)
New Hampshire	NO	N.H. REV. STAT. ANN. § 604-B:2 (1986)	-----		NO	<i>In re</i> Richard A., 771 A.2d 1280 (2001)
New Jersey	NO	N.J. STAT. ANN. § 2A:158A-5 (West 1985)	-----		NO	State v. Preciose, 609 A.2d 1280 (N.J. 1992)
New Mexico	YES	N.M. STAT. ANN. § 31-11-6 (2000). ¹⁶	YES (noncapital—unless summarily dismisses; capital automatic)	N.M. DIST. CT. R. CRIM. P. 5-802	NO	State v. Tapia, 457 P.2d 996 (N.M. Ct. App. 1969)

¹⁶ The statute provides: “The one exception is that if the motion . . . conclusively show that the prisoner is entitled to no relief” N.M. STAT. ANN. § 31-11-6 (1998).

State	Statute		Court Rule		Case
New York	NO	N.Y. C.P.L.R. 7001 (McKinney 1998)	-----		NO People v. Richardson, 603 N.Y.S.2d 700 (N.Y. Sup. Ct. 1993)
North Carolina	YES	N.C. GEN. STAT. § 7A-451 (2003)	-----		NO Jolly v. Wright, 265 S.E.2d 135 (1980) ¹⁷
North Dakota	NO	N.D. CENT. CODE § 29-32.1-05 (1991)	-----		NO (trial court discretion—appoint if nonfrivolous) Woehlhoff v. State, 531 N.W.2d 566 (N.D. 1995)
Ohio	YES (capital) NO (noncapital)	OHIO REV. CODE ANN. § 2953.21 (Anderson 2003)	-----		NO State v. Parsley, 1978 Ohio App. LEXIS 7890 (May 17, 1978)
Oklahoma	YES (capital) NO (noncapital)	OKLA. STAT. ANN. tit. 22, § 1360 (West Supp. 2003)	-----		NO Gaines v. Maryland, 808 P.2d 672 (1991)
Oregon	YES (capital)	OR. REV. STAT. § 138.590 (2003)	-----		YES Elkins v. Thompson, 25 P.3d 376 (Or. Ct. App. 2001)
Pennsylvania	YES (capital) NO (noncapital)	42 PA. CONS. STAT. § 9542 (1998)	YES (first petition)	PA. R. CRIM. P. 904	YES (capital) NO (noncapital) Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998)

¹⁷ The North Carolina Supreme Court affirmed the statutorily created right to counsel for habeas corpus petitioners. Jolly v. Wright, 265 S.E.2d 135 (N.C. 1980).

State	Statute	Court Rule	Case
Rhode Island	YES (but counsel may make motion to withdraw if frivolous and if after hearing, court agrees, petitioner must proceed pro se) YES	-----	NO Shatney v. State, 755 A.2d 130 (R.I. 2000)
South Carolina	S.C. CODE ANN. § 17-27-60 (2002) YES	-----	YES (if there is postconviction hearing) Whitehead v. State, 426 S.E.2d 315 (S.C. 1992)
South Dakota	S.D. CODIFIED LAWS § 21-27-4 (Michie 1987) YES	-----	NO Jackson v. Weber, 637 N.W.2d 19 (S.D. 2001)

State	Statute	Court Rule	Case
Tennessee	YES TENN. CODE ANN. § 8-14-205 (2002)	-----	NO McLaney v. Bell, 59 S.W.3d 90 (Tenn. 2001) ¹⁸
Texas ¹⁹	YES (capital) NO (noncapital) TEX. CRIM. PROC. CODE ANN. § 11.071 (Vernon Supp. 2004)	-----	NO Winters v. Presiding Judge of the Criminal Dist. Court Number Three of Tarrant County, 118 S.W.3d 773 (Tex. Crim. App. 2003)
Utah	YES UTAH CODE ANN. § 77-32-301 (2003)	-----	NO Beal v. Turner, 454 P.2d 624 (Utah 1969)
Vermont	YES VT. STAT. ANN. tit. 13, § 5232 (1998)	-----	NO <i>In re</i> Morse, 415 A.2d 232 (Vt. 1980) ²⁰

¹⁸ See also *Leslie v. State*, 36 S.W.3d 34 (Tenn. 2000) (providing good policy rationale for the right to counsel in habeas corpus proceedings).

¹⁹ For more information regarding the death penalty and habeas corpus proceedings for indigent capital petitioners in Texas, see Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000).

²⁰ See also *Fletcher v. Gorczyk*, 624 A.2d 1132 (Vt. 1992).

State	Statute	Statute	Court Rule	Case
Virginia	YES (capital) NO (noncapital)	V.A. CODE ANN. § 19.2-163.7 (Michie 2004)	-----	NO Howard v. Warden of the Buckingham Corr. Ctr., 348 S.E.2d 211 (Va. 1986)
Washington	NO (discretion)	WASH. REV. CODE ANN. § 7.36.250 (2000)	YES (first personal restraint in capital cases) ²¹ WASH. R. APP. P. 16.25	Honore v. Bd. of Prison Terms & Paroles, 466 P.2d 485 (Wash. 1970)
West Virginia	YES (if court is satisfied petition filed in good faith and is not frivolous)	W. VA. CODE ANN. § 53-4A-4 (Michie 2000)	-----	NO State v. Trent, 523 S.E.2d 547 (W. Va. 1999)

²¹ See Mark A. Wilner, *Justice at the Margins: Equitable Tolling of Washington's Deadline for Filing Collateral Attacks on Criminal Judgments*, 75 WASH. L. REV. 65 (2000).

²² The court notes that if the petition is nonfrivolous, urged in good faith, and requires an evidentiary hearing, courts may desire to appoint counsel. See *Honore v. Bd. of Prison Terms & Paroles*, 466 P.2d 485 (Wash. 1970).

State	Statute	Court Rule	Case
Wisconsin	YES (if public defender office decides petition is not frivolous after court refers case to it) ²³	-----	State v. Murphy, 548 N.W.2d 45 (Wis. 1996)
Wyoming	NO	-----	Long v. State, 745 P.2d 547 (Wyo. 1987)

²³ The Wisconsin legislature mandates that “[i]f it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the state public defender for an indigency determination and appointment of counsel.” WIS. STAT. ANN. § 974.06 (West 1998).

Appendix B: Model Statute

POSTCONVICTION COUNSEL ACT¹

A person detained after a final judgment of conviction has been rendered may file as a matter of right a petition for postconviction review with the convicting court:

- 1) If the petitioner establishes indigency, regardless of whether counsel is formally requested, the court shall refer the petition to the postconviction counsel board for review. The only exception is if petitioner makes an unequivocal request to represent himself during postconviction proceedings in the petition, the court shall establish a valid waiver by ensuring that petitioner understands the dangers of self-representation. If petitioner unequivocally waives the potential assistance of counsel, then the court is excused from referring the petition to the post conviction counsel board.
- 2) Indigency status shall be determined by the same guidelines to determine indigency for court-appointed counsel during the trial phase.
- 3) The postconviction counsel board shall review the court's determination of indigency and if satisfied that the court made the correct decision regarding indigency shall proceed to examine the petition. If the postconviction counsel board believes the court made a mistake in finding the petitioner indigent, the board shall return the petition to the court.
- 4) The postconviction board shall determine whether the court should appoint counsel for the postconviction petitioner. The overall determination shall rest on whether the court and the petitioner would benefit from the appointment of counsel. The board shall not be limited to any exhaustive set of factors, but the board shall consider the following factors:
 - a. Whether the motion presents a colorable, nonfrivolous claim;
 - b. Whether the petition itself is so incomprehensible that counsel is needed to present the issues clearly;
 - c. Whether it appears that great prejudice would occur without the appointment of counsel; and

¹ The author consulted Connecticut and Wisconsin statutes in drafting this model statute. See CONN. GEN. STAT. § 51-296 (2003); WIS. STAT. § 974.06 (2003).

- d. Whether the interests of justice require the appointment of counsel in an extenuating case.
- 5) The convicting court shall give the post conviction counsel board a copy of any trial and appellate record to assist it in making its determination. Furthermore, the court shall provide any other exhibits or other matters that the board requests.
- 6) The board will consist of seven members and one alternate.
 - a. The alternate will be called in when one of the regular members is temporarily unavailable.
 - b. Five members of the board shall have a juris doctorate and at least four of these five members must have at least five years experience in the criminal justice trial system.
 - c. The two remaining members of the board shall not have a juris doctorate degree.
 - d. All members of the board must be registered voters in the state.
 - e. The governor shall make the board representative of the state's diversity. Such diversity includes gender, age, race, and sexual orientation.
 - f. The board will be appointed for a two-year term by the governor with the advice and consent of the entire senate. The lieutenant governor shall have a vote when necessary to break any deadlock within the senate confirmation process.
 - g. The members of the board shall be compensated per the budget established by the executive branch and approved by the house of representatives.
- 7) Before beginning service on the board, the non-juris doctorate members shall be required to undergo forty hours of indigent defense overview training consisting of educational sessions conducted by the state public defender board and court observances. The state public defender board shall give the agenda of the educational training sessions to the governor upon request.
- 8) The board members shall not have any ex parte contacts with the prosecutor who tried the case of the postconviction petitioner.
- 9) All meetings of the board shall be held in private
- 10) All determinations regarding appointment of counsel shall be explained in writing and made on the record. The board shall give a copy of its explanation to the court and to the postconviction petitioner.