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Murray v. Giarratano, 109 S. Ct. 2765 (1989)

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Constitutional Law/Access to Courts—LIMITING THE RELIEF AVAILABLE TO INDIGENT DEATH ROW INMATES DENIED MEANINGFUL ACCESS TO THE COURTS: *Murray v. Giarratano*, 109 S. Ct. 2765 (1989)

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> "*There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.*"[1]

THIS Note examines a prisoner's constitutional right of meaningful access to the courts, focusing on the relief available to a death row inmate denied meaningful access to a state court to obtain a writ of habeas corpus. In *Murray v. Giarratano*,[2] the United States Supreme Court held that a federal district court cannot remedy such a constitutional violation by ordering the state to appoint counsel for the inmate. This Note traces the development of the body of law recognizing that the fourteenth amendment prohibits governmental restrictions which act to deny indigents the right to seek relief in the courts. The Note analyzes the *Giarratano* decision and discusses its impact on meaningful access jurisprudence, concluding that the decision is supported by neither precedent nor policy.

I. MEANINGFUL ACCESS BEFORE *GIARRATANO*

Notice and hearing are basic elements of the constitutional requirement of due process of law.[3] The necessity of due notice and an opportunity to be heard are "immutable principles of justice which inhere in the very idea of free government."[4] At issue in *Giarratano* was this fourteenth amendment right to be heard by the courts—a jurisprudence encompassing both "right-to-counsel" and "access-to-

1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
2. 109 S. Ct. 2765 (1989).
3. Powell v. Alabama, 287 U.S. 45, 68 (1932).
4. Holden v. Hardy, 169 U.S. 366, 389-90 (1898).

courts'' cases.[5] All of these cases "share a concern, based upon the Fourteenth Amendment, that accused and convicted persons be permitted to seek legal remedies without arbitrary governmental interference."[6] As noted by Justice Stevens in *Giarratano*, "the fountainhead of this body of law is *Powell v. Alabama*."[7]

In *Powell v. Alabama*,[8] seven men were accused of rape.[9] The United States Supreme Court noted that "until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants."[10] Finding that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel,"[11] the Court reversed the convictions and death sentences of all seven defendants.[12]

The Court recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[13] Thus, a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him."[14] The Court held that counsel must be appointed in a capital case "as a necessary requisite of due process of law" and that the appointment must not be made "at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[15] The Court stated its rationale in strong language: "In a case such as this, whatever may be the rule in other cases, *the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.*"[16]

A. The Development of the Meaningful Access Doctrine

Following *Powell*, the Court developed the doctrine of meaningful access through its consideration of four types of cases, involving the requirement of "filing fees," the right to counsel, the right of access to courts and the right to effective assistance of counsel. An examination of these cases reveals the origins and extent of the meaningful

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5. *Giarratano*, 109 S. Ct. at 2774 (Stevens, J., dissenting).
6. *Id.*
7. *Id.*
8. 287 U.S. 45 (1932).
9. *Id.* at 49. The Court described the seven defendants as "youthful, . . . ignorant and illiterate." *Id.* at 52.
10. *Id.* at 56.
11. *Id.* at 68-69.
12. *Id.* at 73.
13. *Id.* at 69.
14. *Id.*
15. *Id.* at 71.
16. *Id.* at 72 (emphasis added).

access doctrine and provides the analytical framework for a discussion *Giarratano*.

1. The "Filing Fees" Cases

In *Griffin v. Illinois*,[17] the Supreme Court was asked to decide whether states could administer their criminal appellate systems, consistent with the due process and equal protection clauses of the fourteenth amendment, "so as to deny adequate appellate review to the poor while granting such review to all others."[18] Illinois law provided that in all criminal cases a defendant would have a nondiscretionary right of appeal.[19] Illinois law also required a defendant to furnish the appellate court with either a bill of exceptions or a report of the trial proceedings "in order to get full direct appellate review."[20] Except for indigent defendants sentenced to death, all defendants, whether indigent or not, had to purchase the court records.[21] The petitioners in *Griffin*, two indigents convicted of armed robbery, were unable to acquire copies of the transcript and court records because they could not afford the fees charged to obtain them.[22] The trial court denied the petitioners' motion asking that a certified copy of the entire record be provided to them without cost.[23]

The Supreme Court held that the petitioners' rights under both the due process and equal protection clauses had been violated. In the majority opinion, Justice Black wrote that "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons."[24] The Court then extended this rationale to the appellate stage of the criminal process: "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[25] When a state grants

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17. 351 U.S. 12 (1956).
18. *Id.* at 13.
19. *Id.*
20. *Id.* Indigents could obtain a "mandatory record" free of charge. A "mandatory record" consisted of the indictment, arraignment, plea, verdict and sentence. Review was then limited to errors on the face of the record. There could be no review of trial errors unless the defendant purchased a certified copy of the entire record. *Id.* at 13 n.2.
21. *Id.* at 14.
22. *Id.* at 13.
23. *Id.* at 15.
24. *Id.* at 17.
25. *Id.* at 18.

appellate review as of right,[26] it must do so in a way that does not discriminate "against some convicted defendants on account of their poverty."[27] Thus, the Court held that these indigent defendants were entitled to free transcripts.[28]

The Court based its reasoning on the importance of appellate review:

> [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. . . . Such a denial is misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[29]

Griffin was reinforced three years later in *Burns v. Ohio*.[30] In *Burns*, the petitioner was convicted of burglary and his conviction was upheld by the Ohio Court of Appeals. He then attempted to file a motion for leave to appeal to the Supreme Court of Ohio. Attached to his motion was an affidavit stating that he was indigent and unable to pay the required filing fee.[31] The Clerk of the Court refused to file the papers because the fee was not included. The Clerk returned the papers to Burns and included with them a letter in which he wrote that "the Supreme Court has determined on numerous occasions that the docket fee . . . takes precedence over any other statute which may allow a pauper's affidavit to be filed in lieu of a docket fee. For that reason we cannot honor your request."[32]

Relying upon its decision in *Griffin*, the United States Supreme Court ruled that Ohio had violated Burns' rights under the fourteenth

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26. A state is not required by the United States Constitution to provide a right to appellate review. McKane v. Durston, 153 U.S. 684, 687-88 (1894) (New York not required to provide a right to bail pending appeal because appellate review is not "a necessary element of due process of law").

27. *Griffin*, 351 U.S. at 18.

28. *Id.* at 19. Although the petitioners were entitled to a free transcript, the Court limited its holding: "We do not hold . . . that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The [Illinois] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20. Thus, the states were left to choose the method by which they would comply with the constitutional requirement of nondiscriminatory appellate review.

29. *Id.* at 19 (footnote omitted).

30. 360 U.S. 252 (1959).

31. *Id.* at 253.

32. *Id.* at 254.

amendment by requiring that he pay a fee in order to file an appeal in the state supreme court.[33] The Court rejected several arguments advanced by Ohio. First, Ohio argued that Burns had already received one appellate review of his conviction and therefore the state had satisfied its obligations under *Griffin*. The Court responded that Ohio had failed to comprehend the full import of *Griffin*:

> *Griffin* holds [that] once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.[34]

Ohio next argued that the appellate review at issue in *Griffin* was a matter of right, while leave to appeal to Ohio's Supreme Court was discretionary. The Court rejected this argument as well. Finding that nonindigent defendants would be afforded the opportunity to have the state supreme court consider the merits of their applications for leave to appeal while indigents were denied that opportunity, the Court held that indigents must "have the same opportunities to invoke the discretion of the Supreme Court of Ohio."[35] In vacating the judgment below, the Court stated that "[t]he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."[36]

The "right of access" enumerated in *Griffin* and *Burns* was further refined in *Smith v. Bennett,*[37] where the Supreme Court held that filing fees could not be imposed upon indigent defendants seeking relief in state habeas corpus proceedings.[38] Iowa had established a procedure allowing criminal defendants to apply for a writ of habeas corpus in its state courts. However, before applying for the writ or the allowance of an appeal in such a proceeding, defendants were required to pay a four-dollar filing fee.[39] The petitioners in *Bennett* could not afford the fee and their petitions were therefore not docketed in the dis-

33. *Id.* at 257-58.
34. *Id.* at 257 (citation omitted).
35. *Id.* at 258.
36. *Id.*
37. 365 U.S. 708 (1961).
38. *Id.* at 709.
39. *Id.* at 708.

trict courts.[40] In fact, Iowa conceded that "indigent convicted criminals are unable to file a petition for habeas corpus in Iowa."[41] The Supreme Court held that this procedure violated the fourteenth amendment because "to interpose any financial consideration between an indigent prisoner of the state and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws."[42]

Iowa attempted to distinguish the habeas corpus proceeding from a criminal appellate proceeding. The state noted that *Griffin* and *Burns* concerned the rights of a defendant seeking to make a direct attack upon a conviction by appeal. "Habeas corpus, on the other hand, is not an attack on the conviction but on the validity of the detention and is, therefore, a collateral proceeding."[43] Given Iowa's concession that the writ of habeas corpus was an available postconviction civil remedy, the question presented to the Court was clear: "Since Iowa does make the writ available to prisoners who have the $4 fee, may it constitutionally preclude its use by those who do not?"[44]

The Court determined that exempting indigents from paying the fee would not necessarily lead to like exceptions for all habeas corpus proceedings. The Court also found irrelevant the fact that habeas corpus, as a statutory right, could be legislatively limited.[45] Finally, the Court took strong exception to Iowa's claim that indigents could be afforded federal habeas corpus relief under Iowa's fee structure. Iowa argued that its fee requirement satisfied the demand of the federal habeas corpus statute that in order for a state prisoner to bring a federal petition, circumstances must exist which render state corrective procedures ineffective to protect the prisoner's rights.[46] The Court responded that "it would ill-behoove this great State, whose devotion to the equality of rights is indelibly stamped upon its history, to say to its indigent prisoners seeking to redress what they believe to be the State's wrongs: 'Go to the federal court.'"[47]

The Court found no distinction between the filing fees for writs of habeas corpus in *Bennett* and those fees at issue in *Griffin* and *Burns*.[48] Iowa established a procedure through which convicted

40. *Id.* at 709-10. The Supreme Court of Iowa denied the application as well. *Id.*
41. *Id.* at 709.
42. *Id.*
43. *Id* at 711.
44. *Id.*
45. *Id.* at 713.
46. *Id.* at 711.
47. *Id.* at 713.
48. *Id.* at 710-11.

defendants could petition for a writ of habeas corpus and attempt to overturn their convictions. The procedure, however, was "available only to those persons who [could] pay the necessary filing fees."[49] This restriction violated an indigent prisoner's rights under the fourteenth amendment.[50]

Griffin, *Burns* and *Bennett* established that indigent criminal defendants are no longer subject to filing fees which would effectively foreclose their right of access to appellate procedures. This right of access extends not only to a first appeal as of right, but also to discretionary appeals and civil postconviction collateral proceedings.

2. *The Right to Counsel*

On March 18, 1963, the Supreme Court held that the fourteenth amendment guarantees indigents the appointment of counsel in state trial courts,[51] as well as in their first appeal as of right.[52] In one day, the Court resolved what it described as "a continuing source of controversy and litigation in both state and federal courts": a defendant's federal constitutional right to counsel in a state court.[53]

Until the Supreme Court's decision in *Gideon v. Wainwright*,[54] a state court had no duty to assign counsel to indigent defendants absent "special circumstances."[55] In *Gideon*, the Court explicitly recog-

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49. *Id.* at 713-14.

50. *Id.* at 714.

51. Gideon v. Wainwright, 372 U.S. 335 (1963).

52. Douglas v. California, 372 U.S. 353 (1963).

53. *Gideon*, 372 U.S. at 338. On the same day that the Court decided *Gideon* and *Douglas*, the Court also decided Lane v. Brown, 372 U.S. 477 (1963). In *Brown*, the Court held that Indiana had deprived an indigent defendant "of a right secured by the Fourteenth Amendment by refusing him appellate review of the denial of a writ of error *coram nobis* solely because of his poverty." *Id.* at 478. Under Indiana law, only a public defender could obtain a free transcript of a *coram nobis* hearing for an indigent defendant. *Id.* at 481. Relying upon *Griffin*, *Burns* and *Bennett*, the Court found this provision of Indiana's public defender system to be constitutionally impermissible because "a person with sufficient funds [could] appeal as of right to the Supreme Court of Indiana from the denial of a writ of error *coram nobis*, but an indigent [could], at the will of the Public Defender, be entirely cut off from any appeal at all." *Brown*, 357 U.S. at 481.

In addition to *Griffin*, *Burns* and *Bennett*, the *Brown* Court found support for its decision in Eskridge v. Washington Prison Board, 357 U.S. 214 (1958). In *Eskridge*, the Court held constitutionally invalid a procedure that authorized a judge to give an indigent defendant a free transcript, but only if the judge determined that justice would be promoted by doing so. *Id.* at 215-16; *see also* Draper v. Washington, 372 U.S. 487 (1963) (holding a procedure unconstitutional that authorized judges to provide a free transcript to indigent defendants only if appeal was not frivolous).

54. 372 U.S. 335 (1963).

55. *See* Betts v. Brady, 316 U.S. 455 (1942). In *Betts*, the Court held that the fourteenth amendment does not "embod[y] an inexorable command" that counsel be appointed for every indigent defendant. *Id* at 473. Whether due process is denied by the refusal to appoint counsel in a particular case must be "tested by an appraisal of the totality of facts" in that case. *Id.* at 462.

nized that "appointment of counsel for an indigent criminal defendant was 'a fundamental right, essential to a fair trial.'"[56] Thus, the right to counsel, a "fundamental safeguard[] of liberty," is protected by the due process clause and cannot be abridged by the state.[57] To support this conclusion, the Court noted the important role of defense counsel in a criminal trial:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . [L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.[58]

Gideon dealt only with the right to counsel at trial. In *Douglas v. California*,[59] the issue was "whether or not an indigent shall be denied the assistance of counsel on appeal."[60] The two petitioners in *Douglas* were jointly tried and convicted of thirteen felonies.[61] They both appealed as of right. They "requested, and were denied, the assistance of counsel on appeal, even though it plainly appeared they were indigents."[62] The Supreme Court held that the indigent defendants were denied equal protection of the laws.[63] The Court stated that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[64] The Court observed that a defendant falling on the wrong side of that line received grossly unequal treatment in the appellate system:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the

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56. *Gideon*, 372 U.S. at 340 (quoting *Betts*, 316 U.S. at 471).
57. *Id.* at 341. The Court had previously held that federal courts must provide counsel to indigent criminal defendants. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).
58. *Gideon*, 372 U.S. at 344.
59. 372 U.S. 353 (1963).
60. *Id.* at 355.
61. *Id.* at 353.
62. *Id.* at 354.
63. *Id.* at 355.
64. *Id.* at 357 (emphasis in original).

> record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[65]

No longer would the indigent charged with a crime have to "face his accusers without a lawyer to assist him,"[66] either at trial or on appeal as of right.

3. *The Right of Access to the Courts*

In February 1965, William Joe Johnson, an inmate at the Tennessee State Penitentiary, was confined to the maximum security building because he assisted other inmates in the preparation of habeas corpus petitions,[67] a practice forbidden under a prison regulation.[68] Johnson filed a "motion for law books and a typewriter" in federal district court, which treated the motion as a petition for a writ of habeas corpus.[69] The district court "held that the regulation was void because it in effect barred illiterate prisoners from access to federal habeas corpus."[70]

In *Johnson v. Avery*,[71] the Supreme Court upheld the district court's determination. The Court began its analysis by noting that it had "constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme,"[72] and that the Court had "steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'"[73] Thus, the Court concluded that it is "fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[74]

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65. *Id.* at 357-58. The Court limited the extent of its consideration to the right to counsel for a first appeal as of right and stated explicitly that it was not deciding whether there was a right to counsel for a discretionary appeal. *See id.* at 356.

66. *Gideon*, 372 U.S. at 344.

67. Johnson v. Avery, 393 U.S. 483, 484 (1969).

68. The regulation provided the following:

> No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs.

Id.

69. *Id.*

70. *Id.* (citing Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966), *rev'd*, 382 F.2d 353 (6th Cir. 1967)).

71. 393 U.S. 483 (1969).

72. *Id.* at 485.

73. *Id.* (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)).

74. *Id.*

Tennessee did not provide inmates with any means of assistance with which to prepare habeas corpus petitions.[75] Therefore, by forbidding inmates from assisting other inmates, Tennessee had effectively deprived some of its prisoners access to federal habeas corpus relief altogether, thus denying them a fundamental right of access to the courts.[76] The Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue."[77]

Following *Johnson*, the Supreme Court in *Younger v. Gilmore*,[78] in a two-paragraph per curiam opinion, affirmed a district court judgment which required that indigent prisoners be provided with access to reasonably adequate law libraries in order to prepare legal papers.[79] As explained in a later decision, the Court in *Younger* held that the Constitution mandated that states "protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal knowledge."[80]

The constitutional right of access to the courts was further refined in two 1974 Supreme Court cases. In *Procunier v. Martinez*,[81] the Court enjoined enforcement of a regulation prohibiting the use of law students and paralegals to conduct attorney-client interviews with inmates.[82] The district court had held that this rule inhibited adequate legal representation of indigent defendants.[83] Accepting the trial court's factual conclusions, the Supreme Court stated that its decision was "mandated" by its previous determination in *Johnson*.[84] The Court found no justification for banning the use of law students and paralegals:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance

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75. *Id.* at 488.
76. *Id.* at 489.
77. *Id.* at 490.
78. 404 U.S. 15 (1971).
79. *See* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).
80. Bounds v. Smith, 430 U.S. 817, 817 (1977).
81. 416 U.S. 396 (1974).
82. *Id.* at 419.
83. *Id.* at 420.
84. *Id.* at 421.

> of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.[85]

The right of access recognized in *Johnson* was further extended in *Wolff v. McDonnell*.[86] In *Wolff*, the Court was confronted with a prison regulation similar to that in *Johnson*.[87] The Court was asked whether the legal assistance mandated for habeas corpus petitions in *Johnson* was also required for civil rights actions. In a unanimous opinion, the Court found "no reasonable distinction between the two forms of actions" and extended the right of access to civil rights actions.[88]

The Court rejected the "narrow" view that *Johnson* was limited to assistance in the preparation of habeas corpus petitions.[89] Noting that "the demarcation line between civil rights actions and habeas petitions" lacked clarity, the Court found compelling the fact that "both actions serve to protect basic constitutional rights."[90] The Court explained that "[t]he right of access to the courts, upon which *Johnson* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[91]

States must provide legal assistance to indigent inmates to help them prepare habeas corpus petitions and civil rights complaints. If a state does not provide some form of alternative assistance, a regulation prohibiting inmates from providing legal assistance to other inmates violates the constitutional right of access to the courts.

4. *Effective Assistance of Counsel*

In *Gideon v. Wainright*,[92] the Supreme Court held that the due process clause of the fourteenth amendment requires that indigent defendants facing felony charges be provided with a lawyer at the state's

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85. *Id.* at 419.

86. 418 U.S. 539 (1974).

87. The regulation in *Wolff* stated that the warden had appointed an inmate as "legal advisor . . . for the benefit of those offenders who are in need of legal assistance. . . . No other offender than the legal advisor is permitted to assist [inmates] in the preparation of legal documents unless with the specific written permission of the Warden." *Id.* at 577-78.

88. *Id.* at 580.

89. *Id.* at 579.

90. *Id.*

91. *Id.*

92. 372 U.S. 335 (1963).

expense.[93] In *Douglas v. California*,[94] the Court held that indigent defendants are also guaranteed the right to counsel for their first appeal as of right.[95] *Gideon* and *Douglas* have both been construed to guarantee not only the right to the assistance of counsel, but also the right to *effective* assistance of counsel.

In *Cuyler v. Sullivan*,[96] the Court held that inadequate assistance of counsel during trial could provide the basis for a writ of habeas corpus. The Court held that "inadequate assistance does not satisfy" the right to counsel enunciated in *Gideon*.[97] Reasoning that unless counsel is "able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself."[98] The Court held that the "right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."[99]

The Court extended the right to effective assistance of counsel to a defendant's first appeal as of right in *Evitts v. Lucey*.[100] The Court stated that "[a] first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."[101] The Court also noted that "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel."[102] Finding support in both the equal protection and due process clauses of the fourteenth amendment,[103] the Court held that the appellate level right to counsel comprehends that counsel will be effective.[104]

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93. *Id.* at 344.
94. 372 U.S. 353 (1963).
95. *Id.* at 357.
96. 446 U.S. 335 (1980).
97. *Id.* at 344.
98. *Id.* at 343.
99. *Id.* at 344.
100. 469 U.S. 387 (1985).
101. *Id.* at 396 (footnote omitted).
102. *Id.* at 397.
103. *Id.* at 405. The Court emphatically rejected the argument advanced by the petitioners that the constitutional requirement recognized in *Griffin* and *Douglas* found its source in the equal protection clause and not the due process clause. *See id.*
104. *Id.* at 397. Justice Rehnquist, joined only by Chief Justice Burger, dissented in *Lucey*. While he found that there was "no question that an attorney is of substantial, if not critical, assistance on appeal," Justice Rehnquist nevertheless disagreed with the holding that the *Douglas* appellate level right to counsel comprehended effective assistance. *Id.* at 409 (Rehnquist, J., dissenting). He feared that the Court's decision would allow "lawfully convicted criminals with no meritorious bases for attacking the conduct of their trials . . . to tie up the courts with habeas

Finally, in *Anders v. California*,[105] the Court further refined the *Douglas* right to appellate counsel, holding that once a court appoints counsel for an appeal as of right, the attorney may withdraw only after adhering to certain procedures. Pursuant to *Anders*, if a court-appointed attorney determines that an indigent defendant's appeal is meritless, that attorney must request permission from the court to withdraw.[106] The court then reviews the record and determines whether the appeal has any merit. If any arguable legal issue exists, the court must appoint another lawyer to represent the indigent defendant.[107] *Anders* assures that the right to appellate counsel, set forth in *Douglas*, is not a meaningless gesture.

B. Confining the Right to Counsel

As the Court expanded the meaningful access doctrine, it also curtailed perhaps the most important element of the doctrine: the right to counsel. In *Ross v. Moffitt*,[108] the Supreme Court explicitly rejected extending the rule developed in *Douglas* to discretionary appeals. The Court held that indigent defendants are not entitled to appointed counsel when seeking a discretionary appeal to a state's highest court or when seeking to petition for a writ of certiorari in the United States Supreme Court.[109]

Ross involved North Carolina's refusal to appoint counsel for the respondent, an indigent defendant, in two separate cases.[110] In the first case, the respondent requested the appointment of counsel to assist him in seeking discretionary review in the North Carolina Supreme Court.[111] In the second case, the respondent requested the appointment of counsel to assist him in the preparation of a petition for a writ of certiorari in the United States Supreme Court.[112] The respondent argued that *Douglas* required North Carolina to appoint

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petitions alleging defective performance of appellate counsel." *Id.* at 411. Justice Rehnquist would limit the right to appellate counsel to just that—counsel—without regard to effectiveness, and leave the "criminal defendant who has been badly served by the lawyer whom he hired to represent him" to suffer "the consequences of [his] attorney['s] neglect or malpractice." *Id.*

105. 386 U.S. 738 (1967).

106. *Id.* at 744. The request must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." *Id.* The defendant must be furnished a copy of the brief and given time to raise any arguments the defendant chooses. *Id.*

107. *Id.*

108. 417 U.S. 600 (1974).

109. *Id.* at 619.

110. *Id.* at 603.

111. *Id.*

112. *Id.* at 604.

counsel in both cases.[113] The Court, in an opinion written by Justice Rehnquist, disagreed.

The Court began its analysis by articulating the constitutional rationale for the *Griffin/Douglas* line of cases. Finding support in both the due process and equal protection clauses of the fourteenth amendment, the Court distinguished the two: "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[114] Neither clause, according to the Court, supports the right to counsel for a discretionary appeal.

The Court held that the due process clause did not require North Carolina to provide indigent defendants with an attorney for a discretionary appeal to the North Carolina Supreme Court.[115] The Court found significant the differences "between the trial and appellate stages of a criminal proceeding."[116] The Court observed that while the state has an aggressive role at trial, its role on appeal is different:

> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. . . . The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way.[117]

Because unfairness would result only if indigents were denied access to the courts based upon their poverty, the Court considered the issue to be an equal protection question.[118]

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113. *Id.* at 607.

114. *Id.* at 609.

115. *Id.* at 610.

116. *Id.*

117. *Id.* at 610-11 (emphasis in original). The Court inexplicably cited Douglas v. California, 372 U.S. 353 (1963), to support this proposition. In *Douglas*, the Court held that a state acts unconstitutionally when it does not provide counsel to an indigent defendant for a first appeal as of right. *Id.* at 355. The Fourth Circuit found "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." Moffitt v. Ross, 483 F.2d 650, 653 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974). The Supreme Court majority did not fully explain why the *Douglas* rationale did not apply with equal force where the appeal is discretionary. For a discussion of *Douglas*, see *supra* text accompanying notes 59-65.

118. *Ross*, 417 U.S. at 611.

While the Court found no equal protection violation, it nevertheless recognized the link between the right to counsel and a defendant's right of meaningful access to the courts: "We do not believe that it can be said . . . that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court."[119] The Court found further support for its conclusion in its observation that the "critical issue" before the state supreme court was not whether there had been "a correct adjudication of guilt."[120]

Admitting that an indigent defendant would be "somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding," the Court nevertheless found no equal protection violation.[121] Even though the Court recognized that North Carolina discriminated against impoverished defendants, the discrimination was, apparently, not so invidious as to invoke the protection of the equal protection clause. Thus, the Court concluded that states need only "assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process."[122] Thus, a criminal defendant has no automatic right to counsel in seeking a discretionary state appeal or in petitioning the Supreme Court for a writ of certiorari.[123]

In *Pennsylvania v. Finley*,[124] the Court held that indigent prisoners also have no right to counsel when seeking postconviction relief in a state court. The respondent had been appointed counsel, pursuant to state law, for her state postconviction proceedings. The appointed at-

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119. *Id.* at 615. The Court observed that when seeking discretionary review, a defendant would have a transcript or record of the trial, an appellate brief, and often an appellate decision. Thus, the Court believed an indigent defendant would be able to provide the state supreme court with an adequate basis to grant or deny review. *Id.*

120. *Id.* Thus, the Court distinguished Griffin v. Illinois, 351 U.S. 12, 18 (1956), which concerned a nondiscretionary right to full appellate review of the correctness of the trial court's judgment. For a discussion of *Griffin*, see *supra* text accompanying notes 17-29.

121. Ross v. Moffitt, 417 U.S. 600, 616 (1974). The "relative handicap" of the indigent defendant in *Ross* was, according to the Court, "far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*." *Id.*

122. *Id.*

123. Relying on *Ross*, the Court in Wainright v. Torna, 455 U.S. 586 (1982), held that since defendants have no right to counsel for a discretionary state appeal, they have no constitutional claim if their retained counsel is ineffective in that appeal. *Id.* at 587-88. Therefore, ineffective assistance of counsel in a discretionary state appeal will not support a petition for a writ of habeas corpus. The Fourth Circuit has also rejected a claim of ineffective assistance of state habeas counsel as a basis for a federal habeas corpus petition. *See* Whitley v. Muncy, 823 F.2d 55 (4th Cir.), *cert. denied*, 483 U.S. 1034 (1987).

124. 481 U.S. 551 (1987).

torney sought to withdraw after concluding that there were no arguable bases for collateral relief. Agreeing that there were no arguable issues, the trial court dismissed the petition.[125] This dismissal was reversed on appeal after the respondent acquired another appointed attorney. The state appellate court determined that Pennsylvania law concerning procedures to be followed when appointed counsel finds no basis for an appeal is derived from *Anders v. California*.[126] The court found that the respondent's appointed attorney had failed to follow the *Anders* procedures and remanded the case to the trial court for further proceedings.[127]

The Supreme Court held that the Constitution does not require that the *Anders* procedures be followed if appointed counsel decides to withdraw from state habeas proceedings.[128] Since "*Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel,"[129] the Court needed initially to determine whether indigent prisoners have a right to counsel when seeking state habeas relief. Relying on *Ross*, the Court reasoned that "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process."[130] Thus, if a state chooses to provide an avenue for collateral attack of a criminal conviction, "the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."[131]

Right-to-counsel jurisprudence is clearly defined. Both the due process and equal protection clauses of the fourteenth amendment guarantee an indigent defendant the assistance of effective counsel during the criminal trial and the first appeal as of right. Neither the due process clause nor the equal protection clause, however, automatically requires states to supply an attorney upon request when an indigent defendant seeks discretionary review in a state's highest court, petitions the Supreme Court for a writ of certiorari, or seeks postconviction relief in a state habeas corpus proceeding.

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125. *Id.* at 553.

126. 386 U.S. 738 (1967). For a short discussion of *Anders*, see *supra* text accompanying notes 105-07.

127. *Finley*, 481 U.S. at 553-54.

128. *Id.* at 557.

129. *Id.* at 555.

130. *Id.* The Court explained that "[p]ostconviction 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.

131. *Id.* at 557.

C. Bounds v. Smith *and Meaningful Access*

The seminal case involving a prisoner's right of access to the courts is *Bounds v. Smith*.[132] Inmates from various penal institutions throughout North Carolina alleged that the state failed to provide legal research facilities, thereby depriving them of access to the courts in violation of the fourteenth amendment.[133] The district court found that "the sole prison library in the State was 'severely inadequate' and that there was no other legal assistance available to inmates."[134] The court ruled that the state had denied the inmates access to the courts and "left to the State the choice of what alternative would 'most easily and economically' fulfill" the constitutional duty to provide its prisoners access to the courts.[135]

The Supreme Court began its consideration by declaring that "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts."[136] Tracing the history of its "access to the courts" jurisprudence, the Court "reaffirmed that States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.'"[137] Minimal access is not enough. "'[M]eaningful access' to the courts is the touchstone."[138]

To achieve that goal, states have "affirmative obligations to assure all prisoners meaningful access to the courts."[139] The Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[140]

Two aspects of *Bounds* deserve closer inspection. First, the right of meaningful access to the courts is not as limited in its scope as is the right to counsel. The *Bounds* Court specifically held that habeas cor-

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132. 430 U.S. 817 (1977).

133. *Id.* at 818.

134. *Id.* (quoting district court).

135. *Id.* at 819 (quoting district court). North Carolina offered to establish seven libraries throughout the state. The state also proposed to train inmates as research assistants and typists to assist other inmates. Under North Carolina's proposal, approximately 350 inmates could use the libraries. The state did not offer to provide independent legal advisors for the inmates. The district court held that the state's plan satisfied its constitutional obligation to provide prisoners access to the courts. *Id.* at 819-21.

136. *Id.* at 821.

137. *Id.* at 823 (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).

138. *Id.* (quoting *Ross*, 417 U.S. at 611).

139. *Id.* at 824.

140. *Id.* at 828. The Court added that the holding "is, of course, a reaffirmation of the result reached in *Younger v. Gilmore*[, 404 U.S. 15 (1971)]." *Id.* For a short discussion of *Younger*, see *supra* text accompanying notes 78-80.

pus proceedings and civil rights actions "are encompassed by the right of access."[141] Thus, although no right to counsel may exist for an indigent seeking postconviction relief, the right of meaningful access to the courts requires states to provide a law library or other legal resources to aid indigent inmates in the preparation of postconviction legal documents.[142] Indeed, the right of meaningful access to the courts is, to a large extent, concerned "with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights."[143]

Second, *Bounds* did not dictate that states must establish libraries in their prisons. Adequate law libraries "are one constitutionally acceptable method to assure meaningful access to the courts."[144] *Bounds* "does not foreclose alternative means to achieve that goal."[145] The Court encouraged local experimentation, but cautioned that any plan "must be evaluated as a whole to ascertain its compliance with constitutional standards."[146]

D. *Application of* Bounds

Before the Supreme Court's decision in *Bounds*, the Seventh Circuit had proclaimed that "[c]itation of authority is hardly needed for the proposition that an inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. . . . All other rights of an inmate are illusory without it."[147] Bolstered by *Bounds* and empowered with broad remedial discretion,[148] federal courts have offered

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141. *Bounds*, 430 U.S. at 828 n.17.

142. The Court rejected North Carolina's claim that inmates are "ill-equipped to use the tools of the trade of the legal profession," making libraries useless in assuring meaningful access. *Id.* at 826. In fact, the Court noted that inmates are capable of using law books and referred to a law library or other legal assistance as "vital" for framing legal documents. *Id.* at 825-26.

143. *Id.* at 827.

144. *Id.* at 830.

145. *Id.* The Court listed examples of what these other means might be:

> Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys . . . .

Id. at 831.

146. *Id.* at 832.

147. Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973).

148. In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court held that when prisoners' constitutional rights were violated, and states failed to correct those violations, judicial authority could be invoked. "Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" *Id.* at 687 n.9 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)); *see also* Battle v. Anderson, 457 F. Supp. 719, 734 (E.D. Okla. 1978).

a panoply of measures designed to ensure that inmates are not denied their right of meaningful access to the courts.

Meaningful access to the courts could be guaranteed, according to *Bounds*, through a wide variety of programs. Whether a plan satisfies the *Bounds* mandate requires an evaluation of that particular plan.[149] The United States District Court for the Western District of Kentucky articulated a standard for determining whether an inmate is afforded meaningful access:

> [T]o a greater or lesser degree, dependent upon the circumstances of a particular prison setting, it has been held that all permissible programs must affirmatively include at least three aspects to meet the *Bounds* standard. First, some source of legal information of a professional nature must be available to all inmates for the full legal development of their claims. This may consist of an adequate law library available to all inmates or qualified attorneys in sufficient number, or some combination of both. Secondly, for those inmates who possess insufficient intellectual or educational abilities to permit reasonable comprehension of their legal claims, provision must be made to allow them to communicate with someone who, after consultation with the legal learning source, is capable of translating their complaints into an understandable presentation. Such a presentation does not have to be refined, but it must be reasonable, straightforward, and an intelligible statement. This goal may be accomplished for the unlearned inmate through an institutional attorney, a free-world person with paralegal training, or an inmate, who through experience and intelligence, is a competent "writ-writer." Where these sources of assistance are present, and no physical or coercive restraints to prisoner complaints exist, due process mandating access to the courts is met.[150]

Courts have found a denial of meaningful access in a variety of situations, and have offered equally variant remedies to cure the violations.[151] Federal courts "using the alternatives set out in *Bounds* must fashion a remedy which, under the circumstances found in a particular case, will provide meaningful relief."[152] Courts have found violations of the meaningful access right articulated in *Bounds* when prison

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149. *Bounds*, 430 U.S. at 832.

150. Canterino v. Wilson, 562 F. Supp. 106, 111 (W.D. Ky. 1983); *see also* Kendrick v. Bland, 586 F. Supp. 1536, 1549 (W.D. Ky. 1984).

151. States bear the burden of proving that inmates are provided meaningful access to the courts. Cody v. Hillard, 599 F. Supp. 1025, 1060 (D.S.D. 1984), *aff'd*, 799 F.2d 447 (8th Cir. 1986), *modified*, 830 F.2d 912 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 906 (1988); *Kendrick*, 586 F. Supp. at 1548.

152. *Battle*, 457 F. Supp. at 737.

law libraries lack necessary legal materials or publications.[153] Moreover, courts have uniformly found a denial of prisoners' meaningful access rights when the prisoners have been denied reasonable physical access to prison law libraries.[154] In these situations, courts typically order prisons to purchase new materials and enjoin prison officials from restricting the inmates' physical access to a law library.[155]

Bounds held that the right of meaningful access required states to provide prisoners with "adequate law libraries *or* adequate assistance from persons trained in the law."[156] Interpreting "adequate assistance" has been problematic. Courts have disagreed as to what *Bounds* actually required. Most courts have construed *Bounds* to require other forms of legal assistance, in addition to a library, if more than a library is needed to guarantee meaningful access.[157] Recognizing that a law library is "useless to those who are functionally illiterate,"[158] most courts have rejected the contention that prisons are required to provide either a library or qualified legal assistance, but not both.[159]

A minority of courts have held that if a state provides inmates access to an adequate law library, it need not provide access to trained lawyers.[160]

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153. *See, e.g.*, Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1980); *Kendrick*, 586 F. Supp. at 1551; Wade v. Kane, 448 F. Supp. 678, 682 (E.D. Pa. 1978), *aff'd*, 591 F.2d 1338 (3d Cir. 1979). For a discussion of the sufficiency of a law library under *Bounds*, see Comment, *An Overview of Prisoners' Rights: Part I, Access to the Court Under Section 1983*, 14 ST. MARY'S L.J. 957, 971-74 & n.97 (1983); *see also* Smith v. Bounds, 538 F.2d 541, 544 n.2 (4th Cir. 1975), *aff'd*, 430 U.S. 817 (1977).

154. *See, e.g.*, *Cruz*, 627 F.2d at 720; Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); Knop v. Johnson, 655 F. Supp. 871, 881 (W.D. Mich. 1987).

155. For example, in *Battle*, 457 F. Supp. at 739, the court ordered the establishment of a new library and ordered the prison to establish a new policy affording inmates greater access to legal materials.

156. Bounds v. Smith, 430 U.S. 817, 828 (1977) (emphasis added).

157. "Most recent case law interpreting the scope of *Bounds* establishes that a law library, without more, is not sufficient to enable prison inmates, most of whom are unschooled in the basics of legal research and legal writing, 'to prepare a petition or complaint.'" Cody v. Hillard, 599 F. Supp. 1025, 1061 (D.S.D. 1984) (quoting *Bounds*, 430 U.S. at 828 n.17), *aff'd*, 799 F.2d 447 (8th Cir. 1986), *modified*, 830 F.2d 912 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 906 (1988).

158. Hadix v. Johnson, 694 F. Supp. 259, 291 (E.D. Mich. 1988).

159. *See, e.g.*, Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980); Glover v. Johnson, 478 F. Supp. 1075, 1096 (E.D. Mich. 1979) (stating that "Defendants' positions that they are obligated only to provide *either* an adequate law library *or* qualified legal assistance is too narrow a reading of *Bounds*") (emphasis in original); Wade v. Kane, 448 F. Supp. 678, 684 (E.D. Pa. 1978) (Spanish-speaking inmates or those unable to comprehend legal reference materials "have a constitutional right to legal assistance"), *aff'd*, 591 F.2d 1338 (3d Cir. 1979).

160. *See, e.g.*, Falzerano v. Collier, 535 F. Supp. 800 (D.N.J. 1982). The *Falzerano* Court adhered to this narrow view even though it believed "access to the fullest law library anywhere is

In *Hooks v. Wainright*,[161] the Eleventh Circuit adopted this position and rejected the contention that *Bounds* "intended there would be a constitutional right to legal counsel, if it were found that some prisoners were illiterate and that nonlawyer prisoners could not use the libraries as well as lawyers."[162] The court held that states are not "constitutionally required to provide attorneys in order to furnish inmates with meaningful access to the courts."[163] This holding does not mean that once a prison provides a law library it need do nothing further in every case; meaningful access will sometimes require more than access to a library.[164]

Bounds demands that a law library provide meaningful access for all inmates.[165] If the library cannot provide this access, some other "legal assistance" must be made available to assist inmates in the preparation of legal documents. In ordering legal assistance in addition to libraries, federal courts have offered a wide range of solutions to guarantee inmates access to the courts.

Some courts have found law libraries to be inadequate if staffed by untrained librarians or persons lacking a legal background.[166] In *Kendrick v. Bland*,[167] the court ordered a prison to designate a staff member "trained in the law and law library maintenance" to supervise the prison's law library.[168] Several courts have ordered prisons to provide a legal research staff or a similar entity in addition to competent librarians. In *United States* ex rel. *Para-Professional Law Clinic v. Kane*,[169] the court enjoined the prison from closing a legal assistance clinic formed by inmates. Legal assistance of this nature, in addition

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a useless and meaningless gesture in terms of the great mass of prisoners." *Id.* at 803. "Access to full law libraries makes about as much sense as furnishing medical services through books like: 'Brain Surgery Self-Taught,' or 'How to Remove Your Own Appendix,' along with scalpels, drills, hemostats, sponges, and sutures." *Id.*

161. 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).

162. *Id.* at 1436.

163. *Id.* at 1437.

164. At least one court has recognized this limitation: "*Hooks* does not stand for the proposition that an adequate law library provides functionally illiterate inmates with meaningful access to the courts." United States *ex rel.* Para-Professional Law Clinic v. Kane, 656 F. Supp. 1099, 1106 (E.D. Pa.), *aff'd*, 835 F.2d 285 (3d Cir. 1987), *cert. denied sub nom.* Zimmerman v. Para-Professional Law Clinic, 485 U.S. 993 (1988).

165. Straub v. Monge, 815 F.2d 1467, 1470 (11th Cir.), *cert. denied*, 484 U.S. 946 (1987); Kendrick v. Bland, 586 F. Supp. 1536, 1552 (W.D. Ky. 1984).

166. *See, e.g.*, Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980); Wade v. Kane, 448 F. Supp. 678, 684 (E.D. Pa. 1978), *aff'd*, 591 F.2d 1338 (3d Cir. 1979).

167. 586 F. Supp. 1536 (W.D. Ky. 1984).

168. *Id.* at 1555.

169. 656 F. Supp. 1099 (E.D. Pa.), *aff'd*, 835 F.2d 285 (3d Cir. 1987), *cert. denied sub nom.* Zimmerman v. Para-Professional Law Clinic, 485 U.S. 993 (1988).

to a library, was essential to "assure *all* prisoners *meaningful* access to the courts."[170]

Courts have also ordered prisons to educate some inmates so that they can assist other inmates in the preparation of legal documents.[171] Courts can order prisons to hire staff attorneys to assist inmates.[172] Finally, courts can require prisons to set up grievance procedures for inmates who believe they have been denied meaningful access to the courts.[173]

Pursuant to *Bounds*, federal courts have provided many forms of relief to inmates who have been denied the right of meaningful access to the courts. Rarely, however, has a court held that *Bounds* required the appointment of personal counsel to indigent defendants denied meaningful access to the courts.[174] Whether a federal court may require a state to appoint counsel to assure meaningful access is the question addressed in *Murray v. Giarratano*.[175]

II. *MURRAY V. GIARRATANO*

In *Murray v. Giarratano*,[176] the Supreme Court, for the first time since *Bounds*, addressed the scope of the right of meaningful access. The Court was asked whether a district court, in order to remedy a meaningful access violation, could order a state to provide an indigent death row inmate with a personal attorney.

A. The Prisoners' Claim

Joseph M. Giarratano filed a pro se complaint in the United States District Court for the Eastern District of Virginia seeking declaratory and injunctive relief.[177] The district court permitted other death row

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170. *Id.* at 1108 (emphasis in original).

171. *See, e.g.*, Valentine v. Beyer, 850 F.2d 951, 956 (3d Cir. 1988); *Kendrick* , 586 F. Supp at 1555; Glover v. Johnson, 478 F. Supp. 1075, 1097 (E.D. Mich. 1979).

172. *See, e.g.*, Canterino v. Wilson, 562 F. Supp. 106, 108 (W.D. Ky. 1983).

173. *See, e.g.*, Hadix v. Johnson, 694 F. Supp. 259, 296 (E.D. Mich. 1988).

174. For an example of a holding that counsel is constitutionally required, see Gibson v. Jackson, 443 F. Supp. 239, 250 (M.D. Ga. 1977), *vacated on abstention grounds*, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119 (1979).

175. 109 S. Ct. 2765 (1989).

176. *Id.*

177. Giarratano v. Murray, 668 F. Supp. 511, 512 (E.D. Va. 1986), *rev'd in part*, 836 F.2d 1421 (4th Cir.), *rev'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989). Giarratano was convicted of murdering a Virginia woman and raping and murdering her fifteen-year-old daughter. He was sentenced to death. The Virginia Supreme Court upheld both the conviction and sentence. *See* Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980).

Giarratano confessed twice to the crimes, but has since recanted his confessions. He executed an affidavit in 1988 in which he stated the following: "[S]imply put, I do not know whether I

inmates to intervene and eventually certified a class comprised of all current and future indigent inmates awaiting execution in Virginia.[178] The plaintiffs maintained that "Virginia [was] constitutionally required to provide them with counsel in post-conviction proceedings such as petitions for writs of certiorari to the United States Supreme Court or habeas corpus."[179] The class asserted that the constitutional right of meaningful access to the courts requires Virginia to appoint "each indigent death row inmate competent and adequately paid counsel to represent him in connection with post-conviction proceedings."[180]

B. Virginia Law

Virginia provides for a mandatory direct appeal to the Virginia Supreme Court for all capital convictions and death sentences.[181] The state provides counsel to all indigent defendants for this mandatory appeal.[182] If the Virginia Supreme Court affirms the conviction and sentence, execution may take place at any time, provided thirty days have elapsed since the sentencing date.[183] Generally, a stay of execution may be obtained to enable a prisoner to petition a state court for a writ of habeas corpus.[184] Virginia does not, however, provide counsel to indigent inmates seeking postconviction relief.

In Virginia, if a petition for a writ of habeas corpus omits any allegation that could have been asserted, the petitioner may be forever

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murdered [the victims] or not. Since the night I woke up in their apartment I have always assumed, convinced myself, that I was guilty; but, I have never had any actual memory of committing the murders." Giarratano v. Procunier, 891 F.2d 483, 485-86 (4th Cir. 1989). The Fourth Circuit has rejected a separate habeas corpus petition brought by Giarratano in which he claimed, based in part on doubts about his guilt, "that he lacked the capacity to provide information to counsel that was necessary to construct his defense." *Id.* at 486.

178. *Giarratano*, 668 F. Supp. at 512.

179. *Id.* Plaintiffs requested personal attorneys in both state and federal habeas corpus proceedings. *Id.* at 516. Both the district court and the Fourth Circuit held that Virginia was not required to appoint counsel for federal habeas corpus proceedings. *See id.* at 517; Giarratano v. Murray, 836 F.2d 1421, 1427 (4th Cir. 1988); Giarratano v. Murray, 847 F.2d 1118, 1122 (4th Cir. 1988) (en banc). This issue was not considered by the Supreme Court and is not addressed in this Note.

180. Giarratano v. Murray, 836 F.2d 1421, 1422 (4th Cir. 1988), *rev'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989). The plaintiffs also advanced theories under the eighth amendment, the equal protection clause, the due process clause, the sixth amendment and article I of the Constitution. The district court expressed "serious doubts as to the viability of many of these theories." *Giarratano*, 668 F. Supp. at 512.

181. VA. CODE ANN. § 17-110.1(A) (1988). The death penalty is imposed in Virginia only in cases of aggravated murder. *Id.* § 18.2-31. The state provides for comparative proportionality review of death sentences. *Id.* § 17-110.1(C)(2).

182. *Id.* § 19.2-326 (Supp. 1989).

183. *Id.* § 53.1-232 (1988).

184. *Giarratano*, 668 F. Supp. at 513.

barred from raising those allegations in subsequent state proceedings.[185] Omitted allegations may also be barred in future federal court proceedings under the doctrine of procedural default.[186] Thus, "the state post-conviction petition is often the most critical single document in the capital litigation."[187]

If an indigent death row inmate wishes to pursue postconviction claims, counsel may be appointed under one of two statutes. One provision authorizes the appointment of attorneys to each institution housing indigent prisoners.[188] The second provision authorizes courts to assign counsel to indigent defendants under certain circumstances.[189] However, appointment of counsel is made only after the petition for a writ is filed and the court determines the petition raises a nonfrivolous claim and "presents a triable issue of fact."[190]

C. *The District Court Decision*

Although the plaintiffs asserted several grounds in support of their claim of entitlement to postconviction assistance of counsel, the district court limited its consideration to the right of meaningful access.[191] Finding many of the theories advanced by the plaintiffs to be dubious, the court nevertheless found that "*Bounds* dictates that the plaintiffs here be granted some form of relief."[192]

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185. VA. CODE ANN. § 8.01-654(B)(2) (1984); *see also* Slayton v. Parrigan, 215 Va. 27, 205 S.E. 2d 680 (1974) (holding that issues not raised at trial or on appeal may not be raised for the first time in a state habeas corpus proceeding, absent a showing of ineffective assistance of counsel), *cert. denied sub nom.* Parrigan v. Paderick, 419 U.S. 1108 (1975).

186. *See* Smith v. Murray, 477 U.S. 527 (1986); Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

187. Brief for Respondents at 8, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411) (quoting John C. Boger, plaintiffs' expert witness).

188. VA. CODE ANN. § 53.1-40 (1988). This section provides:

> The judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the Commonwealth's attorney for such county or city, when he is requested so to do by the superintendent or warden of a state correctional facility, appoint one or more discreet and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration.

189. *Id.* § 14.1-183 (1989). This section provides:

> Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.

190. Darnell v. Peyton, 208 Va. 675, 678, 160 S.E.2d 749, 751 (1968).

191. Giarratano v. Murray, 668 F. Supp. 511, 512 (E.D. Va. 1986), *rev'd in part*, 836 F.2d 1421 (4th Cir.), *rev'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989).

192. *Id.*

The district court began its consideration by discussing *Bounds v. Smith*.[193] Noting the obvious importance placed upon the concept of meaningful access, the court stressed that the Supreme Court had held that "'law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'"[194] The district court also noted that the Supreme Court based its decision upon a key assumption: that inmates are capable of using law libraries.[195] In *Bounds*, the Supreme Court stated that "this Court's experience indicates that *pro se* petitioners are capable of using law books to file cases raising claims that are serious and legitimate."[196] As the district court observed, "[t]his assumption provided the basis for the alternative nature of the required relief: trained legal assistance or adequate law libraries."[197] The district court concluded, as a finding of fact determined after the presentation of evidence at trial, that the assumption upon which *Bounds* was decided was "invalid with respect to death row prisoners in Virginia."[198]

Three factors led the court to conclude that Virginia's death row inmates were incapable of effectively utilizing a law library. First, Virginia's death penalty scheme provides little time to prepare and present a petition for a writ of habeas corpus. Thus, "a large amount of legal work must be compressed into a limited amount of time."[199] The court found "beyond cavil that a prisoner unversed in the law and methods of legal research would need much more time than a trained lawyer to explore his case."[200]

Second, preparation of a petition for a writ of habeas corpus is complex and difficult. The court found the difficulties exacerbated by Virginia's bifurcated capital trial proceedings, requiring a detailed analysis of both the guilt determination phase and the sentencing phase of a capital case.[201]

Third, an inmate sentenced to death is inherently incapable of effectively using a law library. The court found that "an inmate preparing himself and his family for impending death is incapable of

193. 430 U.S. 817 (1977).
194. *Giarratano*, 668 F. Supp. at 513 (quoting *Bounds*, 430 U.S. at 825).
195. *Id.*
196. *Bounds*, 430 U.S. at 826.
197. *Giarratano*, 668 F. Supp. at 513.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

performing the mental functions necessary to adequately pursue his claims."[202]

Supported by these three considerations, the district court held that Virginia's death row inmates "are incapable of effectively using lawbooks to raise their claims."[203] Accordingly, Virginia's provision of prison law libraries failed to satisfy the standards enumerated in *Bounds*.[204] Thus, the court concluded "Virginia must fulfill its duty by providing these inmates trained legal assistance."[205] The court next examined Virginia's provision of "legal assistance" to its death row inmates.

The district court first held that Virginia's institutional attorneys failed to provide adequate legal assistance, thereby denying the death row inmates meaningful access to the courts.[206] The court concluded that Virginia's seven institutional attorneys, hired on a part-time basis, attempting to assist two thousand inmates, could not possibly ade-

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202. *Id.*

203. *Id.* Several observers have noted that the majority of death row inmates are totally or functionally illiterate, uneducated, mentally ill, or mentally retarded. *See, e.g.*, Brief of the Maryland State Bar Association, State Bar of Michigan, North Carolina State Bar, South Carolina Bar Association, West Virginia State Bar as Amici Curiae in Support of Respondents at 15-22, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411); Blume, *Representing the Mentally Retarded Defendant*, THE CHAMPION, Nov. 1987, at 32; Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 479-84 (1985); Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 548-52 (1988). In a Florida case, a district court was presented with evidence showing that over half of that state's inmates were functionally illiterate. *See* Hooks v. Wainright, 536 F. Supp. 1330, 1337 (M.D. Fla. 1982), *rev'd*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).

Even the State of Virginia has recognized the difficulties faced by an inmate in presenting legal claims. The state wrote the following as amicus curiae in support of the petitioners in Bounds v. Smith:

> The fact is inescapable that the average prison "writ writer" is, in spite of protestations to the contrary, uneducated, of borderline intelligence and often antagonistic towards the legal system which he views as responsible for his present predicament. The practice of law is at the least challenging and the interpretation of statutes, texts, and judicial decisions are often the subject of intense disagreement between scholarly and experienced counsel. . . . A law library in the hands of the average inmate is virtually useless.

Brief of the Commonwealth of Virginia as Amicus Curiae in Support of the Petitioners at 8-9, Bounds v. Smith, 430 U.S. 817 (1977) (No. 75-915).

204. Virginia's death row inmates are incarcerated at three facilities. Although each facility has a library, two forbid library visits; prisoners may only borrow materials for use in their cells. The remaining facility permits death row inmates to visit the library twice weekly. Murray v. Giarratano, 109 S. Ct. 2765, 2767 n.2 (1989).

205. *Giarratano*, 668 F. Supp. at 513. The district court thus joined the majority of courts in requiring both adequate law libraries and trained legal assistance to effectuate a prisoner's right of meaningful access to the courts.

206. *Id.* at 514.

quately assist the death row inmates.[207] Not one of the seven attorneys had ever assisted a death row inmate in the preparation of a petition for a writ of habeas corpus. The institutional lawyers did not sign pleadings, make court appearances, or "perform factual inquiries of the kind necessitated by death penalty issues."[208] The court held that Virginia's provision of institutional attorneys failed to provide the adequate legal assistance required to afford death row inmates meaningful access:

> For death row inmates, more than the sporadic assistance of a "talking law book" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution.[209]

The district court next determined that Virginia's system of appointed counsel also failed to satisfy the *Bounds* mandate. Noting that counsel could not be appointed to indigent prisoners until a petition raising nonfrivolous claims was filed, the court found that "the timing of the appointment [was] a fatal defect with respect to the requirements of *Bounds*."[210] The court recognized that because "an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing his claims."[211] Given Virginia's procedural default rules,[212] the court noted that "the delay in receiving comprehensive assistance of counsel . . . may be devastating."[213]

The district court concluded that the constitutional requirements of *Bounds* were not satisfied by the provision of prison law libraries or institutional attorneys, or by the appointment of counsel to those inmates who file petitions for writs of habeas corpus.[214] Furthermore, the district court found that the evidence "conclusively" established that voluntary representation of death row inmates could not guaran-

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207. *Id.* The evidence at trial demonstrated that each of the seven institutional attorneys could not "adequately handle more than one capital case at a time." *Id.* At the time of the district court decision, Virginia's death row housed 32 inmates. *Id.* at 512.

208. *Id.* at 514.

209. *Id.*

210. *Id.* at 515.

211. *Id.*

212. *See supra* text accompanying notes 185-87.

213. *Giarratano*, 668 F. Supp at 515 n.2.

214. *Id.* at 515.

tee an inmate meaningful access.[215] Thus, the court found relief both "necessary and warranted" and ordered the state to "appoint counsel to death row inmates who request such assistance before the petition is filed."[216]

D. *The Court of Appeals Panel Decision*

By a majority vote, a three-judge panel of the Fourth Circuit reversed,[217] holding that "Virginia fulfills its obligation under *Bounds* to provide all inmates with meaningful access to the courts, and there is no factual or legal justification for requiring a higher standard of access for death row inmates."[218] Rejecting a "sweeping extension of *Bounds*," the panel found that the district court had, "under the guise of meaningful access, established a right of counsel where none is required by the Constitution."[219]

The appellate panel found compelling the Supreme Court's decision in *Pennsylvania v. Finley*.[220] The court stated that it was "concerned

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215. *Id.* The State of Virginia does not recruit attorneys to represent indigent death row inmates on a pro bono basis. That function is performed exclusively by the private Virginia Coalition on Jails and Prisons. The Coalition is a one-person operation: Marie Deans is its founder, executive director and sole staff person. The Coalition is Virginia's only "system" of legal assistance for prisoners condemned to die, a fact acknowledged by the state at trial. Ms. Deans testified that it is becoming increasingly difficult to locate attorneys willing to represent Virginia's death row inmates on a pro bono basis. *See* Brief in Opposition to Petition for Writ of Certiorari at 1-5, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411).

Virginia is not the only state experiencing a crisis in pro bono representation of prisoners sentenced to death. The American Bar Association (ABA), in its amicus brief in *Giarratano*, recognized that "due to the enormous complexity of state post-conviction capital proceedings, attorneys have expended huge amounts of time and money and have become emotionally drained." These enormous costs convinced the ABA "that it is, and will continue to be, impossible to find sufficient volunteer attorneys to handle these cases on a *pro bono* basis." Brief of American Bar Association as Amicus Curiae in Support of Respondents at 29, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411); *see also* Blodgett, *Death Row Inmates Can't Find Lawyers*, A.B.A. J., Jan. 1, 1987, at 58; Godbold, Pro Bono *Representation of Death Sentenced Inmates*, 42 REC. OF N.Y. CITY B.A. 859, 866 (1987); Wilson & Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 337 (1989).

216. *Giarratano*, 668 F. Supp. at 515. The relief was limited to state habeas corpus proceedings. Federal law currently provides for the appointment of counsel in federal capital postconviction proceedings. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(q)(4)(B), 102 Stat. 4181, 4393-94.

217. Giarratano v. Murray, 836 F.2d 1421, 1428 (4th Cir. 1988), *rev'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989).

218. *Id.* at 1423. The court recognized that it was bound by the district court's finding of fact that Virginia violated its duty to provide death row inmates meaningful access to the courts, but only if the finding was not "clearly erroneous." Thus, in order to reverse, the court determined that the district court "clearly erred" in concluding that a meaningful access violation had occurred. *Id.*

219. *Id.*

220. 481 U.S. 551 (1987). *Finley* was decided after the district court's opinion. For a discussion of *Finley*, see *supra* text accompanying notes 124-31.

here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement of the Supreme Court that there is no previously established constitutional right to counsel in state habeas corpus proceedings."[221] Realizing that *Finley* did not address a prisoner's right of meaningful access, the court was quick to add that "[t]he rule of *Bounds* was not addressed in *Finley* only because *Bounds* was not intended to imply a broad-based right of counsel as the District Court here so interpreted it."[222] The court envisioned the question before it as whether Virginia's indigent death row inmates "constitute an exception to *Finley*, or justify an exceptional application of *Bounds*."[223]

The Fourth Circuit panel rejected the contention that the difference between the death penalty and lesser punishments required the relief granted by the district court. The court observed that the "significant constitutional difference" of the death penalty relates to sentencing procedures.[224] Thus, the court determined that the severity of the death penalty was inapplicable to the meaningful access issue and stated that the "'difference,' significant as it is, is not a basis upon which we may begin implying a separate panoply of additional constitutional standards only applicable to collateral challenges in death penalty cases."[225]

To support its conclusion, the court discarded the district court's findings of fact. The court found invalid all of the considerations which led the district court to conclude that Virginia had denied its death row inmates meaningful access to the courts. The appellate court did not believe the record suggested the conclusion that the mental toll inherent with a sentence of death could render a death row inmate incapable of initiating postconviction proceedings.[226] The court also noted that the record did not suggest the finding that a death penalty case is uniquely complex.[227] Finally, the court found that the evidence did not establish that the inmates were given a limited amount of time to file habeas corpus petitions.[228] The panel concluded that the district court's determination was clearly erroneous because Virginia had satisfied its constitutional obligation to furnish its death row inmates with meaningful

221. *Giarratano*, 836 F.2d at 1424.
222. *Id.*
223. *Id.* at 1425.
224. *Id.*
225. *Id.*
226. *Id.* at 1426. The court noted that the district court's conclusion was refuted by the fact that Giarratano himself had initiated several successful pro se lawsuits. *Id.*
227. *Id.*
228. *Id.* The court again used Giarratano as an example: he had been on death row for seven years. *Id.*

access to the courts.[229] Virginia was not, therefore, required to appoint counsel upon request to assist in the preparation of state habeas corpus petitions.[230]

E. The Court of Appeals En Banc Decision

A majority of the Fourth Circuit voted to hear the case en banc and, upon reconsideration, affirmed the district court's judgment.[231] The en banc court rejected the two principle arguments advanced by the state.

Virginia first asserted that "the constitutional right of access to the courts does not require appointment of counsel for death row inmates in state habeas corpus proceedings and that Virginia provides constitutionally adequate legal assistance to death row inmates."[232] The court rejected this assertion and held that "the legal assistance presently available to Virginia death row inmates in state post-conviction proceedings fails to meet the constitutional requirement of meaningful access to the courts as set forth in *Bounds*."[233]

The Fourth Circuit also rejected Virginia's contention that *Finley*, not *Bounds*, should guide the court's determination.[234] Arguing that under *Finley* there is no constitutional right to counsel in state post-conviction proceedings, the state claimed that the indigent death row inmates were not entitled to personal counsel to ensure their right of meaningful access. The court found the state's reliance upon *Finley* "misplaced,"[235] and distinguished it by observing that "*Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty."[236]

The en banc court noted that "'there is a significant constitutional difference between the death penalty and lesser punishments.'"[237]

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229. *Id.* at 1423.

230. *Id.* at 1428.

231. Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989).

232. *Id.* at 1121.

233. *Id.* Because the determination that Virginia denied its death row inmates their constitutional right of meaningful access to the courts was a finding of fact, the court applied the "clearly erroneous" standard set forth in Anderson v. City of Bessemer City, 470 U.S. 564 (1985). Not only did the court hold that the findings of fact were not clearly erroneous, the court found no abuse of discretion in ordering, as a remedy, the appointment of personal counsel. *Giarratano*, 847 F.2d at 1121.

234. *Giarratano*, 847 F.2d at 1121.

235. *Id.*

236. *Id.* at 1122.

237. *Id.* (quoting Beck v. Alabama, 447 U.S. 625, 637 (1980)).

Finding this difference to be compelling,[238] a majority of the Fourth Circuit refused to "read *Finley* as suggesting that the counsel cannot be required under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty."[239] Concluding that Virginia did not provide its death row inmates with meaningful access to the courts, the court reinstated the district court's order. Death row inmates, upon request, would be appointed a personal attorney to enable them to effectively petition state courts for a writ of habeas corpus.[240]

F. The Supreme Court Decision

In a plurality opinion authored by Chief Justice Rehnquist, the Supreme Court reversed.[241] The Court found *Finley* indistinguishable from the case before it and reaffirmed that "neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of 'meaningful access'" required states to "appoint counsel for indigent prisoners seeking state postconviction relief."[242]

The Court placed no significance on the fact that *Finley* was not a death penalty case. The Court observed that the severity of the death penalty was traditionally a factor considered only when examining the trial stage of a capital case.[243] Appellate review, on the other hand, required no special standards when dealing with a capital conviction.[244] The Court reasoned that if no special standards are required in

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238. The court stated that "[b]ecause of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney." *Id.* at 1122 n.8.

239. *Id.* at 1122.

240. The court pointed out that an attorney's assistance is "particularly critical" in Virginia because of the state's procedural bar rules. If a claim is procedurally barred in the state courts, federal courts generally may not consider it in a subsequent habeas corpus proceeding. *Id.* at 1120 n.4 (citing Smith v. Murray, 477 U.S. 527 (1986); Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)). For a short discussion of Virginia's procedural bar rules, see *supra* text accompanying notes 185-87.

241. Murray v. Giarratano, 109 S. Ct. 2765, 2772 (1989). Chief Justice Rehnquist's opinion was joined by Justices White, O'Connor and Scalia.

242. *Id.* at 2769.

243. *Id.* at 2770.

244. *Id.* The Court cited several of its decisions regarding appellate review of capital convictions, including the following: Satterwhite v. Texas, 486 U.S. 249 (1988) (traditional appellate standard of harmless error applies when reviewing claim of constitutional error in a capital case); Smith v. Murray, 477 U.S. 527 (1986) (principles of procedural default in habeas corpus proceedings do not differ depending on severity of penalty); Pulley v. Harris, 465 U.S. 37 (1984) (proportionality review of death sentences not required); Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception"); *see also* Ford v. Wainright, 477 U.S. 399 (1986) (where five

a capital case on appeal, it follows that no special standards are required in a collateral proceeding:

> [T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.[245]

The Court also disagreed with the Fourth Circuit's statement that *Finley* did not address the right of meaningful access to the courts.[246] Indeed, the Court perceived no "tension" at all between *Bounds* and *Finley*.[247] The Court's holding in *Finley* was clear: "'[P]risoners seeking judicial relief from their sentence in state proceedings were not entitled to counsel.'"[248] The right of meaningful access to the courts could not be invoked as an exception to this hard-and-fast rule:[249] "*Finley* applies to those inmates under sentence of death as well as to other inmates, and that holding necessarily imposes limits on *Bounds*."[250] Thus, Virginia was not required to appoint personal counsel to an indigent death row inmate who had been denied meaningful access to petition a state court for a writ of habeas corpus.[251]

Justices, in separate opinions, rejected the proposition that proceedings to determine sanity as a predicate to execution are governed by the same heightened safeguards required in capital trials and sentencings).

245. *Giarratano*, 109 S. Ct. at 2770-71 (footnote omitted).

246. *Id.* at 2771. The Court's disagreement was succinctly stated in one sentence: "Whether the right of access at issue in *Bounds* is primarily one of due process or equal protection, in either case it rests on a constitutional theory considered in *Finley*." *Id.* (footnote omitted).

247. *Id.*

248. *Id.*

249. The Court remarked that "it would be a strange jurisprudence that permitted the extension of [*Bounds*] to partially overrule a subsequently decided case such as *Finley*" and that "[i]t would be an even stranger jurisprudence to allow" such a partial overruling based upon a district court's finding of fact. *Id.*

250. *Id.* at 2772.

251. Justice O'Connor and Justice Kennedy wrote concurring opinions. Justice O'Connor agreed that the Constitution does not require a state to appoint counsel in a state postconviction proceeding and stated that "[b]eyond the requirements of *Bounds*, the matter is one of legislative choice." *Id.* at 2772 (O'Connor, J., concurring). Simply put, states could voluntarily pro-

G. *The Dissent*

Four Justices dissented in an opinion written by Justice Stevens.[252] Justice Stevens maintained that the appropriate question before the Court was "not whether there is an absolute 'right to counsel' in collateral proceedings, but whether due process requires that these respondents be appointed counsel in order to pursue legal remedies."[253] The dissent distinguished *Finley* and "accorded controlling importance" to *Bounds*.[254]

The dissent noted three "critical differences" between *Finley* and *Giarratano*.[255] First, *Finley* was not a death penalty case. The dissent recognized "that 'the penalty of death is qualitatively different from a sentence of imprisonment, however long.'"[256] The "unique nature of the death penalty . . . enhances the importance of the appellate process."[257] Justice Stevens offered telling proof of the critical difference between the death penalty and lesser punishments:

> Federal habeas courts granted relief in only 0.25% to 7% of noncapital cases in recent years; in striking contrast, the success rate in capital cases ranged from 60% to 70%. Such a high incidence of uncorrected error demonstrates that the meaningful appellate review necessary in a capital case extends beyond the direct appellate process.[258]

Clearly, postconviction proceedings are vitally more important to the prisoner condemned to die.

Second, the dissenting Justices recognized the difference between Virginia's postconviction proceedings and those at issue in *Finley*. Unlike Pennsylvania law, Virginia law contemplated "that some claims ordinarily heard on direct review will be relegated to postconviction

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vide indigent inmates with counsel, but could not be obligated to do so by the federal courts.

Justice Kennedy, joined by Justice O'Connor, found no meaningful access violation. *See id.* at 2773 (Kennedy, J., concurring in judgment). Since no inmate on death row in Virginia had been unable to obtain counsel for postconviction proceedings and since the state provided institutional lawyers in its prisons, Justice Kennedy was satisfied that there was no constitutional violation "[o]n the facts and record of this case." *Id.* Apparently, he viewed the district court's findings of fact as clearly erroneous, although this was not explicitly stated. Justice Kennedy concurred in the judgment but did not join Chief Justice Rehnquist's plurality opinion.

252. *Id.* at 2773 (Stevens, J., dissenting). Justices Brennan, Marshall and Blackmun joined Justice Stevens' dissent.

253. *Id.* at 2775-76.

254. *Id.* at 2773.

255. *Id.* at 2776.

256. *Id.* at 2777 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

257. *Id.*

258. *Id.* at 2778 (footnote omitted) (citing Mello, *supra* note 203, at 520-21).

proceedings."[259] Thus, in Virginia, "postconviction proceedings are key to meaningful appellate review of capital cases."[260]

Third, the dissent accorded the appropriate deference to the district court's findings of fact and found compelling the special circumstances surrounding an inmate on Virginia's death row. Recognizing the "extremely limited period" a death row inmate has to prepare a postconviction petition, the complexity and difficulty of death penalty litigation and the emotional burdens faced by a prisoner condemned to death, the dissent understood that "the plight of the death row inmate constrains his ability to wage collateral attacks far more than does the lot of the ordinary inmate considered in *Finley*."[261]

According to the dissent, "[t]hese three critical factors demonstrate that there is a profound difference between capital postconviction litigation and ordinary postconviction litigation in Virginia."[262] This difference "support[s] the conclusion that to obtain an adequate opportunity to present their postconviction claims fairly, death row inmates need greater assistance of counsel than Virginia affords them."[263] Furthermore, Virginia failed to assert any valid justification for its refusal to provide counsel to its thirty-two death row inmates.[264] Notwithstanding *Finley*, the four dissenting Justices believed that "[s]imple fairness" required affirmance.[265]

H. Analysis

The plurality opinion in *Giarratano* is narrowly drawn and its conclusion is very limited: states are not required to appoint personal counsel for indigent prisoners seeking state postconviction relief, regardless of the sentence imposed.[266] The Court weighed the fourteenth

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259. *Id.* For example, Justice Stevens noted that until a state habeas corpus proceeding, defendants in Virginia could not raise claims of ineffective assistance of counsel. *See id.* Justice Stevens also suggested that claims of prosecutorial misconduct often do not surface until a state postconviction proceeding. *See id.* Additionally, because Virginia will not permit direct appellate review of a claim not objected to contemporaneously at trial, many claims cannot be raised until a postconviction proceeding. *See id.* at 2779.

260. *Id.* The dissent further stressed the importance of Virginia's postconviction provisions by noting the Court's strict adherence to its procedural default rules. *See id.*

261. *Id.* at 2780.

262. *Id.* at 2781.

263. *Id.*

264. *Id.*

265. *Id.* at 2782.

266. It should be emphasized, however, that only four Justices joined in the Rehnquist opinion. Justice Kennedy did not join in the opinion, but did concur with the result. This has prompted at least one author to state that the "four-justice plurality" opinion which maintained that the Constitution does not require the appointment of counsel in state postconviction proceedings is not a holding. Tabak, *Justices Send Mixed Signals in Capital Cases*, Nat'l L.J., Aug. 21, 1989, at S9, S14.

amendment right of meaningful access to the courts, as outlined in *Bounds*, against the absence of a right to counsel when mounting collateral attacks to criminal convictions, as outlined in *Finley*. The Court decided that the rule of *Finley* trumps the rule of *Bounds*.[267]

As important as what the Court did, however, is what the Court did not do. The Court did not diminish a prisoner's constitutional right of meaningful access. Rather, the Court removed a single remedy from the arsenal of remedies a federal court may use to redress a meaningful access violation. Where, as in Virginia, prisoners are denied meaningful access, a federal court may not order the appointment of personal counsel. Other relief is not foreclosed, however. Indeed, the Court did not hold that the plaintiffs had been provided meaningful access to the courts. Rather, the Court vacated the district court's order requiring the appointment of personal counsel, and remanded the case to the district court to remedy the situation without enlarging the holding of *Bounds*.[268]

Regardless of these limitations, the reasoning of the Court in reaching its conclusion is faulty. The plaintiffs never requested, nor did the district court create, a right to counsel where none had existed before. Admittedly, the practical result is the same, but the district court only authorized the appointment of counsel to remedy Virginia's denial of the constitutional right of meaningful access. Although *Giarratano* was a meaningful access case, the Supreme Court treated it as a right-to-counsel case. Nonetheless, the Court's previous decisions concerning the right to counsel did not compel the result reached in *Giarratano*.

The plurality relied heavily on the Court's decisions in *Finley* and *Ross v. Moffitt*.[269] Yet neither *Finley* nor *Ross* supports the plurality opinion as each decision was based upon its unique circumstances. In *Ross*, the Court stated that it did not believe "that a defendant *in respondent's circumstances* is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court."[270] Similarly, in *Finley*, the Court stated that "the equal protection guarantee of

267. *Giarratano*, 109 S. Ct. at 2772. This decision should surprise no one given Chief Justice Rehnquist's professed belief that "[t]here is nothing in the United States Constitution which requires that a convict serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a 'right of access' to the federal courts in order to attack his sentence." Bounds v. Smith, 430 U.S. 817, 837 (1977) (Rehnquist, J., dissenting).

268. *Giarratano*, 109 S. Ct. at 2772.

269. 417 U.S. 600 (1974).

270. *Id.* at 615 (emphasis added).

'meaningful access' [was not] violated *in this case.*"[271] Only after determining that the constitutional right of meaningful access had been provided to the defendants in *Ross* and *Finley* did the Court rule that they were not entitled to counsel.

The proceedings considered in *Ross* were quite different from those considered in *Giarratano*. The plurality ignored this difference. In *Ross*, the respondent requested the appointment of counsel to assist him in seeking discretionary review in the North Carolina Supreme Court.[272] As the Court in *Ross* was careful to point out, the North Carolina Supreme Court's power of review is limited and can be invoked only under certain narrowly drawn circumstances:

> We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, . . . but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of the Supreme Court. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect.[273]

This review is quite distinct from that given in a habeas corpus proceeding, such as that considered in *Giarratano*, which affords a defendant the first opportunity to raise some constitutional claims, such as ineffective assistance of counsel. This distinction, overlooked by the plurality in *Giarratano*, was not overlooked by the Court in *Bounds*, where the Court contrasted the discretionary review at issue in *Ross* with the kind of review provided by habeas corpus:

> [I]n this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this Court has "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights. . . . While applications for

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271. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (emphasis added).

272. *Ross*, 417 U.S. at 603. For a discussion of *Ross*, see *supra* text accompanying notes 108-23.

273. *Id.* at 615 (citation omitted).

> discretionary review need only apprise an appellate court of a case's possible relevance to the development of the law, the prisoner petitions here are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review.[274]

The proceedings at issue in *Giarratano* were virtually identical to those considered in *Bounds*.

The plurality also did not consider the factual differences between *Giarratano* and *Finley*. In *Finley*, the respondent had been appointed counsel under state law for her postconviction proceedings.[275] Thus, she was not claiming that counsel must be appointed. Rather, her claim was that the procedures delineated in *Anders v. California*[276] be followed when appointed counsel seeks to withdraw.[277] In other words, she was not seeking the protection that appointed counsel affords, but was seeking the further protection of the *Anders* procedures. Indeed, after the respondent's initial appointed counsel was permitted to withdraw and the postconviction petition dismissed, she was appointed a different attorney to assist her in appealing that dismissal.[278] Unlike the *Giarratano* plaintiffs, the respondent in *Finley* was provided with legal assistance throughout her postconviction proceedings.

The *Giarratano* plurality's reliance upon *Ross* and *Finley* is misplaced. Before *Giarratano*, the Court had never held that under no circumstances could states be required to appoint personal counsel in postconviction proceedings. The Court has extended *Ross* and *Finley* beyond their rational underpinnings. Confronted with a denial of the meaningful access right, the Court ignored the basis of its past decisions and refused to require the appointment of counsel to cure the recognized constitutional violation.

Perhaps most disturbing about the *Giarratano* decision is the Court's treatment of the significance of the death penalty. The Court's statement on this point deserves further consideration:

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274. Bounds v. Smith, 430 U.S. 817, 827-28 (1977) (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969); Wolff v. McDonnell, 418 U.S. 539, 579 (1974)). This critical difference was brought to the attention of the Court by the respondents in *Giarratano*. *See* Brief for Respondents at 29, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411).

275. *Finley*, 481 U.S. at 553. For a discussion of *Finley*, see *supra* text accompanying notes 124-31.

276. 386 U.S. 738 (1967). For a short discussion of *Anders*, see *supra* text accompanying notes 105-07.

277. *Finley*, 481 U.S. at 553-54.

278. *Id.* at 553.

> [T]he rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.[279]

The dissent aptly demonstrated the fallacy of this statement.[280] As Justice Stevens pointed out, federal courts grant relief in sixty to seventy percent of all habeas corpus proceedings in capital cases.[281] This fact suggests that the "process by which the death penalty is imposed" is patently unreliable. The eighth amendment "safeguards" imposed at the trial stage of a capital case are demonstrably ineffective and simply cannot ensure the "reliability" of a death sentence.

The Court's refusal to require "yet another distinction" between the rights of capital and noncapital defendants is confusing. As the plurality itself pointed out, the Court has never required greater procedural safeguards in capital appeals than it requires in noncapital appeals.[282] Carving out a special rule in *Giarratano* for capital defendants would not have been "yet another distinction"; it would have been the only one. Additionally, the Court gave unwarranted short shrift to the right at issue—the right of meaningful access to the courts—"one of, perhaps *the*, fundamental constitutional right."[283]

Holding that Virginia could, but was not required to, appoint counsel in state postconviction proceedings, the Court noted that "Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding."[284] The Court reasoned that "[c]apable

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279. *Giarratano*, 109 S. Ct. at 2770-71 (footnote omitted).

280. *See id.* at 2778 (Stevens, J., dissenting).

281. *Id.* The high rate of success in capital habeas corpus proceedings has been recognized by several authorities. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting); Godbold, *supra* note 215, at 873; Mello, *supra* note 203, at 520-21.

282. *Giarratano*, 109 S. Ct. at 2770.

283. Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973) (emphasis in original).

284. *Giarratano*, 109 S. Ct. at 2771. Virginia's "concentration of resources" devoted to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding is most unimpressive. A study of Virginia's system for the representation of indigent defendants concluded that the fees authorized for court-appointed counsel in Virginia are "the lowest of any

lawyering [at those stages] would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack."[285] Of course, under *Gideon v. Wainwright*[286] and *Douglas v. California*,[287] Virginia has no choice in the matter; counsel must be appointed for the trial and the first appeal.[288] The plurality, however, assumed that increased funding necessarily results in increased lawyer effectiveness.[289] The plurality's proposition is speculative at best. The theory espoused is premised on a belief that increased funding will attract more competent attorneys to represent indigent capital defendants. As a consequence of increased representation by competent attorneys, the plurality concludes that capital defendants will advance fewer claims of ineffective assistance of counsel in postconviction proceedings. The plurality's logic is flawed—incompetent attorneys will be as attracted to the greater monetary rewards as competent attorneys. Furthermore, the plurality assumes that fewer claims of ineffective assistance of counsel in postconviction proceedings would evidence a higher level of capable lawyering at the trial and appellate stages of a capital proceeding. One could more plausibly assume that any decrease in the number of such claims would be due to the fact that indigent, illiterate death row inmates would be unable to recognize or assert an ineffective assistance of counsel claim in a postconviction proceeding without the aid of an attorney.

The Court also failed to explain why it attached greater importance to *Finley* than to *Bounds*.[290] The Court refused to require Virginia to appoint counsel to indigent death row inmates seeking postconviction relief, but failed to examine critically Virginia's postconviction process. Upon closer inspection, the dissent found Virginia's system to be

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comparable state in the country." Abt Associates Inc., Analysis of Costs for Court-Appointed Counsel in Virginia 1 (Apr. 1985, Cambridge, Mass.) [hereinafter Abt Associates Study] (included as an exhibit in Motion for Preliminary Injunction, Giarratano v. Murray, 669 F. Supp. 511 (E.D. Va. 1986) (Civ. A. No. 85-0655-R) (motion filed Feb. 12, 1986)). A later study revealed that one court-appointed attorney in Virginia was paid by the state at a rate of $.57 per hour. *See* Wilson & Spangenberg, *supra* note 215, at 336.

285. *Giarratano*, 109 S. Ct. at 2771.

286. 372 U.S. 335 (1963).

287. 372 U.S. 353 (1963).

288. For a discussion of *Gideon* and *Douglas*, see *supra* text accompanying notes 51-66.

289. No evidence or study is cited to support this proposition. However, the Court may be correct. The Abt Associates Study warned that the "crisis in indigent defense funding" in Virginia placed judges "in the impossible position of being required to make appointments, but not being able to secure a sufficient number of competent attorneys to meet the constitutional requirements of 'effective assistance of counsel.'" Abt Associates Study, *supra* note 284, at 54.

290. The Court does mention that *Finley* was decided after *Bounds*. *See Giarratano*, 109 S. Ct. at 2771. Other than the timing of the two decisions, it is unclear why the *Finley* rule takes precedence over the *Bounds* right of meaningful access.

markedly different from the system of review at issue in *Finley*.[291] The plurality failed to address this distinction. Instead, the plurality simply embraced the rule of *Finley*, and refused to "enlarge the holding of *Bounds*."[292]

Chief Justice Rehnquist once observed that "[i]f 'meaningful access' to the courts is to include law libraries, there is no convincing reason why it should not also include lawyers appointed at the expense of the State."[293] In *Giarratano*, Chief Justice Rehnquist offered no convincing reason to deny the appointment of personal counsel to an indigent death row inmate denied meaningful access to the courts. Under the rationale of the plurality, "a court could find that lawyers were an appropriate *Bounds* remedy for illiterate prisoners who could not otherwise bring civil rights actions, draft wills, or file divorce papers, but *Finley* would preclude this same court from finding that a lawyer is necessary to obtain a stay of execution."[294]

III. CONCLUSION

The kind of trial a death row inmate will receive in a state post-conviction proceeding will now depend on the amount of money that prisoner has. In *Murray v. Giarratano*, the Supreme Court delineated a bright-line rule: states are not required to appoint counsel to indigent defendants except at trial and the first appeal as of right. The Court, therefore, limited the relief available to an indigent prisoner deprived of the constitutional right of meaningful access to the courts. Indigent prisoners will now be forced to seek other, possibly more costly, remedies.

Federal courts are afforded broad discretion in fashioning equitable remedies. When a state has deprived its inmates of their meaningful access rights, a court may not order the offending state to appoint personal counsel, but the court could require the state to cure the constitutional defect in a variety of other ways. For example, the state could be required to increase the volume and quality of legal materials contained in its prison libraries, increase the size of the library staff, implement legal education programs for its inmates, afford greater physical access to the libraries and materials, or afford a much greater amount of time in which to allow indigent, and often illiterate, inmates to prepare their habeas corpus petitions. Virginia could be re-

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291. *Id.* at 2778 (Stevens, J., dissenting).

292. *Id.* at 2772.

293. Bounds v. Smith, 430 U.S. 817, 841 (1977) (Rehnquist, J., dissenting).

294. Brief in Opposition to Petition for Writ of Certiorari at 26-27 n.12, Murray v. Giarratano, 109 S. Ct. 2765 (1989) (No. 88-411).

quired to employ additional institutional attorneys on a full-time basis. *Giarratano* rejected only the remedy of appointment of *personal* counsel. Finally, a court may stay an execution indefinitely if a particular inmate's meaningful access rights cannot be guaranteed by any means other than the appointment of personal counsel.[295]

On remand, the United States District Court for the Eastern District of Virginia will decide how Virginia will provide its death row inmates with meaningful access to the courts. Virginia may not be required to appoint counsel for postconviction proceedings, but it should not be allowed to deprive these inmates of their constitutional right of meaningful access to the courts.

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295. The refusal of the Supreme Court of Florida to vacate the stays of execution of two death row inmates until those inmates were provided with postconviction counsel provided part of the impetus for the creation of Florida's Office of Capital Collateral Representative. Mello, *supra* note 203, at 600-01 (citing State v. Green, 466 So. 2d 218 (Fla. 1985) (summary denial of writ of prohibition); State v. Beach, 466 So. 2d 218 (Fla. 1985) (summary denial of writ of prohibition)). This office is responsible for representing all indigent death row inmates in Florida who are without counsel in postconviction proceedings. FLA. STAT. § 27.702 (1987). Florida's response to the postconviction attorney crisis is thoroughly analyzed in Professor Mello's article.