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Sixth and Fourteenth Amendments--Constitutional Right to State Capital Collateral Appeal: The Due Process of Executing a Convict without Attorney Representation

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SIXTH AND FOURTEENTH AMENDMENTS—CONSTITUTIONAL RIGHT TO STATE CAPITAL COLLATERAL APPEAL: THE DUE PROCESS OF EXECUTING A CONVICT WITHOUT ATTORNEY REPRESENTATION

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

I. INTRODUCTION

In *Murray v. Giarratano*,[1] a plurality of the United States Supreme Court refused to establish a constitutional right of state appointed counsel for indigent death row inmates seeking state postconviction appeals. The plurality argued that equal protection and due process rights to state appointed attorneys, which the Constitution guarantees to prisoners for mandatory appeals, satisfies the accuracy of the capital process. Denying that tension exists in the prisoner rights line of cases, the plurality embraced the categorical approach of earlier assistance of counsel cases to conclude that the Constitution does not mandate state appointed attorneys for state postconviction appeals.

Basing its argument on the fourteenth amendment, the dissent maintained that capital cases' special procedural treatments at trial and direct appeal fail to meet the accuracy necessary in a death penalty case. The dissent also highlighted the important issues unique to collateral appeals and the death row inmate's hardship in raising these matters while awaiting his or her execution. The dissent distinguished the right to assistance of counsel cases from the issue under consideration because those cases had not dealt with the death sentence.

This Note argues that the plurality arbitrarily limited a line of prisoner rights precedent that leads naturally to a constitutional right to state appointed counsel in death penalty postconviction appeals. In light of the realistic inability of death row inmates to pur-

[1] 109 S. Ct. 2765 (1989).

sue postconviction relief, the plurality should have extended the right to state appointed counsel to include state postconviction appeals. Also, after sampling policy reasons for the right to counsel in postconviction appeals, this Note illustrates through a simple procedural due process analysis the need for fourteenth amendment, rather than legislative, protection of this important safeguard in our capital adjudication process.

II. BACKGROUND

Murray is the latest indigent prisoner rights decision involving the due process and equal protection clauses[2] of the fourteenth and sixth amendments.[3] These precedents break into sometimes converging, but analytically distinct, right-to-counsel and meaningful access categories.[4] *Murray* applies these doctrines to state capital collateral appeals.[5]

A. INDIGENTS' RIGHTS TO STATE APPOINTED COUNSEL

The Court in *Powell v. Alabama*[6] held that indigent prisoners accused of state capital offenses had the right to court appointed counsel at trial. In that case, the Court held that the right to the assistance of counsel was applicable to the states through the fourteenth amendment because it was part of the "fundamental character" of due process.[7] Alabama might not refuse to those defendants

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[2] '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.

Ross v. Moffitt, 417 U.S. 600, 609 (1974).

[3] The sixth amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Council for his defence.

U.S. CONST. amend. VI.

The fourteenth amendment reads in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[4] The Court suggested this distinction in Pennsylvania v. Finley, 481 U.S. 551 (1987) (in rejecting a right to counsel on collateral appeal, the Court split its analysis into right to counsel and meaningful access divisions).

[5] *Murray*, 109 S. Ct. at 2765.

[6] 287 U.S. 45 (1932).

[7] *Id.* at 68.

the opportunity to hire counsel or receive state-appointed lawyers.[8]

The Court's decisions in *Gideon v. Wainwright*[9] and *Douglas v. California*[10] extended the right to counsel to include criminal cases and mandatory appeals, respectively.[11] In *Douglas*, the Court relied on the due process clause to invalidate a California rule requiring an ex-parte judicial hearing before appointing counsel to an indigent defendant's appeal of right.[12] Although the state could have considered some economic differences among litigants,[13] it might not have singled out the poor for ex-parte determinations of guilt before the appeal.[14] This procedure would have forced indigents to undergo a "meaningless ritual" without a lawyer, whereas a wealthier defendant could have enjoyed the privilege of a significant appeal unburdened by the ex-parte determination.[15]

The Court also carved out limitations to this expanding right. An indigent prisoner does not have a constitutional right to counsel

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8 *Id.* at 71.

9 372 U.S. 335 (1963).

10 372 U.S. 353 (1963).

11 These decisions followed earlier cases expanding a defendant's right to assistance of counsel. Johnson v. Zerbst, 304 U.S. 458 (1938) (criminal defendants in federal court have an automatic right to state appointed counsel). *But see* Betts v. Brady, 316 U.S. 455 (1942) (the sixth and fourteenth amendments do not require state appointed attorneys for all state criminal trials in all circumstances), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963).

12 *Douglas*, 372 U.S. at 356.

13 The Court stated, "But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an invidious discrimination." *Id.* (citing Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956)).

14 The Court used far more stirring language in *Gideon* when it stated, "[n]ot only these precedents but also reason and reflection require us to recognize that in 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." *Gideon*, 372 U.S. at 344.

15 *Douglas*, 372 U.S. at 358. The Court stated, "For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' " *Id.* at 355 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

The Court later extended the right to counsel line of cases to acknowledge the state's constitutional duty to provide counsel in misdemeanor cases where imprisonment could result, Argersinger v. Hamlin, 407 U.S. 25 (1972), and to include a right to effective counsel. *See* Evitts v. Lucey, 469 U.S. 387 (1985) (the constitutional right to effective assistance of counsel extends to the first appeal of right); Strickland v. Washington, 466 U.S. 668 (1984) (the sixth amendment right to counsel includes a right to effective assistance of counsel); Anders v. California, 386 U.S. 738 (1967) (on appeal of right, appointed counsel cannot withdraw from a case he deems meritless without first following certain constitutionally required procedures). Though collateral appeals often claim ineffective assistance of counsel in earlier proceedings, these issues remain outside the scope of this Note. The right to an attorney must be decided before a right to effective counsel arises.

for discretionary appeals to state supreme courts or to the United States Supreme Court.[16] Similarly, in *Pennsylvania v. Finley*,[17] the Court refused to acknowledge a constitutional right to state appointed counsel in state postconviction proceedings.[18] In these cases, the Court distinguished trials, in which the state seeks to strip the presumption of innocence from the defendant, from appeals, in which the accused initiates the adjudication to overturn a prior determination of guilt.[19] Because in a discretionary appeal the state does not force the defendant into court to prove his guilt, its refusal to appoint counsel to him does not violate due process.[20]

The Court in *Ross* further noted that the equal protection clause of the fourteenth amendment[21] does not mandate complete equality among litigants.[22] Moreover, state discretionary reviews are not intended to address the guilt of the accused.[23] Rather, such reviews usually center on constitutional questions or interesting legal issues.[24] The indigent prisoner's pro se petitions and records of earlier materials suffice for this type of review.[25] Finally, if discretionary appeals garner no constitutional right to counsel, then neither do collateral appeals.[26]

Thus, prior to *Murray*, both state and federal courts had right to assistance obligations where imprisonment could result.[27] Although the right included an appeal of right, it did not encompass discretionary or non-death penalty collateral appeals.

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

17 481 U.S. 551 (1987).

18 *Id.* In this case, appointed counsel for an indigent prisoner decided his client had no basis for a habeas corpus petition. Rather than meeting the constitutionally required process for withdrawing from a wholly frivolous appeal, counsel simply notified the Court of his intention to drop the case. The Court held that the attorney had no constitutional obligation to follow the procedure for withdrawing from an appeal of right. Because a prisoner had no right to appointed counsel for discretionary appeals, he or she also had no right on collateral attack, and an attorney need not follow a constitutionally mandated procedure before withdrawing. *Id.* at 557.

19 *Ross*, 417 U.S. at 610.

20 *Id.* at 611.

21 See *supra* note 3 for the text of the fourteenth amendment.

22 *Ross*, 417 U.S. at 611 ("[u]nfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty" (citing Douglas v. California, 372 U.S. 353 (1963)).

23 *Id.* at 615.

24 *Id.*

25 *Id.*

26 Pennsylvania v. Finley, 481 U.S. 551 (1987).

27 *See* Scott v. Illinois, 440 U.S. 367 (1979) (the right to assistance of counsel does not extend to a case in which imprisonment was authorized but not imposed).

B. INDIGENT DEFENDANTS' MEANINGFUL ACCESS RIGHTS

A parallel line of cases beginning with *Ex parte Hull*,[28] assures to an indigent prisoner the right to communicate with a court. Acknowledging both due process and equal protection arguments, the Court later extended this right to include documents necessary in filing direct appeals and inmate legal assistance.[29] These cases combined with the assistance of counsel precedents to define an indigent prisoner's ability to access and use the courts.

In *Bounds v. Smith*,[30] the Court harnessed much of the meaningful access and right to counsel precedent to obligate states to establish either law libraries or assistance of legally trained individuals for inmates drafting legal papers. The Court rhetorically raised and defeated the notion that precedent had prohibited restraints to court access, but had not embraced the expenditure of state funds for such purposes.[31] The Court rebuffed, stating that "[t]he inquiry is rather whether 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."[32] Although the Court conceded that a prisoner needs only to delineate the facts behind his complaint in a pro se civil rights or habeas petition,[33] he requires some legal knowledge to recognize a valid claim.[34] Unlike discretionary appeals which were tied to the record, habeas corpus petitions often raised important new issues.[35]

In sum, the meaningful access doctrine before *Murray* forbade the states from hindering an indigent convict's communication with

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28 312 U.S. 546, 549 (1941) (a Michigan prison could not submit a prisoner's communications or legal documents to multiple prison reviews before sending them to a court).

29 Wolff v. McDonnell, 418 U.S. 539 (1974) (prison could not hinder inmates from helping fellow convicts prepare civil rights petitions); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom*, Younger v. Gilmore, 404 U.S. 15 (1971) (meaningful access imposed an affirmative duty on the states to provide adequate law libraries to prisoners); Johnson v. Avery, 393 U.S. 483 (1969) (prison could not prohibit prisoners from helping other inmates prepare habeas corpus petitions); Gardner v. California, 393 U.S. 367 (1969) (indigent had a right to a free transcript for habeas corpus petitions just as for appeals of right); Draper v. Washington, 372 U.S. 487 (1963) (indigent prisoner permitted free transcript on appeal of right where taking the appeal did not require a transcript); Griffin v. Illinois, 351 U.S. 12 (1956) (state of Illinois prohibited from making a defendant's direct appeal contingent upon his providing a bill of exceptions or report of proceedings).

30 430 U.S. 817 (1977).

31 *Id.* at 825.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

the courts. The doctrine also imposed an affirmative duty to create meaningful access to the courts through state provided legal documents and research materials or assistance. While suggesting that state-supplied counsel would serve the meaningful access requirement, the Court declined to require states to supply personal attorneys to indigent prisoners.[36]

III. FACTS

In 1986, Joe Giarratano, a Virginia death row prisoner,[37] filed a pro se civil rights complaint[38] for declaratory and injunctive relief against the state of Virginia in the Federal District Court for the Eastern District of Virginia.[39] He claimed that the state of Virginia had a constitutional obligation under article I, the sixth amendment, the eighth amendment, and the due process clause of the fourteenth amendment to provide counsel for death row inmates pursuing state postconviction relief.[40]

Because the Constitution requires states to provide to prisoners meaningful access to the courts through law libraries or other legal assistance,[41] the district court interpreted the Constitution also to

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36 *Id.* at 832.

37 Giarratano was sentenced to death in 1979 for rape and murder. Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980).

38 Giarratano based his complaint on 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982).

The other principle type of postconviction proceeding is a writ of habeas corpus. Federal habeas corpus review has been codified in 28 U.S.C. § 2254. A successful motion under this statute requires that the individual be imprisoned against the Constitution, laws or treaties of the U.S., and that she first exhaust state remedies by raising the question at issue in all possible state procedures. 28 U.S.C. § 2254(a), (d) (1982).

39 Giarratano v. Murray, 668 F. Supp. 511 (E.D. Va. 1986).

40 *Id.* When other death row inmates intervened, the district court certified the group as a class. The formal description of the class was as follows:

> . . . [A]ll persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

Id. at 512.

41 This right was first enunciated in Bounds v. Smith, 430 U.S. 817 (1977). *See supra* note 30 and accompanying text.

require appointed counsel for death row postconviction actions.[42] The district court highlighted the unique position of Virginia death row inmates: they faced a limited time in which to prepare petitions, confronted complex legal procedures, and suffered the strain of preparing themselves and their families for the imminent execution.[43] These unique circumstances compelled the district court to find law library access insufficient to satisfy meaningful access requirements.[44] Likewise, both institutional lawyers serving multiple prisoners on a limited basis and personal attorneys appointed after a prisoner filed a nonfrivolous petition fall short of satisfying the constitutional mandate.[45] Too few institutional attorneys serve too many inmates in too limited a fashion.[46] Furthermore, attorneys come into the litigation too late to do a major portion of the work when the court appoints them after the prisoner files a nonfrivolous motion.[47] Finally, the district court argued that additional appointment rights would not impose substantial financial burdens because the state already had appointed counsel to nonfrivolous claims.[48]

The district court limited its holding to state habeas corpus petitions because the underlying right to state appointed counsel excludes federal discretionary appeals.[49] This limitation followed the tenet that states should not fund counsel for an individual seeking relief under a federal statute.[50] The district court added that exhaustion requirements would supply federal courts with the advantage of earlier materials on all issues possibly raised.[51]

The Commonwealth appealed the district court's requirement

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42 *Giarratano*, 668 F. Supp. at 516.

43 *Id.* at 513.

44 Giarratano v. Murray, 668 F. Supp. 511, 513 (E.D. Va. 1986).

45 *Id.* at 514.

46 The district court stated:

> Currently there are seven institutional attorneys attempting to meet the needs of over 2,000 prisoners. No pretense is made by the defendants in this case that these few attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates. . . . Moreover, they are not hired to work full time; they split time between their private practice and their institutional work. . . .
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> . . . .
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> . . . The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking law books."

Id.

47 *Id.*

48 The district court also noted that the burden would be slight because of the small number of prisoners placed on death row each year. *Id.*

49 Giarratano v. Murray, 668 F. Supp. 511, 516 (E.D. Va. 1986); *see* Ross v. Moffit, 417 U.S. 600 (1974); *see supra* note 16 and accompanying text.

50 *Giarratano*, 668 F. Supp. at 516.

51 *Id.*

of state appointed attorneys for state capital postconviction appeal.[52] The class of prisoners cross-appealed the district court's refusal to include a right to assistance of counsel in federal appeals.[53] Finding the district court's factual findings clearly erroneous, the Court of Appeals for the Fourth Circuit reversed.[54] The court deemed *Finley*[55]—decided after the district court's opinion in *Giarratano*—controlling precedent.[56] It dismissed *Bounds* as not entailing a right to counsel.[57] Finally, the court limited consideration of any "significant constitutional difference" of death penalty cases to the trial phase.[58]

After en banc reconsideration, the circuit court affirmed the district court's decision.[59] The circuit court determined that the lower court's findings were not clearly erroneous.[60] *Finley* had neither involved meaningful access, addressed *Bounds*,[61] nor discussed the death penalty.[62] Finally, the court acknowledged that society's special interest in properly imposing death sentences required consideration of the punishment's "significant constitutional difference."[63]

The United States Supreme Court granted certiorari to reconcile the circuit court's holding with *Finley*, and thereby determine whether or not a constitutional right to counsel exists in a postconviction proceeding.[64]

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52 Giarratano v. Murray, 836 F.2d 1421 (4th Cir. 1988).

53 *Id.*

54 *Id.* at 1422.

55 Pennsylvania v. Finley, 481 U.S. 551 (1987). See *supra* note 17 and accompanying text for a discussion of *Finley*.

56 *Giarratano*, 836 F.2d at 1423-25.

57 *Id.* at 1424. The district court stated:

> In *Bounds* the issue was access to "sources of legal knowledge" to prepare meaningful papers . . . and the Court explicitly stated that, for inmates seeking to file postconviction papers, meaningful access to the courts can be satisfied by either providing adequate law libraries or "adequate assistance from persons trained in the law."

Id. (citations omitted).

58 *Id.* at 1425.

59 Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988).

60 *Id.* at 1121. The circuit court stated:

> The district court made findings of fact based upon the record which indicated that Virginia was not in compliance with constitutional rights of access to the courts. Under Anderson v. City of Bessemer City, 470 U.S. 564 . . . (1985), we cannot say these findings of fact are clearly erroneous.

Id. (citation omitted).

61 Bounds v. Smith, 430 U.S. 817 (1977). See *supra* note 30 and accompanying text for a discussion of *Bounds*.

62 *Giarratano*, 847 F.2d at 1122.

63 *Id.*

64 Murray v. Giarratano, 109 S. Ct. 303 (1988); Pennsylvania v. Finley, 481 U.S. 551 (1987).

IV. SUPREME COURT OPINIONS

A. THE PLURALITY

Writing for the plurality, Chief Justice Rehnquist[65] held that the Constitution requires state appointed counsel only for trials and appeals of right, not for voluntary postconviction proceedings.[66] He first delineated the history of an indigent defendant's right to counsel so as to reveal an expanding right to assistance limited only by *Ross v. Moffitt* and *Finley*.[67] Addressing the relevance of *Finley* to capital postconviction rights, the Chief Justice conceded the existence of special capital constitutional restraints.[68] These standards, however, have been limited to the trial level.[69] Furthermore, in state criminal procedures, the Constitution does not require collateral appeals which serve a "different and more limited purpose than either the trial or appeal."[70] Instead, the eighth amendment's heightened procedural standards for capital trials assures the proper application

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

66 *Id.*

67 The Chief Justice cited *Finley*, 481 U.S. at 551 (the fourteenth amendment does not mandate state appointed counsel in postconviction proceedings); Ross v. Moffitt, 417 U.S. 600 (1974) (no constitutional right to counsel for discretionary appeals to state supreme courts or to the United States Supreme Court); Gideon v. Wainwright, 372 U.S. 335 (1963) (extends the right to assistance of counsel to include state felony cases); Douglas v. California, 372 U.S. 353 (1963) (right to assistance of counsel embraces mandatory appeals); Griffin v. Illinois, 351 U.S. 12 (1956) (the Constitution requires the state of Illinois to provide an indigent defendant with the report of proceeding or bill of exceptions necessary for his direct appeal).

68 *Murray*, 109 S. Ct. at 2769 (citing Beck v. Alabama 447 U.S. 625 (1980) (because of the "significant constitutional difference between death penalty and lesser punishments," Alabama could not impose a death sentence when the jury had not been instructed on lesser included offenses); Eddings v. Oklahoma, 455 U.S. 104 (1982) (the state court had to consider evidence of troubled family background and emotional disturbance before sentencing a 16 year old to death); Lockett v. Ohio, 438 U.S. 586 (1978) (noting the "qualitative difference" between death sentences and other penalties, the Court required state judges to consider any proffered mitigating factors before imposing capital punishment)).

69 *Murray*, 109 S. Ct. at 2769 (citing Satterwhite v. Texas, 486 U.S. 249 (1988) (applying the "harmless error doctrine" to the admission of psychiatric testimony in capital sentencing hearings); Ford v. Wainwright, 477 U.S. 399 (1986) (the eighth amendment prohibits states from executing an individual who has become insane after his conviction); Smith v. Murray, 477 U.S. 527 (1986) (procedural default precludes the raising of defenses or errors not raised on direct appeal); Pulley v. Harris, 465 U.S. 37 (1984) (because California trial procedure provided adequate protection, the Court refused to require proportionality review in appellate proceedings); Barefoot v. Estelle, 463 U.S. 880 (1983) (the Florida Court of Appeals did not err when it decided the merits of an appeal together with an application for a stay of execution, even though it did not formally affirm the lower court's holding); Wainwright v. Sykes, 433 U.S. 72 (1977)).

70 *Murray*, 109 S. Ct. at 2770.

of the death penalty.[71] The rule in *Finley*, therefore, applies uniformly in capital and non-capital cases.[72]

The plurality denied that the state would have saved funds by providing attorneys to prisoners before they filed habeas corpus motions.[73] Although attorneys might have weeded out frivolous petitions, Chief Justice Rehnquist rejected this argument as an improper basis for constitutional adjudication.[74] He also suggested that the state might invest in a better direct appellate process to reduce the number of genuine issues arising for postconviction proceedings.[75]

Denying any tension between *Bounds* and *Finley*, Chief Justice Rehnquist eschewed as "strange jurisprudence" the lower court's use of the 1977 *Bounds* holding to limit the 1987 *Finley* decision.[76] He deemed a limitation based on factual findings "even stranger jurisprudence" because the districts might then create varying constitutional rights to counsel.[77] These jurisdictional variations would become firmly entrenched because appellate courts could review them only on the "clearly erroneous" standard applicable to factual findings.[78] Finally, he argued that a factual-based constitutional standard would contravene the categorical approach to right-to-counsel cases used since *Gideon*.[79]

Therefore, the Chief Justice extended the *Finley* Court's denial of a constitutional right to counsel in discretionary appellate proceedings to capital cases and forms of collateral review other than discretionary appeals.[80] He thereby limited the *Bounds* meaningful access doctrine to the degree it remained inconsistent with his holding.[81]

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71 *Id.*
72 *Id.*
73 *Id* at 2771.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.* (citing Powell v. Alabama, 287 U.S. 45 (1932); Griffin v. Illinois, 851 U.S. 12 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Ross v. Moffitt, 417 U.S. 600 (1974); Pennsylvania v. Finley, 481 U.S. 551 (1987); Betts v. Brady, 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963)).
80 Murray v. Giarratano, 109 S. Ct. 2765, 2772 (1989).
81 *Id.*

B. THE CONCURRING OPINIONS

1. *Justice O'Connor's Concurrence*

Concurring, Justice O'Connor agreed that no constitutional or precedential authority requires state appointed counsel in postconviction proceedings.[82] Although acknowledging the difficulties facing death row inmates seeking collateral review, she championed the discretion given to the states by *Bounds*.[83] The state legislatures would have to formulate any further requirements.[84]

2. *Justice Kennedy's Concurrence*

Concurring, Justice Kennedy[85] agreed that the states could supply meaningful access to the courts in many ways.[86] Because imposing one method of achieving this access might preclude better options, he claimed that the choice belongs to the state legislatures, which are better able than the Court to study the policy ramifications of the various choices.[87] Furthermore, Virginia did not violate the Court's meaningful access requirements.[88] Each Virginia inmate had obtained counsel before pursuing postconviction proceedings.[89]

Justice Kennedy disagreed with the plurality's diminution of the role of postconviction proceedings in the criminal justice process.[90] He admitted that the complexity of such proceedings greatly increases the difficulty of success without counsel.[91] Thus, he restricted his agreement with the plurality to the facts of this case.[92]

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82 *Id.* (O'Connor, J., concurring) (citing *Finley*, 481 U.S. at 551).

83 Bounds v. Smith, 430 U.S. 817 (1977).

84 *Murray*, 109 S. Ct. at 2772 (O'Connor, J., concurring). Justice O'Connor elaborated that "[b]eyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures." *Id.* (O'Connor, J., concurring).

85 *Id.* (Kennedy, J., concurring). Justice O'Connor joined Justice Kennedy, concurring in judgment.

86 *Id.* (Kennedy, J., concurring).

87 *Id.* at 2773 (Kennedy, J., concurring).

88 *Id.* (Kennedy, J., concurring).

89 *Id.* (Kennedy, J., concurring).

90 *Id.* at 2772 (Kennedy, J., concurring).

91 *Id.* (Kennedy, J., concurring). Justice Kennedy stated, "The complexity of our jurisprudence in this area, moreover, makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id.* (Kennedy, J., concurring).

92 *Id.* (Kennedy, J., concurring). "On the facts and record of this case, I concur in the judgement of the court." *Id.* at 2773.

C. THE DISSENT

Dissenting, Justice Stevens[93] argued that the fourteenth amendment requires state appointed attorneys for the respondents.[94] Viewing right-to-counsel and meaningful access cases as a single line of authority,[95] he highlighted three factors unique to these death row inmates which triggers their right to appointed counsel. First, the dissent emphasized capital cases' special procedural treatment.[96] Maintaining that the trial and appeal of right does not assure accuracy in such an important and irreversible matter, he called for the continuation of these heightened procedural standards through the collateral appeal.[97] Justice Stevens dismissed *Finley* as irrelevant because it did not involve the death penalty.[98]

Second, the significant role of collateral appeals in Virginia's capital trials further distinguishes *Finley*, a discretionary appeal, from a non-capital conviction. Postconviction proceedings provide the first opportunity to raise claims procedurally barred on direct review because trial counsel neglects to raise them.[99] Moreover, raising a claim, which a state court procedurally bars during collateral appeal, requires that the defendant show "cause for the default and resultant prejudice, or that failure to review [would] cause fun-

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93 *Id.* (Stevens, J., dissenting). Justices Brennan, Marshall, and Blackmun joined Justice Stevens in his dissent.

94 *Id.* (Stevens, J., dissenting).

95 *Id.* at 2774 (Stevens, J., dissenting). Justice Stevens stated:

> Far from creating a discrete constitutional right, *Bounds* constitutes one part of a jurisprudence that encompasses "right-to-counsel" as well as "access-to-courts" cases. Although each case is shaped by its facts, all share a concern, based upon the Fourteenth Amendment, that accused and convicted persons be permitted to seek legal remedies without arbitrary governmental interference.

Id. (Stevens, J., dissenting) (citing Pennsylvania v. Finley, 481 U.S. 551 (1987); Ross v. Moffitt, 417 U.S. 600 (1974); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963) (striking down an Indiana law making it possible for a wealthy individual to appeal a denial of a writ of *corum noblis*, while an indigent had to first receive the aid of a public defender); Smith v. Bennett, 365 U.S. 708 (1961) (Indiana cannot make a habeas corpus petition contingent on a four dollar filing fee); Griffin v. Illinois, 351 U.S. 12 (1959)).

96 *Murray*, 109 S. Ct. 2765, 2777 (1989) (Stevens, J., dissenting).

97 *Id.* at 2778 (Stevens, J., dissenting). Justice Stevens commented:

> There is, however, significant evidence that in capital cases what is ordinarily considered direct review does not sufficiently safeguard against miscarriages of justice to warrant this presumption of finality. Federal habeas courts granted relief in only 0.25% to 7% of non-capital 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.

Id. (Stevens, J., dissenting).

98 *Id.* at 2776 (Stevens, J., dissenting).

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

damental miscarriage of justice."[100] These factors made state collateral appeal crucial to the capital conviction process.[101]

Third, Justice Stevens reiterated the circuit court's findings that death row inmates had been largely unable to mount successful collateral attacks.[102] Echoing the meaningful access cases, he concluded that Virginia's refusal to appoint counsel until after a nonfrivolous petition had been filed failed to "assure its indigent death row inmates an adequate opportunity to present their claims fairly."[103] Finally, Justice Stevens claimed that the state has no countervailing interest in denying counsel to the respondents.[104]

V. ANALYSIS

Because precedent fails to compel the denial of appointed counsel for death row inmates and because death row prisoners experience unique conditions, the Court should have extended the natural trend of meaningful access cases to include appointed counsel in state death penalty collateral appeals.[105] Furthermore, the lack of state interest to withhold counsel makes inconceivable the plurality's denial of state appointed attorneys beyond a trial of right.

A. PRECEDENT FAILS TO COMPEL THE PLURALITY'S DENIAL OF THE RIGHT TO ASSISTANCE OF COUNSEL IN CAPITAL COLLATERAL PROCEEDINGS

The plurality failed to recognize manifest tensions between the *Bounds* meaningful access and *Finley* right to counsel doctrines.[106] The latter,[107] relying largely on *Ross*, denies constitutional rights to

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100 *Id.* at 2779 (Stevens, J., dissenting).

101 *Id.* (Stevens, J., dissenting).

102 *Id.* (Stevens, J., dissenting).

103 *Id.* at 2780 (Stevens, J., dissenting).

104 *Id.* at 2781 (Stevens, J., dissenting) (citing Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require an evidentiary hearing in a disability benefit pretermination case)). Justice Stevens mentioned that Virginia already appointed counsel after the submission of nonfrivolous petitions, and that there were only 32 inmates on death row. Thus, the state would not incur large additional costs in supplying attorneys. Furthermore, because state appointed counsel would reduce the burden of frivolous or multiple petitions, Virginia would receive a net benefit from appointing attorneys before the filing of any pro se motion. *Id.* at 2781. (Stevens, J., dissenting).

105 *See* Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065 (1989).

106 *See Murray*, 109 S. Ct. at 2771. The appellate court, however, realized the differences between *Finley* and *Bounds*. Giarratano v. Murray, 847 F.2d 1118, 1122 (4th. Cir. 1988), *rev'd*, 109 S. Ct. 2765 (1989). *Finley* did not deal with meaningful access, it did not address the *Bounds* meaningful access doctrine, and it did not involve the death penalty. *Id.*

107 See *supra* note 17 and accompanying text for an account of *Finley*.

assistance of counsel after mandatory appeals of right are completed.[108] The equal protection and due process doctrines discussed in *Powell* and *Douglas* extend to only one mandatory appeal.[109] In the meaningful access cases such as *Bounds*, however, the accused enjoys a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[110] The states must protect this right even if it means supplying law libraries or other types of legal assistance.[111] Unlike the right to assistance of counsel, the meaningful access doctrine extends to postconviction procedures.[112]

Because the plaintiffs in *Murray* were seeking collateral relief after mandatory appeals, the *Finley* line seems determinative of their rights to assistance of counsel. Special characteristics of death row inmates, however, make law libraries or institutional attorneys insufficient to meet the *Bounds* requirement of meaningful access. Thus, the *Finley* and *Bounds* lines of precedent plausibly reach opposite results in cases such as *Murray*.[113]

The Court's list of special procedures applicable to capital trials but not to appeals[114] also fails to support a denial of counsel. Ostensibly, this list of examples rejects a death row petitioner's special rights based solely on the imposition of the death penalty. The lower court's extension of the *Bounds* meaningful access doctrine required that death row inmates receive special treatment. Otherwise, the lower court would have had to argue for the much broader proposition that all capital convicts, or all convicts, have a constitutional right to counsel on collateral appeal.

Although somewhat meritorious, the Court's argument that special safeguards protect only the trial phase of a capital proceeding fails to justify denying the assistance of counsel to the *Murray* prisoners.[115] The Court has stated that death penalty trials are

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108 Pennsylvania v. Finley, 481 U.S. 551 (1987).

109 See *supra* notes 6 and 12 and accompanying text for discussions of *Powell* and *Douglas*.

110 Bounds v. Smith, 430 U.S. 817, 825 (1977).

111 *Id.*

112 *Id.*

113 Therefore, one can conclude that the Court chose to cut the right to counsel line short, possibly because of cost considerations, while the meaningful access line continued its natural development.

114 See *supra* note 69 and accompanying text for an enumeration of these procedures.

115 Likewise, the Court's argument that the categorical approach present since *Betts* prohibits an exception for attorney appointment on capital collateral appeals does not withstand scrutiny. The Court's meaningful access line of cases has never adhered to this categorical doctrine. *See Bounds*, 430 U.S. at 817. The Court in *Bounds* stated, "We hold, therefore, that the fundamental constitutional right of access to the courts requires

unique only in some respects.[116] Therefore, the Court simultaneously could have remained true to precedent, required state appointed attorneys for indigent death row inmates, and avoided any "floodgates" objections. Given the arguably fundamental nature of representation by counsel in assuring other legal rights, the Court's failure to require state appointed counsel is indefensible.[117]

The plurality's categorization of collateral appeal as civil or secondary[118] fails to limit the meaningful access doctrine to appeals of right. Under the Court's theory, due process does not involve counsel on discretionary appeal because the convicted individual, rather than the state, initiates the proceeding.[119] However, the state must provide an attorney on the first appeal of right, which the prisoner

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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." *Id.* at 828. The Court then eschewed any categorical mandate. "It should be noted that while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here, as in *Gilmore*, does not foreclose alternative means to achieve that goal." *Id.* at 830. Instead, the Court reiterated its contention that meaningful access "to the courts is the touchstone." *Id.* at 823. Indeed, Justices Kennedy and O'Connor disagreed with the plurality because they viewed a right to counsel as too categorical under the *Bounds* holding. See *supra* note 82 and accompanying text for Justice O'Connor's disagreement.

116 *See* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("Direct appeal is the primary avenue for review . . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."); Wainwright v. Sykes, 433 U.S. 72 (1977) (procedural default situations in which an accused may waive objections by not raising them at the appropriate time).

But see Ford v. Wainwright, 477 U.S. 399 (1986) (refusing to use a narrower eighth amendment standard when determining whether a convicted individual was competent to be executed):

> Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.

Id. at 411.

117 The initial circuit court opinion pointed out the inconsistency inherent in a class of death row inmates making the argument that they had no access to the courts. Giarratano v. Murray, 836 F.2d 1421, 1423 (4th Cir. 1988). The circuit court dissent, however, pointed out Giarratano's extraordinary abilities and that this was a less complicated civil rights action, not a habeas corpus petition. *Id.* at 1430 (Hall, J., dissenting).

118 *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."); Fay v. Noia, 372 U.S. 391, 423 (1963) (habeas corpus is civil in nature).

119 Ross v. Moffitt, 417 U.S. 600, 610 (1974).

also initiates.[120] This internally inconsistent argument fails as a reasonable justification for limiting state appointed counsel to appeals of right.[121]

B. REALISTIC CONDITIONS PRISONERS FACE CALL FOR THE RIGHT TO THE ASSISTANCE OF COUNSEL IN CAPITAL COLLATERAL PROCEEDINGS

Because many death row inmates do not have the intellectual capacity or skills to pursue collateral relief, meaningful access requires assistance beyond Virginia's law libraries, staff attorneys, and discretionary appointed attorneys.[122] At least one federal court has raised concerns over the general inability of prisoners to file mean-

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120 *See* Douglas v. California, 372 U.S. 353 (1963).

121 It also does not follow that Pennsylvania v. Finley, 481 U.S. 551 (1987), should necessarily extend the *Ross* discretionary appeal rule to all collateral attacks. The Court in *Bounds* stated:

> By contrast in 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.

Bounds v. Smith, 430 U.S. 817, 827 (1977) (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969); Wolff v. McDonnell, 418 U.S. 539, 579 (1974)). Furthermore, the dissent in *Murray* noted that capital litigation tended to continue after the appeal of right, making meaningless any distinction between trial or appeal and collateral appeals. Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting). The dissent stated, "Nor can we overlook our experience that capital litigation proceeds apace after affirmance of a conviction. With the vigorous opposition of state legal departments, capital defendants seek not only review of state and federal judicial decisions, but also relief from state governors and parole boards." *Id.* at 2778 n.12 (Stevens, J., dissenting).

122 Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988); *see also* Mello, *Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 549 (1988). The *Giarratano* Court considered the complexity of habeas corpus cases, the limited time available in which to file petitions, and the emotional strain associated with impending death.

Mello discussed the intellectual ability and skills of prisoners in general:

> A 1968 study of federal and state prisons found that in most states the average prisoner had only eight years of education. In states with large death row populations, the figures were even more troubling: 49% of Florida inmates completed less than nine years of education. Louisiana inmates averaged six years of schooling, and Texas inmates had an average educational level of 5.1 years. The average inmate IQ in Alabama and Louisiana was eighty, while in Texas it was eighty-six. Thirty percent of South Carolina inmates had IQs less than eighty, while 49% of North Carolina inmates had IQs less than ninety. The study found that prisoners are three times more likely to be mentally disabled than members of the general population.

Mello, *supra*, at 549.

Mello found two additional reasons for a right to counsel on capital collateral appeal. Mello, *supra* note 105, at 1065. First, the use of habeas corpus is a "dialectic" between state and federal courts to delineate the boundaries of asserted rights. *Id.* at 1080. Both sides must have counsel to maintain the adversarial discourse. *Id.* Second, a need for extreme care exists when imposing death as a punishment. *Id.* at 1099. These

ingful habeas corpus and civil rights claims.[123] Poorly written but meritorious petitions with meaningless string cites and legal phrases could easily fall through the judicial screening process.[124] Moreover, claims that survived the initial weeding procedure are likely to have faltered when prisoners failed to amend complaints or otherwise respond to the court.[125] Prisoners who did not speak English faced an even greater barrier in gaining access.[126]

Furthermore, commentators note an increasing judicial adherence to "abuse of the writ" doctrines[127] and expedited procedures for considering multiple habeas petitions.[128] These factors combine with inmates' deficient legal skills, habeas law's inherent complexity, and death row prisoners' peculiar emotional problems and time limitations to leave meaningful access realistically impossible. Additionally, as the dissent acknowledged, Virginia's capital procedures make the need for assistance of counsel more compelling because many issues arise only in postconviction appeals.[129]

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two reasons in addition to the general trend of right to counsel and meaningful access lines of authority compel the appointment of counsel. *Id.* at 1102.

123 Hooks v. Wainwright, 536 F. Supp. 1330, 1344, 1345 (1982), *rev'd*, 775 F.2d 1433 (11th Cir. 1985) (acknowledging the lower court's factual findings, the court reversed on its reading of *Bounds*' meaningful access requirements), *cert. denied*, 479 U.S. 913 (1986). The district court gave a few examples of particularly meaningless petitions. One bore the title, "The Wave-Like Form of Fronds." *Hooks*, 536 F. Supp. at 1344-45. The court also gave a representative sample of a civil rights claim:

> Mr. Martin: being vocational counselor, are the *essence of conspiracy*. As to why Marshall, are locked up anyway. Because he took inmate: Joseph Nelson, 854467, The inmate. he is locked up for and brought from city D.O.T. to county D.O.T. After failing to get along with his fellow inmates, on city D.O.T. *Prior* to January 7th, 1982, plaintiff, Marshall, had worked on county D.O.T. without any problems at all. Mr. Martin placed Nelson, on county D.O.T. to *harass* and to *intimidate* Marshall, because he had a civil suite against Mr. Martin's *boss man*, Mr. Wainwright.

Id. at 1344 n.26 (emphasis in original).

124 *Id.* at 1345.

125 *Id.*

126 *Id.* at 1344.

127 Mello, *supra* note 122, at 552; *see also*, Rose v. Lundy, 455 U.S. 509 (1982) (district court must dismiss a habeas corpus petition which includes both exhausted and unexhausted claims); Wainwright v. Sykes, 433 U.S. 72 (1977) (construing 28 U.S.C. § 2254, to uphold a Florida law barring procedurally waived issues absent a showing of cause and actual prejudice).

128 Smith v. Murray, 477 U.S. 527 (1986) (application of procedural default rules in federal capital habeas appeals); Barefoot v. Estelle, 463 U.S. 880 (1983) (expedited procedures for multiple habeas petitions). Although these arguments may support the appointment of counsel on federal habeas petitions, attorneys in state collateral proceedings would ensure that only well presented and more meritorious claims reached the federal level.

129 Justice Stevens stated:

> In contrast to the collateral process discussed in *Finley*, Virginia law contemplates that some claims ordinarily heard on direct review will be relegated to postconvic-

C. THE EFFICIENT AND JUST SOLUTION IS THE RIGHT TO THE ASSISTANCE OF COUNSEL IN CAPITAL COLLATERAL PROCEEDINGS

Although the arbitrary line drawn between direct and collateral appeals connotes underlying concerns over the efficient operation and fairness of capital convictions, the Court could have avoided such difficult choices. As to efficiency, current lengthy and repetitive collateral appeal practices diminish the retributive and deterrent purposes of capital punishment.[130] Both society and potential criminals do not closely relate crimes warranting capital punishment with the punishment given.[131] In addition, the burgeoning number of federal habeas petitions calls for efficient habeas procedures in both state and federal courts.[132]

Habeas petitioners who obtain counsel, however, have a high chance of obtaining some form of relief.[133] Thus, the increase in petitions is not pure abuse of the process. Apparently, significant error exists in capital trials and appeals. Denying to a death row inmate an attorney on collateral appeal is especially unjust. Too large a chance exists that constitutional error occurred in the lower courts and that the prisoner may receive some relief on appeal.

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tion proceedings. Claims that trial or appellate counsel provided constitutionally ineffective assistance, for instance, usually cannot be raised until this stage. . . .

. . . .

. . . The postconviction procedure in Virginia may present the first opportunity for an attorney detached from past proceedings to examine the defense and to raise claims that were barred on direct review by prior counsel's ineffective assistance.

Murray v. Giarratano, 109 S. Ct. 2765, 2778 (1989) (Stevens, J., dissenting).

130 Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1041 (1989). Former Justice Powell also gave an account of a typical capital trial and appeals process:

[A]fter a bifurcated trial and sentence, the defendant will appeal, first to the state intermediate appeals court, and then to the state supreme court. The defendant may at this point file a petition for certiorari in the United States Supreme Court. If the sentence and conviction are approved, the defendant then—often after a considerable lapse of time—initiates state habeas review, appeals to the state supreme court a second time, and again seeks certiorari. Unless relief is obtained, the next step is to seek federal habeas review of alleged errors made by the state courts on constitutional questions. If the federal district court denies relief, the defendant—on the first round—usually will obtain a certificate of probable cause and request a stay of execution from the federal court of appeals.

If relief is not obtained, a request for a stay is made to the Supreme Court, usually accompanied by a petition for certiorari.

Id. at 1039.

131 *Id.* at 1041.

132 The number of federal habeas petitions has increased from 127 in 1940, to 660 in 1950, to 9542 in 1987. *Id.* at 1039.

133 Mello gives the success rates for state non-capital habeas petitions as ranging from .25% to 7%. State capital habeas petitions had success rates as high as 60% for all petitions as of 1986. Federal capital habeas petitions succeeded in 73.2% of the cases reaching the appellate level between 1976 and 1983. Mello, *supra* note 122, at 520.

Fortunately, the solution does not involve an impossible choice between judicial efficiency and acceptable levels of injustice. Instead, appointing counsel to death row prisoners seeking collateral appeal serves both goals. Counsel appointed early in the proceedings helps weed out non-meritorious claims and presents coherently those issues raising constitutional questions.[134] As a result, the judiciary is freed from devoting valuable time to meaningless petitions.[135] In addition, a more comprehensive review earlier in the process reduces last minute questions and stays of execution.[136] Finally, society has added assurance that a death sentence is imposed in a constitutionally approved manner where safeguards are provided equally to prisoners.

A simple due process[137] analysis places this discussion within a constitutional framework calling for judicial resolution rather than merely leaving the matter to the legislatures.[138] The procedural due process test of *Mathews v. Eldridge* weighs three factors: the private interest at stake, the risk of violating that interest through government action or possible substitutes, and the government's interest in the matter.[139] According to this test, death row inmates have a due process right to state appointed counsel on collateral appeal.

First, the prisoner in a capital case faces the possibility that the state will unconstitutionally deprive him of his life. Second, the number of successful collateral attacks and a death row inmate's in-

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134 *See* Hooks v. Wainwright, 536 F. Supp. 1330, 1345 (1982), *rev'd*, 775 F.2d 1433 (1985), *cert. denied*, 479 U.S. 913 (1986).

135 Some may suggest that prisoners would continue filing their own pro se petitions even if an appointed attorney categorized their claims as futile. The solution is to require the attorney to submit any claim proposed by the death row inmate. The courts would still enjoy the efficiency of having the non-meritorious claim reduced to perhaps a few crystal clear pages.

136 Powell, *supra* note 130, at 1040 ("It is only fair to add that a significant part of the delay has been attributable to the difficulty of obtaining counsel for collateral review.").

137 The dissent states the issue as whether or not due process requires attorney appointments in this case. Murray v. Giarratano, 109 S. Ct. 2765, 2776 (1989) (Stevens, J., dissenting). Mello also recognized an unstated due process analysis in the circuit court's majority opinion. Mello, *supra* note 105, at 1072.

138 In her concurring opinion, Justice O'Connor stated that "[b]eyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures. *Murray*, 109 S. Ct. at 2772 (O'Connor, J., concurring).

139 Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (applying the *Mathews* due process test to appointment of a psychologist in a capital case); Evitts v. Lucey, 469 U.S. 387, 401 (1985) ("In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."); Lassiter v. Dep't of Social Servs., 452 U.S. 18 (1981) (applying due process test to civil appointment of counsel issues).

ability to represent himself adequately indicate a high probability that constitutional errors may slip through the system. Moreover, appointing counsel before the pro se petition will likely substantially affect individual cases.[140] Third, the states have no net offsetting costs in providing death row inmates this constitutional safeguard. The cost includes attorneys for only approximately 2000 death row inmates in all states.[141] The benefit, however, includes a more efficient collateral appeals process because fewer frivolous petitions reach the court. Those reaching the court will more clearly state the asserted claim.[142]

Additionally, an efficient and swifter capital adjudication process better serves both the deterrent and retributive justifications of the death penalty.[143] Criminals may see the death penalty as a more real possibility.[144] Society will more closely associate a crime with its punishment.[145] Finally, the courts will have the appearance of

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[140] The presence of counsel substantially aids a habeas corpus petitioner in gaining relief. One study found the presence of counsel gave a petitioner a chance of relief 15 times greater than the chance of relief given a pro se applicant. Mello, *supra* note 122, at 566.

[141] *Id.* at 515. As Mello points out, the trial court did not see as significant the cost of appointed attorneys. Virginia already appointed attorneys for those who could successfully file a nonfrivolous petition. Mello, *supra* note 105, at 1073. *See* Giarratano v. Murray, 668 F. Supp. 511, 515 (E.D. Va. 1986). Similarly, counsel for respondents argued against the proposition that a right to counsel would become a right to effective counsel, and yet another ground for further collateral attack. Brief for Respondent at 17, *Murray* (No. 88-411). Instead, a United States Court of Appeals for the Fourth Circuit decision based on the *Giarratano* trial court opinion held that the collateral petitioner had a right to counsel, but not effective counsel. Whitley v. Muncy, 823 F.2d 55, 56 (4th Cir.), *cert. denied*, 483 U.S. 1034 (1987). However accomplished, the courts could avoid the "floodgates" specter without sacrificing constitutional rights.

[142] With this safeguard in place, the Court could conceivably limit further the use of inefficient collateral appeals if it chose to do so. Similarly, these safeguards would allow legislative solutions to habeas corpus abuses without the danger of unfavorable court review.

[143] *See* Powell, *supra* note 130, at 1041.

[144] *Id.* Former Justice Powell stated that "[d]elay certainly robs the penalty of much of its deterrent value, 'since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal acitivity believe there is a possibility that they will escape punishment through repetitive collateral attacks.' " *Id.* (quoting Kuhlmann v. Wilson, 477 U.S. 436, 452-53 (1986) (Powell, J., plurality opinion)).

In Gregg v. Georgia, 428 U.S. 153, 185-86 (1976) (Stewart, Powell, and Stevens, JJ., plurality opinion), *reh'g denied*, 429 U.S. 875 (1976), the plurality stated:

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.

Id.

[145] The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe

fairness from which they derive much of their power. Thus, due process calls for the appointment of counsel in state death row collateral appeals.

VI. CONCLUSION

The plurality's decision in *Murray* fails to offer to death row inmates a constitutional right to meaningful access to the courts as defined in *Bounds*.[146] Rather than giving a useful policy justification for its holding, the plurality chose to bury its reasoning in a technical and questionable treatment of the assistance of counsel precedent.

The plurality should have recognized the continuity in the right to assistance of counsel and meaningful access doctrines and extended the right to include state collateral appeals. Both the due process and equal protection clauses of the sixth and fourteenth amendments and the inability of death row inmates to access meaningfully the courts compels this result. Taking an individual's life is too important and irreversible a state action to allow without the procedural safeguard of state appointed attorneys for indigent death row inmates pursuing a crucial part of the criminal adjudication process.

DONALD P. ZEITHAML, JR.

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that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring), *reh'g denied*, 409 U.S. 902 (1972).

146 See *supra* note 30 and accompanying text for a discussion of *Bound*.