Vanderbilt Law Review

Volume 43
Issue 2 *Issue 2 - March 1990*

Article 8

3-1990

Meaningful Access for Indigents on Death Row: Giarratano v. Murray and the Right to Counsel in Post-conviction Proceedings

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RECENT DEVELOPMENT

Meaningful Access for Indigents on Death Row: *Giarratano v. Murray* and the Right to Counsel in Postconviction Proceedings

I. INTRODUCTION

In 1932 the United States Supreme Court held that the states must provide free legal counsel to indigent defendants in capital cases.[1] Since then the Court has continued to define the scope of an indigent death row defendant's right to counsel at various critical stages of the defend-

1. *See* Powell v. Alabama, 287 U.S. 45 (1932).

ant's trial and appeal.[2] Following a direct appeal to the state court of appeals and state supreme court, an inmate on death row may seek a writ of certiorari from the United States Supreme Court.[3] A prisoner is not entitled to state appointed counsel for that action.[4]

Next, the defendant may seek postconviction relief in state court or in federal court if state remedies have been exhausted. Until recently, however, the question remained whether the Constitution provides indigent death row inmates with state appointed counsel and financial assistance in postconviction proceedings that collaterally attack the validity of a conviction, such as habeas corpus actions brought in state and federal court.[5]

Under constitutional law and statutory provisions, capital defendants are entitled to pursue certain postconviction remedies; nevertheless, an indigent death row inmate traditionally has not been entitled to a state appointed lawyer for these proceedings.[6] In *Giarratano v. Mur-*

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2. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600 (1974) (holding that the right to counsel does not extend to discretionary appeals to the state court of last resort or to the United States Supreme Court); Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending the sixth amendment right to counsel to a misdemeanor defendant who ultimately receives a prison sentence); Douglas v. California, 372 U.S. 353 (1963) (holding that a defendant is entitled to state appointed counsel on the first appeal of right from conviction); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that an indigent felony defendant has a sixth amendment right to appointed counsel at trial); *see also* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 14-16 (1986); Mounts & Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 195-97 (1986).

3. For an excellent overview of the mechanics of a review of a capital sentence, see Wright & Miller, *In Your Court: State Judicial Federalism in Capital Cases*, 18 URB. LAW. 659 (1986). A federal court almost certainly will review every capital sentence at least once. *Id.* at 668; *see also* Powell, *Capital Punishment*, 102 HARV. L. REV. 1035, 1039-41 (1989).

4. *Ross*, 417 U.S. at 600 (limiting the scope of the right to counsel to the first appeal of right).

5. *See* 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 7.2, at 74 (1988). *See generally* Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065 (1989); Millemann, *Capital Post-Conviction Petitioners' Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles*, 48 MD. L. REV. 455 (1989).

This Recent Development does not attempt to analyze the many intricacies of the habeas corpus process. Many commentators have written on the complexity of the writ of habeas corpus. For an in-depth discussion of this area, see, e.g., R. SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969); L. YACKLE, POSTCONVICTION REMEDIES (1981 & Supp. 1988); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 749 (1987); Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1989); Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966); Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); Note, *Successive Chances for Life:* Kuhlmann v. Wilson, *Federal Habeas Corpus, and the Capital Petitioner*, 64 N.Y.U. L. REV. 455 (1989).

6. Mikva & Godbold, *You Don't Have to Be a Bleeding Heart*, HUM. RTS., Winter 1987, at 22.

ray[7] the Supreme Court held that an individual appointment of an attorney to represent an indigent death row defendant throughout the process is not constitutionally required to fulfill the right of meaningful access to the courts. Prior to *Giarratano* several district courts and circuit courts of appeals had disagreed over the scope of the right of access and the necessity for attorney assistance or appointment.[8]

The United States Supreme Court has recognized that prisoners have a constitutional right of access to the courts.[9] The scope of that right provides one rationale for determining whether indigent defendants on death row are entitled to state appointed counsel for the purpose of pursuing postconviction remedies.[10] This issue is especially relevant to inmates on death row because of the severity and finality of the sentence.[11] Any constitutional defects that may have tainted the initial trial or sentence and that were missed on appeal can be remedied only through habeas actions. A determination of the scope of the right of access is especially important today due to the continuously expanding death row population, the increasing frequency of executions in the United States, and the growing shortage of competent and experienced attorneys to represent capital defendants at the postconviction stage.[12]

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7. 109 S. Ct. 2765 (1989) (plurality decision), *rev'g* 847 F.2d 1118 (4th Cir. 1988) (en banc), *aff'g* 836 F.2d 1421 (4th Cir. 1988), *aff'g in part, rev'g in part* 668 F. Supp. 511 (E.D. Va. 1986).

8. *See, e.g.*, DeMallory v. Cullen, 855 F.2d 442 (7th Cir. 1988); Hadix v. Johnson, 694 F. Supp. 259 (E.D. Mich. 1988); *Giarratano*, 668 F. Supp. at 511; Peterkin v. Jeffes, 661 F. Supp. 895 (E.D. Pa. 1987), *aff'd in part, vacated in part*, 855 F.2d 1021 (3d Cir. 1988); Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982), *rev'd*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986); Gibson v. Jackson, 443 F. Supp. 239 (M.D. Ga. 1977), *vacated on other grounds*, 578 F.2d 1045 (5th Cir.), *cert. denied*, 439 U.S. 1119 (1979); Corey v. Garrison, 403 F. Supp. 395 (W.D.N.C. 1975).

An important distinction exists hetween attorney assistance and a right to counsel. An institutional attorney system provides attorney *assistance* to inmates who want to file postconviction pleadings. The right to counsel provides an individual *appointment* and representation throughout the postconviction proceeding.

9. *See* Bounds v. Smith, 430 U.S. 817 (1977).

10. *See* Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279 (1983).

11. For an excellent discussion and analysis of the errors that can go undetected in the capital punishment process and the likelihood of executing an innocent person, see Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) (estimating that 350 innocent men have been sentenced to death in the twentieth century, 23 of whom have actually been executed).

12. *See* AMNESTY INT'L, UNITED STATES OF AMERICA: THE DEATH PENALTY app. 1, at 192-93 (1987); Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513 (1988); *see also* Reid, *Caught on Death Row*, STUDENT LAW., Jan. 1988, at 15.

Thirty-six states now have capital punishment statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Da-

Commentators disagree about whether a constitutional right to state appointed counsel in postconviction proceedings exists. Some commentators believe that counsel must be provided to death row inmates for habeas petitions because inmates are not capable of bringing effective postconviction actions without assistance in these overly complex proceedings.[13] Other commentators have noted that past Supreme Court decisions make any constitutional right to counsel for collateral attacks on convictions unlikely, notwithstanding the complexity of such actions.[14] Many commentators have addressed the general area of postconviction counsel rights,[15] but the issue of whether this right is constitutionally mandated remained unsettled until the Supreme Court decided *Giarratano*.

This Recent Development focuses on whether the Court's decision in *Giarratano* is consistent with prior decisions concerning the right of meaningful access and the effect of the decision on the imposition of the death penalty. Part II examines the Supreme Court's development of a prisoner's right of access and the application of that right in various cases involving the postconviction claims of capital defendants. Part III examines recent cases that have defined further the scope of the right of access, focusing on *Giarratano*. Part IV compares the Court's holding in *Giarratano* with its previous holdings in right of access cases. Part V concludes that appointed counsel for capital defendants in postconviction proceedings is not constitutionally mandated, but the lack of such counsel is illustrative of the inherently flawed capital punishment system in use today.

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kota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. NAACP LEGAL DEFENSE & EDUC. FUND, INC., DEATH ROW, U.S.A. (July 1989 & Execution Update Jan. 18, 1990) [hereinafter DEATH ROW, U.S.A.]. Only 13 states have executed prisoners since the reinstatement of the death penalty in 1976: Alabama, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Nevada, North Carolina, South Carolina, Texas, Utah, and Virginia. Since 1976, 121 executions have occurred in the United States. As of July 1989 there were 2210 inmates on death row in the United States. *Id.*

13. *See* 1 J. LIEBMAN, *supra* note 5, at 84 (stating that together the eighth and fourteenth amendments require counsel at each step of a capital case from trial through federal habeas corpus proceedings); Mello, *supra* note 12, at 531; Millemann, *supra* note 5, at 517 (concluding that "[c]apital post-conviction petitioners should have an automatic right to counsel in state post-conviction proceedings").

14. *See* 2 J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 7.10, at 293 (2d ed. 1986).

15. *See generally* Mello, *supra* note 5; Mello, *supra* note 12; Millemann, *supra* note 5; Miller, *The Right to Counsel in Collateral Proceedings—Habeas Corpus*, 15 How. L.J. 200 (1969); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970); Note, *supra* note 10; Note, *Discretionary Appointment of Counsel at Post-Conviction Proceedings: An Unconstitutional Barrier to Effective Post-Conviction Relief*, 8 GA. L. REV. 434 (1974); Note, *Criminal Procedure—Post-Conviction Right to Counsel*, 77 W. VA. L. REV. 571 (1975); Comment, *The Right to Appointed Counsel at Collateral Attack Proceedings*, 19 U. MIAMI L. REV. 432 (1965).

II. LEGAL BACKGROUND

A. *The Right of Meaningful Access:* Bounds v. Smith[16]

Some courts and commentators have stated that a prisoner's most important right is meaningful access to the courts.[17] None of the prisoner's other constitutional rights has any real meaning without the protection of access to court. A prisoner's right of access generally is defined according to the guidelines established by the United States Supreme Court in *Bounds v. Smith*.[18] The *Bounds* standard of meaningful access has been the main principle applied by courts to determine whether an indigent death row defendant must be afforded state appointed counsel in postconviction actions.[19]

The issue before the Court in *Bounds* was whether the State of North Carolina must protect a prisoner's right of access by providing law libraries or alternative sources of legal aid.[20] The State contended that it had no constitutional obligation to provide inmates with legal research facilities.[21] The inmates, however, claimed that the State must provide prisoners with access to law books or a reasonable alternative.[22]

The Court began its analysis by noting that an inmate's constitutional right of access to the courts is well established.[23] The right of access requires that a state take remedial measures to correct any deficiencies in its system so that an inmate's right of access to the courts is "adequate, effective, and meaningful."[24]

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16. 430 U.S. 817 (1977).

17. *See DeMallory*, 855 F.2d at 446; *Hadix*, 694 F. Supp. at 286; *see also* Hinckley, Bounds *and Beyond: A Need to Re-evaluate the Right of Prisoner Access to the Courts*, 22 U. RICH. L. REV. 19, 19 (1987).

18. 430 U.S. at 817. *See generally* Note, *supra* note 10, at 1283-86.

19. *See, e.g.*, Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988); Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989) (plurality decision).

20. *See Bounds*, 430 U.S. at 817. The inmates who brought the action in *Bounds* were incarcerated at various correctional facilities within the North Carolina prison system. *Id.* at 818. They were primarily "writ writers" who wanted legal research facilities. Flores, Bounds *and Reality: Lawbooks Alone Do Not a Lawyer Make*, 77 LAW LIBR. J. 274, 281 (1984-1985).

21. *See* Flores, *supra* note 20, at 282.

22. *Id.*

23. *Bounds*, 430 U.S. at 821. The Court relied on its decisions in Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam), and *Ex parte* Hull, 312 U.S. 546 (1941), to support the right of access. In *Gilmore* the Court affirmed a lower court decision mandating the establishment of law libraries or, alternatively, the provision of professional or quasi-professional legal assistance for inmates. *See Bounds*, 430 U.S. at 829. In *Hull* the Court struck down a regulation that prohibited prisoners from filing habeas corpus petitions unless the petitions were drawn and approved by a state parole board investigator. *Hull*, 312 U.S. at 549.

24. *Bounds*, 430 U.S. at 822. The Court cited several examples of remedial measures that are required to ensure meaningful access. *Id.* at 822-23. Indigent inmates must be allowed to file appeals and habeas corpus petitions without the payment of docket fees. *See* Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959). The state must provide trial records and transcripts to indigent defendants at no charge so that the inmate can have "adequate and effec-

The *Bounds* Court specifically held that the constitutional right of meaningful access to the courts requires that assistance must be provided to inmates preparing "meaningful legal papers."[25] This assistance could be provided by allowing inmates access to adequate law libraries or, alternatively, assistance from persons trained in the law.[26]

The specific constitutional basis for the right of access never was explained fully in the Court's holding and presents a significant problem in the analysis of how far the right extends and precisely what it includes.[27] The difficulty of implementing a meaningful access plan is clearly illustrated by the *Bounds* litigation itself. Ten years after the Supreme Court's decision, the Fourth Circuit still was struggling with North Carolina's access plan.[28]

Justice William Rehnquist's dissent in *Bounds* further magnified the vagueness of the constitutional basis underlying the right to access. Justice Rehnquist strongly asserted that no constitutional requirement that an inmate have a right of access to the federal courts to collaterally attack a sentence exists.[29] Rather, when a prisoner seeks to collaterally attack a final judgment of conviction, the Constitution requires only physical access to the courts.[30] Justice Rehnquist's chief concern was that the holding in *Bounds* seemed to conflict directly with the Court's ruling in *Ross v. Moffitt*.[31] A logical extension of *Ross*, according to Justice Rehnquist, would not provide a constitutional right to state appointed counsel in postconviction proceedings.[32]

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tive appellate review." *See* Griffin v. Illinois, 351 U.S. 12 (1956). Counsel must be appointed to indigent defendants for the first appeal of right from a conviction. *See* Douglas v. California, 372 U.S. 353 (1968). Prisoners cannot be prevented from assisting each other with habeas corpus petitions if no alternative form of legal assistance is available. *See* Johnson v. Avery, 393 U.S. 483 (1969).

25. *Bounds*, 430 U.S. at 828. At least one commentator has noted that by requiring a state to expend funds to provide law libraries or legal services to prisoners, the Court may have expanded the original right of access found in *Hull* and *Avery*. Instead of simply prohibiting a state from impeding a prisoner's right of access through oppressive restrictions, the Court imposed an affirmative state duty requiring the state to make previously unnecessary expenditures. *See* Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 IND. L.J. 207, 210 (1978).

26. *Bounds*, 430 U.S. at 828. By requiring a state to take these affirmative measures the Court encouraged "local experimentation" and did not set forth what kind of assistance plan would satisfy the *Bounds* standard. The Court also noted that although economic factors may be considered when choosing an appropriate plan to ensure meaningful access, the cost of protecting a constitutional right cannot serve as a basis for denying that right. *Id.* at 825.

27. *See* Hinckley, *supra* note 17, at 20; *see also* Potuto, *supra* note 25, at 216.

28. *See* Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987).

29. *Bounds*, 430 U.S. at 837 (Rehnquist, J., dissenting).

30. *Id.* at 840.

31. 417 U.S. 600 (1974) (holding that the right to counsel on the first appeal of right is not extended to discretionary appeals to a state court of last resort or to the United States Supreme Court).

32. *Bounds*, 430 U.S. at 840-41 (Rehnquist, J., dissenting). Justice Rehnquist further stated

Justice Rehnquist further concluded that if meaningful access to the courts includes the provision of law libraries by the state, then no reason prevents its extension to include a requirement that the state provide appointed lawyers at the state's expense. Thus, no such right to counsel would exist under *Ross*, but could be found through an extension of *Bounds*. A state might be wise to implement an attorney assistance program for policy reasons, but according to Justice Rehnquist, the Constitution does not require such action.[33]

The concern voiced by Justice Rehnquist has indeed reappeared and comprised the question facing the Court in *Giarratano*: whether a state is constitutionally required by the right of access to provide a system of state appointed attorneys to assist a death row inmate making a postconviction attack on a capital sentence.[34]

B. Application of the Meaningful Access Requirement

1. *Hooks v. Wainwright*[35]

Following the *Bounds* decision, the lower courts had to determine whether an individual state's plan provided prisoners with meaningful access to the courts.[36] An analysis of two such decisions shows the difficulty courts have faced in interpreting the right of access, particularly in capital punishment litigation. The court in *Hooks v. Wainwright* closely analyzed the Supreme Court's alternative access plan. The *Hooks* court considered a civil rights class action brought on behalf of all indigent inmates incarcerated in Florida's prison system who alleged that Florida provided inadequate access to the courts through its prison programs.[37] The primary issue was whether the assistance of attorneys, in some form, was required to comply with the *Bounds* mandate of meaningful access.[38]

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that "none of our cases has ever suggested that a prisoner would have such a right." *Id.* at 841.

33. *Id.* at 841; *see also* Potuto, *supra* note 25, at 225 (discussing the difference between constitutionally minimum standards and sound policy).

34. *See infra* notes 92-139 and accompanying text.

35. 536 F. Supp. 1330 (M.D. Fla. 1982) (*Hooks I*), *rev'd*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).

36. *See, e.g.*, DeMallory v. Cullen, 855 F.2d 442 (7th Cir. 1988); Peterkin v. Jeffes, 855 F.2d 1021 (3d Cir. 1988); Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988), *rev'd*, 109 S. Ct. 2765 (1989) (plurality decision); Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987); Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986); Campbell v. Miller, 787 F.2d 217 (7th Cir. 1986); Green v. Farrell, 801 F.2d 765 (5th Cir. 1986); Hadix v. Johnson, 694 F. Supp. 259 (E.D. Mich. 1988).

37. The ultimate decision in this case was the result of over 11 years of litigation. *Hooks I*, 536 F. Supp. at 1331.

38. It is especially relevant to the focus of this Recent Development that this litigation implicated the Florida prison system because Florida has an extremely large death row population and a recognized shortage of attorneys to represent those inmates. *See* Mello, *supra* note 12, at 567-68.

Florida currently has the largest number of death row inmates with 295. Since 1976 Florida

The district court extended the decision in *Bounds* and held that to ensure meaningful access, any plan submitted by the State of Florida had to provide some form of attorney assistance to inmates.[39] Libraries alone would be insufficient to meet the constitutional requirements of meaningful access.[40] The Florida Department of Corrections had submitted a plan to comply with *Bounds* by establishing a law library in seven of the state's major institutions, with smaller, less equipped libraries in twenty other major institutions.[41] The district court found that this plan was constitutionally insufficient for meaningful access purposes and required attorney assistance for the inmates.[42]

Several demographic factors present in the Florida inmate population appeared to affect significantly the district court's decision. First, the court observed that the plaintiff, Hooks, was an intelligent and capable *pro se* litigant. Based on his earlier pleadings, however, the district court found that Hooks was unable to pursue a legal action in federal court effectively despite his obvious intelligence.[43] Next, and more importantly, the court considered the literacy rate of the Florida prison population. The evidence in the case showed that more than fifty percent of Florida's inmates were functionally illiterate and that a substantial portion were borderline retarded.[44] The court concluded that law libraries were essentially useless because the inmates would not be able to comprehend and use effectively the materials in the libraries.[45] Finally, the court noted that ninety-five percent of Florida's inmates were unable to afford counsel.[46] Therefore, attorney assistance was required to ensure effective access to the courts for all prisoners.[47]

In its conclusion that the State's plan did not meet the standards of *Bounds*, the court acknowledged other courts' holdings that law libraries alone are sufficient to protect the prisoner's right of access.[48] Nevertheless, the *Hooks* court held that meaningful access to the courts could be realized only through some form of assistance from an attor-

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has executed 21 prisoners, which ranks second behind the 33 executions in Texas. DEATH ROW, U.S.A., *supra* note 12.

39. *Hooks I*, 536 F. Supp. at 1341.

40. *See* Potuto, *supra* note 25, at 227 (discussing whether *Bounds* requires alternatively law libraries *or* legal assistance).

41. *Hooks I*, 536 F. Supp. at 1335.

42. *See id.* at 1341.

43. *See id.* at 1333. The Supreme Court in *Bounds*, however, stated that "*pro se* petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate even if ultimately unsuccessful." Bounds v. Smith, 430 U.S. 817, 826-27 (1977).

44. *Hooks I*, 536 F. Supp. at 1337-38.

45. *See id.* at 1341. *See generally* Flores, *supra* note 20, at 274.

46. *See Hooks I*, 536 F. Supp. at 1338.

47. *See* Note, *supra* note 10, at 1281.

48. *See Hooks I*, 536 F. Supp. at 1340.

ney. The holding was based primarily on the high illiteracy rate among the inmates.[49] The court focused on the *Bounds* requirement that access must be meaningful as the main concern in determining whether the right was properly fulfilled. Thus, although *Bounds* clearly stated that either an adequate law library *or* assistance from persons trained in the law may satisfy the right to access, neither of these remedies was sufficient for the *Hooks* court if *meaningful* access was not attained.[50]

The court's extension of *Bounds* to include mandatory attorney assistance, however, apparently did not require appointed counsel to represent individual prisoners throughout the course of postconviction proceedings. Following the district court's order and prior to the State's appeal, a death row inmate, Timothy Charles Palmes, petitioned the court for a stay of execution. Palmes contended that under the district court's ruling in *Hooks* the State of Florida had to provide him with individual appointed counsel for state and federal habeas corpus proceedings.[51] The court dismissed Palmes's petition on jurisdictional grounds, but clearly was displeased with his request for a state appointed attorney when he was represented by two other attorneys in the petition before the court.[52] The court also noted, however, that while the previous order did not hold that prisoners are entitled to individualized appointment of counsel, the earlier ruling would be relevant to such a claim.[53] Thus, even under the *Hooks* court's expanded reading of *Bounds*, an indigent death row inmate did not have a clear right to appointed postconviction representation.

The State of Florida appealed the district court's order requiring the State to implement an attorney assistance plan, and the Eleventh Circuit reversed.[54] The court held that under *Bounds*, a state plan need not include an attorney assistance provision to fulfill the prisoner's right of meaningful access.[55] The Eleventh Circuit focused on the *Bounds* Court's holding that meaningful access requires states to provide "adequate law libraries *or* adequate assistance from persons trained in the law."[56] Furthermore, the court felt that the district

49. *See id.* at 1341. The court did not describe any particular form of assistance or plan, but simply ordered that the plan must provide for some form of assistance of counsel. *See id.* at 1355; *see also supra* note 26.

50. *See Hooks I*, 536 F. Supp. at 1349; *see also* Hinckley, *supra* note 17, at 49 (stating that the alternative access approach of *Bounds* is fatally flawed).

51. *See* Hooks v. Wainwright, 540 F. Supp. 652 (M.D. Fla. 1982) (*Hooks II*). For a more thorough examination of the Palmes litigation, see Mello, *supra* note 12, at 589-93. Palmes subsequently was executed on November 8, 1984. DEATH ROW, U.S.A., *supra* note 12.

52. *See Hooks II*, 540 F. Supp. at 654 n.1; *see also* Mello, *supra* note 12, at 591.

53. *See Hooks II*, 540 F. Supp. at 656.

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

55. *See id.* at 1434-35.

56. *Id.* at 1434 (emphasis in original) (citing Bounds v. Smith, 430 U.S. 817, 828 (1977)).

court's order directly contradicted *Bounds* and that meaningful access did not require anything beyond the *Bounds* holding.[57]

Although Florida's inmate population is largely illiterate, the Eleventh Circuit held that mandatory provision of legal services resulted from an excessively broad reading of the words "meaningful access."[58] *Bounds* recommended that states provide attorneys, but did not equate this recommendation with a constitutional mandate.[59] The court relied heavily on the Supreme Court's decision in *Ross v. Moffitt*[60] and made a strong distinction between state programs that are wise and desirable and those that are constitutionally required.[61] Indeed, the court stated that providing assistance for inmates is clearly a good idea and cited Florida's Capital Collateral Representative Office as an example.[62] Nevertheless, the court concluded that state provision of attorney assistance for inmates is not constitutionally required to ensure meaningful access.[63]

2. *Gibson v. Jackson*[64]

Hooks illustrates the potential tension among courts interpreting the scope of the right of access under *Bounds*. A similar situation regarding a death row inmate arose in *Gibson v. Jackson*. Samuel Gibson, an indigent black male, was convicted of murder and rape and sentenced to death. The Georgia Supreme Court affirmed his conviction.[65] Thus, Gibson's traditional right to appointed counsel was exhausted. A volunteer lawyer then filed a state habeas corpus petition for Gibson, which claimed that the state court was required to appoint counsel to represent Gibson in postconviction proceedings and that the State of Georgia was required to provide the defendant with funds for investiga-

57. *See id.* at 1435; *see also* Cepulonis v. Fair, 732 F.2d 1 (1st Cir. 1984) (vacating the portion of the district court order requiring at least five hours a week of assistance to inmates by law students under a lawyer's supervision); Harrington v. Holshouser, 741 F.2d 66 (4th Cir. 1984) (stating that attorney assistance is one way of assuring access, but is not required); Potuto, *supra* note 25, at 227.

58. *See Hooks I*, 775 F.2d at 1435.

59. *Id.* at 1437.

60. 417 U.S. 600 (1974).

61. *See Hooks I*, 775 F.2d at 1438.

62. *See id.* The Florida legislature created Florida's Capital Collateral Representative Office in response to the growing need for representation of indigent death row defendants. The Office is designed to provide state financed attorneys to death row inmates for collateral attacks on convictions. Mello, *supra* note 12, at 600. Thirteen of the thirty-seven states with capital punishment statutes have similar resource centers. Giarratano v. Murray, 109 S. Ct. 2765, 2781-82 & n.27 (1989) (Stevens, J., dissenting).

63. *See Hooks I*, 775 F.2d at 1438.

64. 443 F. Supp. 239 (M.D. Ga. 1977), *vacated on other grounds*, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119 (1979).

65. Gibson v. State, 236 Ga. 874, 226 S.E.2d 63 (1976).

tory expenses in the state habeas proceeding.[66] The state habeas proceeding was stayed while Gibson filed a section 1983 action in federal court seeking a declaratory judgment that the state was required to appoint counsel and provide monetary assistance as a matter of constitutional right.[67] The district court held that Gibson was constitutionally entitled to counsel appointed and paid for by the state for the state habeas proceeding and to payment by the state for investigative expenses reasonably necessary for his case to be heard fully and fairly.[68]

Like the district court in *Hooks*, the *Gibson* court primarily relied on an expanded interpretation of a prisoner's constitutional right of access to the courts established by *Bounds*. The *Gibson* court first looked to the language in *Bounds* that requires a reviewing court to evaluate a meaningful access plan as a whole to determine if it is constitutionally adequate.[69] The court then stated that the broad constitutional standards of *Bounds* constitute a minimum level of protection for a prisoner in any postappeal civil action.[70] Furthermore, the State of Georgia had submitted a plan providing all prisoners with access to an adequate law library.[71] Therefore, the question before the court was whether the Constitution mandates more than access to an adequate law library.

The court based its holding that Gibson was entitled to appointed counsel and fees for his state habeas action on two major considerations. Surprisingly, the court first quoted from Justice Rehnquist's dissent in *Bounds* concerning the extension of meaningful access to include appointed lawyers.[72] Next, the court noted the extreme complexity of a state habeas action and Gibson's probable inability to bring an effective habeas action without counsel.[73] Consequently, the court

66. *Gibson*, 578 F.2d at 1046-47.

67. *Id.* at 1047.

68. *Gibson*, 443 F. Supp. at 250.

69. *See id.* at 249. The language in *Bounds* states that "any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards." Bounds v. Smith, 430 U.S. 817, 832 (1977) (footnote omitted).

70. *See Gibson*, 443 F. Supp. at 250.

71. *Id.*

72. *See id.*; *see also supra* notes 27-32 and accompanying text. Justice Rehnquist, however, was not advocating the appointment of counsel under the right of access. Rather, he believed that appointment of counsel might be a natural result of the right of access formulated by the majority in *Bounds*, which he considered constitutionally baseless. *See Bounds*, 430 U.S. at 841 (Rehnquist, J., dissenting).

73. The court concluded that Gibson had raised five issues in his habeas petition that could not be litigated effectively or fairly without the appointment of an attorney and investigative funds: (1) ineffective assistance of counsel at trial and on appeal; (2) unconstitutionally composed grand jury and petit jury lists; (3) deceased victim at time of rape; (4) due process claim based on extraordinary length of trial; and (5) requirement that petitioner's admissions must be believed in their entirety under Georgia law. *See Gibson*, 578 F.2d at 1047 n.2 (summarizing the district court's findings); *supra* note 43.

held that counsel appointed at the state's expense and state payment of investigative and other litigation expenses were necessary to fulfill Gibson's right of meaningful access.[74] Thus, the *Gibson* court extended *Bounds* even further than the *Hooks* court, which attempted to establish only an absolute right to attorney assistance rather than a right to appointed counsel and expense fees.[75]

Like the Eleventh Circuit in *Hooks*, however, the appellate court refused to allow an expansion of the right of access. The Fifth Circuit vacated the judgment and held that the district court should have abstained from ruling on the issue of the scope of the right of access because the state supreme court had not yet addressed the issue.[76] Cases such as *Hooks* and *Gibson* reveal the difficulty courts have faced when attempting to define the scope of the right of meaningful access. Although the necessary elements of the right are far from clear, the preceding cases tend to show that a right to appointed counsel for habeas corpus actions initially was not included in the right of meaningful access.

III. Recent Developments

A. Pennsylvania v. Finley[77]

Precisely the assistance to which an inmate was entitled following a conviction and appeal remained unclear after the Court's decision in *Bounds*. States had little guidance when formulating a constitutionally adequate meaningful access plan. Ten years after the *Bounds* decision, some of Justice Rehnquist's concerns in *Bounds* reappeared in *Pennsylvania v. Finley*.

The primary issue in *Finley* was whether the procedures of *Anders v. California*[78] for a court appointed attorney on direct appeal would apply to postconviction collateral representation when the attorney can find no grounds for seeking relief.[79] Finley was appointed counsel for

74. *See Gibson*, 443 F. Supp. at 250. The court also stated that not every prisoner who brings a habeas petition is entitled to counsel and litigation expenses. Rather, the court awarded Gibson relief because of his "demonstrated need." *Id.* This reasoning provides very little guidance for the State in attempting to formulate a meaningful access plan and only adds to the confusion surrounding whether such a plan is adequate.

75. *See supra* note 42 and accompanying text.

76. Gibson v. Jackson, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119 (1979).

77. 481 U.S. 551 (1987). Chief Justice Rehnquist wrote the majority opinion in *Finley*.

78. 386 U.S. 738 (1967).

79. *Finley*, 481 U.S. at 554. The *Anders* case established procedures for a court appointed attorney who can find no basis for a meritorious direct appeal. Counsel must advise the court and request permission to withdraw. This request must be accompanied by a brief describing anything in the record that plausibly might support the appeal. The indigent is supplied with a copy of the brief and is given time to raise potential claims. The court then decides whether the case is frivo-

her postconviction claims as required by Pennsylvania law.[80] Finley's counsel concluded that no meritorious claims for relief were available, advised the trial court of this conclusion, and withdrew.[81] Finley obtained new counsel and appealed, challenging the conduct of counsel in the trial court. The Superior Court of Pennsylvania held that the *Anders* procedures were applicable to an attorney's conduct in collateral postconviction proceedings.[82] The United States Supreme Court reversed and held that the Pennsylvania court improperly relied on the Constitution to extend the *Anders* requirements to postconviction procedures.[83]

First, the *Finley* Court noted that the holding in *Anders* was based on the constitutional right to appointed counsel on direct appeal established in *Douglas v. California*.[84] Thus, *Anders* created procedures that are applicable only when a previously established constitutional right to counsel exists.[85] Next, the Court stated that no court had ever held that prisoners have a constitutional right to counsel when mounting collateral attacks on convictions.[86]

Furthermore, the Court found that the due process and equal protection concerns that the *Ross*[87] Court rejected as a basis for a right to counsel in discretionary appeals also were unpersuasive in the context of other forms of postconviction review. Because the right to appointed counsel does not extend beyond the first appeal of right under *Ross*, the *Finley* Court held that a defendant has no right to counsel when attacking a final conviction in postconviction proceedings.[88] Equal protection concerns do not require the appointment of counsel for an indigent defendant simply because a more affluent inmate might be able to retain counsel.[89]

Because Finley's right to counsel was state created, not constitutionally required, the Court held that the *Anders* procedures were inapplicable. Counsel in this postconviction proceeding need only meet the

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lous. *Anders*, 386 U.S. at 744. This reasoning also assumes that the defendant has the necessary skill and intellect to raise such claims.

80. *Finley*, 481 U.S. at 551.

81. *Id.*

82. Commonwealth v. Finley, 330 Pa. Super. 313, 479 A.2d 568 (1984).

83. *Finley*, 481 U.S. at 554.

84. 372 U.S. 353 (1963); *see Finley*, 481 U.S. at 554.

85. *Finley*, 481 U.S. at 555.

86. *See id.* The Court stated that "[o]ur cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals." *Id.* (citations omitted).

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

88. *See Finley*, 481 U.S. at 555.

89. *Id.* at 556.

fundamental fairness requirement of the due process clause.[90] Finally, in language especially relevant to the representation of indigents on death row, the Court noted that states have no obligation to provide an avenue of postconviction relief and when they do provide such relief, fundamental fairness does not require the state to supply a lawyer as well.[91]

Therefore, while the issue of an indigent death row defendant's right to postconviction counsel was not directly before the Court in *Finley*, the case clearly revealed the Court's reluctance to hold that a right to counsel in postconviction proceedings constitutionally is required. This holding is consistent with the holdings of other cases such as *Hooks* and *Gibson*, which refused to require states to implement attorney assistance or appointment systems to ensure meaningful access. Although Finley was not a capital defendant, the Court in *Giarratano* relied on the *Finley* holding to determine whether an indigent death row defendant constitutionally is entitled to state appointed counsel following conviction and appeal.

B. Giarratano v. Murray[92]

Although some courts have addressed the issue of whether a lawyer must be provided to an indigent death row defendant in postconviction proceedings in order to ensure meaningful access, none had required a state to implement a system to appoint individual lawyers to indigent death row defendants at the postconviction stage until the recent case of *Giarratano v. Murray*. The inconsistent holdings in *Giarratano* clearly illustrate the judicial tension over whether a state constitutionally is required to appoint counsel to represent indigent death row inmates in postconviction actions. *Giarratano* further illustrates the chaotic judicial process that inevitably accompanies the review of a capital punishment conviction.

1. Ten Years of Appeals

On February 4, 1979, fifteen-year-old Michelle Kline and her mother, Barbara Ann Kline, were murdered in their Norfolk, Virginia apartment. Michelle Kline was raped before the murders.[93] Joseph M. Giarratano, age twenty-one, was arrested two days later and confessed

90. *Id.* at 556-57.

91. *See id.* at 557.

92. 668 F. Supp. 511 (E.D. Va. 1986), *rev'd*, 836 F.2d 1421 (4th Cir.), *aff'd*, 847 F.2d 1118 (4th Cir. 1988) (en banc), *rev'd*, 109 S. Ct. 2765 (1989) (plurality decision).

93. Giarratano v. Commonwealth, 220 Va. 1064, 1066, 266 S.E.2d 94, 95 (1980).

to the rape and murders. Giarratano was appointed counsel[94] and convicted of rape, murder in the first degree, and capital murder.[95] The trial court sentenced Giarratano to death for the capital murder of Michelle Kline.[96] On April 18, 1980, fourteen months after the crime, the Supreme Court of Virginia affirmed the capital murder conviction.[97] Today, after ten years of appeals, Joseph M. Giarratano remains on Virginia's death row.

Following his conviction, Giarratano brought an action in federal district court seeking declaratory and injunctive relief from the Commonwealth of Virginia's refusal to provide postconviction assistance of counsel to death row inmates.[98] The court permitted other Virginia death row inmates to intervene and certified a class action. The class consisted of all present and future death row inmates who could not afford to retain an attorney for postconviction assistance.[99] The inmates primarily contended that Virginia constitutionally was required to provide counsel to indigent death row defendants in postconviction proceedings such as writs of certiorari to the United States Supreme Court or habeas corpus proceedings in state and federal court.[100]

The district court first stated that the *Bounds* assumption that either trained legal assistance or adequate law libraries would suffice to provide meaningful access was invalid when applied to death row inmates.[101] The court reasoned that because of the limited amount of time available to prepare habeas petitions, the complexity of the legal work, and the emotional instability of the inmates, a law library could not satisfy Virginia's obligation under the right of meaningful access to assist death row inmates in preparing and filing useful legal papers.[102]

The court analyzed the two forms of attorney assistance provided by Virginia. At the time, Virginia provided assistance to death row inmates involved in postconviction proceedings in the form of attorneys appointed to each penal institution to assist in matters related to incarceration.[103] Although the Fourth Circuit previously had held that Vir-

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94. *Id.* at 1069, 266 S.E.2d at 97.

95. *Id.* at 1064, 266 S.E.2d at 94.

96. *Id.* Giarratano also was sentenced to life imprisonment for the murder of Barbara Ann Kline and to 30 years imprisonment for the rape of Michelle Kline. *Id.* at 1066, 266 S.E. 2d at 95.

97. *Id.* at 1064, 266 S.E.2d at 94.

98. *See Giarratano*, 668 F. Supp. at 511. Giarratano brought this action under 42 U.S.C. § 1983 (1982).

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

100. *Id.*

101. *See id.* at 513.

102. *See id.*; *see also* Bounds v. Smith, 430 U.S. 817, 828 (1977).

103. *Giarratano*, 668 F. Supp. at 514. This assistance was provided pursuant to VA. CODE ANN. § 53.1-40 (1978). The distinction between attorney assistance and a right to counsel is important. An institutional attorney system such as the one in *Giarratano* provides attorney assistance

ginia's institutional attorney system satisfied the *Bounds* standard of meaningful access,[104] the district court held that this system provided inadequate assistance for death row prisoners.[105] The court noted that Virginia had only seven institutional attorneys to meet the needs of over two thousand prisoners.[106] The court also found that if the state appointed additional attorneys to assist death row inmates, the *Bounds* duty still would remain unfulfilled because of the limited scope of the assistance.[107] The court concluded that an attorney must "investigate, research, and present claimed violations of fundamental rights" to fulfill the meaningful access requirement.[108]

Virginia's second form of attorney assistance provided appointed counsel to inmates who met certain residency and indigency requirements. An inmate could obtain this assistance only after filing a petition and raising a nonfrivolous claim.[109] The court held that this form of assistance also was inadequate under *Bounds* because of the timing of the appointment of counsel. Because an inmate already must have filed a petition, no attorney assistance was available at the critical stage of the prisoner's claims.[110]

Finally, the court stated that the importance of a death row inmate's habeas corpus petition and the scarcity of competent and willing counsel to assist indigent death row inmates demanded that relief be granted.[111] When shaping the required scope of state appointed assistance, the court first held that assistance is not required for the filing of petitions for writs of certiorari under *Ross v. Moffitt*.[112] Next, the court held that state appointed counsel is required only for state habeas corpus proceedings and not for federal habeas actions. Thus, Virginia was required to develop a program to provide appointed counsel on request to indigent death row inmates for the purpose of pursuing state habeas corpus relief.[113]

Both parties appealed the district court's decision.[114] The Fourth

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to inmates who desire to draw postconviction pleadings. The right to counsel provides individual appointment and representation throughout the proceeding. *See supra* note 8.

104. *See* Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978) (holding that Virginia's institutional attorney system provided meaningful access for prisoners who were not on death row).

105. *See Giarratano*, 668 F. Supp. at 514.

106. *See id.*

107. *See id.*

108. *Id.*

109. *Id.* at 514-15. This assistance was pursuant to VA. CODE ANN. § 14.1-183 (1978).

110. *See Giarratano*, 668 F. Supp. at 515.

111. *See id.*

112. 417 U.S. 600 (1974); *see Giarratano*, 668 F. Supp. at 516.

113. *See Giarratano*, 668 F. Supp. at 517.

114. Virginia appealed the district court's order requiring a new system of attorney assistance, and the inmate class appealed the court's refusal to order appointment of counsel in federal

Circuit held that the district court erred in concluding that Virginia had not met its duty under *Bounds* and found that a higher standard of access is not required for death row inmates.[115] The court succinctly and forcefully summarized its holding by stating that the district court incorrectly had extended *Bounds* to create a right to counsel that the Constitution did not require.[116]

The Fourth Circuit relied heavily on *Finley*, which was decided after the district court's ruling. The court's decision centered on the premise that no constitutional right to counsel in postconviction proceedings exists. The court refused to distinguish *Finley* on the grounds that the death penalty was not involved in that decision. The court acknowledged a "significant constitutional difference" between the death penalty and other forms of punishment;[117] the court interpreted this difference, however, to mandate the establishment of procedures to ensure a fair imposition of the death penalty at trial.[118] Therefore, a death penalty exception to *Finley* was inappropriate because *Finley* and *Giarratano* involved requests for posttrial appointment of counsel.

The Fourth Circuit refused to adopt the district court's reasoning for its exception to *Bounds* and held that the district court's three underlying premises were unfounded.[119] Finally, the court noted the difference between personal notions of fairness and constitutional requirements.[120] Thus, while Virginia's adoption of a more comprehensive system for dealing with postconviction capital cases may have been a step forward, the court felt that it lacked authority to order such a

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habeas petitions. *See Giarratano*, 836 F.2d at 1421.

115. *See id.* at 1423.

116. The court stated: "In essence, by reading the record to support a sweeping extension of *Bounds*, the district court has, under the guise of meaningful access, established a right of counsel where none is required by the Constitution." *Id.*

117. *Id.* at 1424; *see* Beck v. Alabama, 447 U.S. 625 (1980) (holding that the death penalty is constitutionally different).

118. *See Giarratano*, 836 F.2d at 1425.

119. *See id.* at 1426; *see also supra* note 102 and accompanying text. The court stated that inmates were capable of initiating postconviction proceedings; Giarratano himself had done so several times in the last seven years. Furthermore, the complexity of death penalty cases was not excessive, and the purpose of the right to counsel was not to provide the inmate with a private investigator. Finally, time constraints were not present, but rather, a substantial period of time was allowed to file petitions in death penalty cases. *See Giarratano*, 836 F.2d at 1426; *cf.* Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 4 (1986). Justice Thurgood Marshall characterized the capital punishment review process as a "Rush to Judgment" that gives inmates very little time to prepare petitions. Capital defendants usually have no counsel until the situation becomes urgent. *See id.* at 5. Justice Marshall further noted that indigents on death row did not appear to have a constitutional right to counsel for discretionary posteonviction appeals in light of the Court's earlier decisions. *See id.*

120. *See Giarratano*, 836 F.2d at 1427.

change under the Constitution.[121]

The Fourth Circuit subsequently reconsidered the case en banc, reversed the panel's decision, and affirmed the district court's decision.[122] First, the court held that the state could not rely on *Finley* for the proposition that prisoners are not entitled constitutionally to state supplied attorneys in postconviction proceedings.[123] The court refused to apply *Finley* because *Finley* did not address the meaningful access rule of *Bounds* directly. Furthermore, the fact that *Finley* did not involve the death penalty was extremely significant to the court.[124] According to the *Giarratano* en banc court, a prisoner is entitled to appointed counsel in state habeas proceedings because of society's compelling interest in ensuring that the death penalty is administered constitutionally and because of the belief that the death penalty is constitutionally different.[125] Therefore, the court refused to hold that *Finley* suggested that counsel is not required in postconviction proceedings in death penalty cases.

The court also refused, however, to extend the right to counsel to federal habeas actions and Supreme Court certiorari petitions.[126] Relying on *Ross*,[127] the court stated that a federal court considering a habeas petition would have briefs, transcripts, and opinions available from the lower proceedings.[128] Furthermore, the indigent death row inmate would have these same materials available if a state appointed attorney was provided for the state habeas action.[129] Thus, the court concluded that meaningful access requires only appointment of counsel at the state level of postconviction proceedings in death penalty cases.[130]

2. The Supreme Court's Holding

The Supreme Court reversed the judgment of the Fourth Circuit and held that in capital cases, as in noncapital cases, no constitutional right to postconviction representation exists.[131] The Court began its

121. *Id.*
122. *See Giarratano*, 847 F.2d at 1118.
123. *See id.* at 1121.
124. *See id.* at 1122.
125. *See id.* The court further 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.
126. *See id.* at 1122.
127. Ross v. Moffitt, 417 U.S. 600 (1974).
128. *See Giarratano*, 847 F.2d at 1122.
129. *Id.*
130. *Id.*
131. *See Giarratano*, 109 S. Ct. at 2765.

analysis by noting that, in some instances, the Constitution requires special procedures for a capital punishment case.[132] The Court distinguished these procedures, however, on the ground that they all occur at the trial stage of a capital offense case, rather than during a postconviction action.[133] The Court held, therefore, that the rule of *Finley* applies equally in capital and noncapital cases, even though *Finley* was not a death penalty case.[134] A plurality of the Court stated that additional safeguards imposed at the trial level of a capital case are sufficient to ensure the reliability of the death penalty.[135] The Court refused to use the eighth amendment or the due process clause to create yet another distinction between capital and noncapital cases.[136]

The Court also noted that direct appeal is the primary avenue for review of both capital convictions and other sentences. Therefore, public policy considerations of conserving scarce resources require Virginia to use its resources for the appointment of attorneys at the trial and appellate stages of a capital case, which would reduce the number of ineffective assistance of counsel claims that are brought in collateral attacks.[137]

The plurality also held that the holdings in *Bounds* and *Finley* are not inconsistent and that neither case is determinative of the issue presented in *Giarratano*.[138] The plurality held, however, that the reasoning of *Finley* would apply to death row inmates as well as other inmates and that *Finley*, therefore, limits the reach of the *Bounds* right of access.[139]

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132. *See id.* at 2769 (plurality opinion) (citing Beck v. Alabama, 447 U.S. 625 (1980) (holding that the trial judge must give the jury the option to convict the defendant of a lesser offense); and Lockett v. Ohio, 438 U.S. 586 (1978) (holding that the jury must be allowed to consider all of a capital defendant's mitigating evidence)).

133. *See id.* at 2770.

134. *See id.*

135. *See id.* at 2770-71. This statement ignores the startlingly high success rate of federal habeas petitions in death penalty cases. *See infra* note 154.

136. *See Giarratano*, 109 S.Ct. at 2771.

137. *Id.* (stating that "[c]apable lawyering [at trial and direct appeal] would mean fewer colorable claims of ineffective assistance of counsel to he litigated on collateral attack").

138. *See id.* at 2772.

139. *See id.* The Court also noted that under the Anti-Drug Abuse Act of 1988, attorneys will be appointed in federal habeas corpus actions that raise a challenge to a death penalty sentence for drug-related convictions. *See id.* at 2772 n.7; *see also The Drug Bill's Secret Provision*, NAT'L L.J., Feb. 20, 1989, at 3. The pertinent provisions of the Act state:

> (B) In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to ohtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
>
> (5) If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in whicb the prosecution is to be tried for not less

IV. ANALYSIS

A. *The* Bounds *Dissent Revisited*

The Court's decision in *Giarratano* is not surprising in light of previous decisions addressing the right of access and the right to counsel. Justice Rehnquist's dissent in *Bounds* foreshadowed the plurality's decision in *Giarratano*.[140] Because of the lack of a sufficient constitutional basis for a right to appointed counsel in postconviction proceedings, the *Giarratano* plurality followed the reasoning of the *Bounds* dissent reflecting a belief that no constitutional basis for a right to counsel following the first appeal of right exists in any case.[141]

Chief Justice Rehnquist indicated in his dissent in *Bounds* that a logical extension of the right of access articulated by the *Bounds* majority would lead to the conclusion that a right to counsel would exist dur-

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than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

(6) If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in tbat court in felony cases.

(7) With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications, for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

(9) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

(10) Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court sball fix the compensation to be paid to attorneys apppointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragrapb (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4393-94. This Act, however, is not relevant to the question in *Giarratano* of whether counsel is required in *state* habeas actions.

140. *See supra* notes 29-34 and accompanying text.

141. *See supra* notes 131-39 and accompanying text.

ing the postconviction stage.[142] In *Giarratano*, however, the plurality clearly restricted the reach of *Bounds* in an attempt to maintain consistency with *Finley* and *Ross*. This restriction is correct despite the practical difficulties that a lack of postconviction counsel poses in the administration of the death penalty.[143] While the Supreme Court's holding can be justified under *Finley* and *Ross*, the Court's rationale that "death is different" applies only to procedures used at trial[144] ignores the realities of death penalty litigation.[145]

The Fourth Circuit's reasons for requiring appointed counsel in *Giarratano* clearly represent a wise policy that states should implement, but these reasons do not rest on a solid constitutional basis.[146] The court correctly acknowledged that the inherent difficulty facing an indigent death row defendant when preparing postconviction petitions favors attorney assistance.[147] Although an institutional attorney system was in place in Virginia, the Fourth Circuit extended *Bounds* beyond other right of access cases such as *Hooks* by requiring individual attorney appointments.[148] Furthermore, the Fourth Circuit seemed to ignore the legal complexity of filing habeas petitions in federal court and gave few reasons to support its holding that a right to counsel is a necessary element of meaningful access in state habeas actions, but is not required for federal habeas petitions. Although the court determined that *Finley* does not preclude a right to counsel in state habeas actions, the court gave no constitutional basis for the existence of the right.[149]

B. State Legislative Duty

Giarratano effectively leaves the fulfillment of meaningful access for indigents on death row to state legislatures because the courts cannot place an affirmative burden on states to provide services that may

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

143. For an example of the immense difficulty that counsel faces when brought into a capital case at the last minute, see Judge, *Death Row Defense, Wall Street Style*, AM. LAW., Jan.-Feb. 1989, at 35, which details the two-year, $1.7 million appeal that resulted in the reversal of a death sentence for Mississippi inmate Samuel Bice Johnson.

144. *See Giarratano*, 109 S. Ct. at 2777 n.9 (Kennedy, J., concurring) (quoting Ford v. Wainwright, 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion)).

145. A commission chaired by Justice Lewis Powell stated: "Because, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems." JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 4 (1989) [hereinafter POWELL COMMITTEE], *reprinted in Report on Habeas Corpus in Capital Cases*, 45 Crim. L. Rep. (BNA) 3239, 3240 (Sept. 27, 1989) [hereinafter *Report on Habeas Corpus*].

146. *See Giarratano*, 847 F.2d at 1118.

147. *See id.* at 1122.

148. *See supra* notes 122-29 and accompanying text.

149. *See Giarratano*, 847 F.2d at 1122.

be wise but are unsupported on constitutional grounds. The distinction between what is wise for a state to do and what is constitutionally mandated is important. Despite the apparent crisis in indigent defense,[150] especially among death row prisoners, courts are limited in their power to force a state to provide attorneys. Without a clear judicial definition of the right to counsel, a state may implement whatever plan it chooses as long as the plan meets the vague minimum standards of *Bounds*.[151] Some states have made great strides toward fulfilling the need for counsel, but an even greater response is necessary if capital punishment is ever to be used in a truly reliable and expeditious manner.

V. CONCLUSION

The result reached in *Giarratano*, although constitutionally correct, reflects a tremendous weakness in the manner in which capital punishment currently is imposed.[152] The death penalty presently is administered in a grossly ineffective manner and serves none of the purposes of capital punishment.[153] The recent increase in cases requiring a determination of the scope of the right of access for death row prisoners demonstrates that more definite guidelines are needed to ensure that inmates receive the full benefit of the procedures available to them. The right of access is extremely important to death row inmates because collateral proceedings are a capital defendant's last line of defense against execution. The startlingly high success rate of these actions reveals that these petitions are crucial to a capital defendant and cannot be ignored.[154] If the death penalty must be imposed at all, it should be imposed with the highest degree of accuracy.[155]

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150. *See generally* Mello, *supra* note 12; Reid, *supra* note 12.

151. Some commentators had indicated prior to the Court's decision in *Giarratano* that a reversal of the Fourth Circuit "could have devastating consequences." *See* Spangenberg & Wilson, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 337 (1989). These commentators warned that "[i]n the absence of a federal requirement, some state legislatures might elimimate the costly and time-consuming provision of counsel in state capital post-conviction matters." *Id.*

152. As Justice Lewis Powell has stated, "The problems associated with capital punishment are among the more serious ones in our system of justice. . . . If capital punishment is to serve its intended purposes, perhaps the time has come for some reexamination of our system of dual collateral review." Powell, *supra* note 3, at 1035.

153. *See id.* at 1041 (stating that "[b]oth the retributive and deterrent purposes of capital punishment are imperiled by the current practice of repetitive review"); *see also* POWELL COMMITTEE, *supra* note 145, at 3, *reprinted in Report on Habeas Corpus*, supra note 145, at 3239 (stating that "[f]ew would argue that the current state of death penalty administration is satisfactory").

154. *See* Mello, *supra* note 12, at 520-21 (estimating that the success rate from 1976-1986 in federal capital habeas proceedings is between 60-70%).

155. Some commentators have argued that due to the popularity of the death penalty, states will not repeal death penalty statutes even if the statutes appear unworkable. These states may adopt alternative methods of punishment to avoid the high political costs of abolishing the death

The problem with postconviction review in capital cases only will worsen in the future. Studies show that an even greater number of capital cases soon will be entering the postconviction review stage.[156] More than fifty percent of all death row inmates still are awaiting the outcome of their first appeal, and more than two hundred and fifty inmates join death row each year.[157]

The ever worsening delay in capital cases will continue unless the states take the initiative to provide counsel to a defendant at all stages of trial and review in a capital case. A capital defendant needs competent counsel at the postconviction stage more than a noncapital defendant. Until the states provide competent counsel for postconviction attacks on capital sentences, the federal court system will continue to be plagued by repetitive petitions for postconviction relief.

William H. Brooks

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penalty. *See, e.g.*, Note, *Life Without Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529 (1990).

156. Spangenberg & Wilson, *supra* note 151, at 332.

157. As of June 1988, only 934 of more than 2100 death row inmates in the United States had completed the first appellate review of their convictions. *Id.*