Maryland Law Review

Volume 48 | Issue 3 Article 3

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MARYLAND LAW REVIEW

VOLUME 48 1989 NUMBER 3

Article

CAPITAL POST-CONVICTION PETITIONERS' RIGHT TO COUNSEL: INTEGRATING ACCESS TO COURT DOCTRINE AND DUE PROCESS PRINCIPLES

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INTRODUCTION

Two separately developed lines of Supreme Court decisions, generally characterized by courts as "access to court" and "procedural due process" decisions,[1] have produced constitutional rights to legal help in certain civil cases. Despite flickers of mutual recognition,[2] these decisions remain virtual jurisprudential strangers,

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There were a number of people whose creativity and hard work are reflected in this article. They include, Evan Caminker, Joseph Tétrault, Karen Schifter, and Michael Mello. They have been indispensable in developing the major themes of this article and, often, in best expressing these themes. I deeply appreciate their very important contributions. I also am very thankful for the good editorial suggestions of Richard Burr, George Kendall, and Ronald Tabak, as well as the help for this article that was provided by Stephen H. Sachs and the law firm of Wilmer, Cutler, and Pickering. They most generously supported much of the work that I did on this article in the best *pro bono* tradition. This article also could not have been written and published without the very special hard work of Karen Gallion, Shirley Appelt, and many members of the Maryland Law Review editorial staff, to whom I am very much indebted.

1. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (access to court case); Johnson v. Avery, 393 U.S. 483 (1969) (same); Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (procedural due process decision); Mathews v. Eldridge, 424 U.S. 319 (1976) (same). For lower court "access to court" decisions implementing *Bounds*, see *infra* note 50.

2. Justice Harlan, speaking for the majority in Boddie v. Connecticut, 401 U.S. 371 (1971), grounded the access to court right (access right) in the promise of due process,

even though the rights they separately recognize have a common history,[3] function,[4] and constitutional source.[5]

The procedural due process doctrine is presently the more developed of the two embryonic rights to legal help. The access to court doctrine, essentially having been estranged from its natural twin, has yet to fully mature. If properly reintroduced to and merged with procedural due process analysis, the now fragmented access to court right (access right) can blossom into a more coherent, integrated, and constitutionally justifiable right to legal help in specific civil cases.

The Supreme Court's recent grant of certiorari in *Murray v. Giarratano*[6] presents the Court with an important opportunity to clarify both the scope of the access right and the analysis that best supports it. The district court in *Giarratano v. Murray*[7] found that a

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holding unconstitutional the State's failure to waive court fees and costs for indigent litigants seeking divorces. *Id.* at 380-81. He performed a version of the procedural due process balancing test, *see infra* text accompanying notes 79-82, to justify his decision. He noted, however, that "this Court has seldom been asked to view access to the courts as an element of due process." *Id.* at 375. *But see* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). *See also* Procunier v. Martinez, 416 U.S. 396, 419 (1974); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-18, at 753-60 (2d ed. 1988). *See generally* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153 [hereinafter Michelman—*Part I*]; Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527; Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279 (1983).

3. *See infra* note 230.

4. *See infra* text accompanying notes 83-84.

5. *See* L. TRIBE, *supra* note 2, § 10-18, at 759 ("[I]t would be surprising, and ultimately indefensible, if the separate strands of doctrine . . .—including procedural due process, equal protection, and the first amendment rights of speech and petition—were not in the end woven into a fundamental right of access to a neutral and fair tribunal in which to ventilate such claims of right as one may have under the governing body of substantive law."). *See also* NAACP v. Button, 371 U.S. 415, 428-29 (1963) (litigation may be a protected form of political expression); Douglas v. California, 372 U.S. 353, 357-58 (1963) (equal protection clause requires states to provide appellate counsel to indigents in criminal cases); Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) (equal protection and due process allow no "invidious discriminations" in criminal trials and appellate review). *See generally* Mello, *Is There a Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 801 (1988); Note, *supra* note 2. These additional constitutional sources form the due process analysis. In the context of capital post-conviction proceedings, the access right is also supported by the sixth and eighth amendments as well as by the equal protection clause. *See infra* text accompanying notes 263-305.

6. 109 S. Ct. 303 (1988).

7. 668 F. Supp. 511 (E.D. Va. 1986), *aff'd in part & rev'd in part*, 836 F.2d 1421 (4th Cir.), *on reh'g*, 847 F.2d 1118 (4th Cir.) (en banc), *cert. granted*, 109 S. Ct. 303 (1988).

prison law library does not provide death-sentenced prisoners with meaningful access to the courts[8] to investigate, prepare, and litigate capital post-conviction claims in state courts.[9] The district court also found that Virginia does not provide sufficient attorney assistance to death-sentenced prisoners in post-conviction cases to implement their access right.[10] The court required the State to provide counsel to death-sentenced prisoners to prepare and draft post-conviction pleadings and to litigate the post-conviction cases.[11]

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8. 668 F. Supp. at 513 ("[P]laintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to 'assist inmates in the preparation and filing of meaningful legal papers' with respect to Virginia death row prisoners." (quoting Bounds v. Smith, 430 U.S. 817, 828 (1977))).

9. 668 F. Supp. at 514. At present, 49 of 50 states provide by statute or rule that, after a criminal conviction is finally affirmed on direct appeal, the convicted defendant may file in state court a "collateral" proceeding challenging the legality of the conviction. This proceeding is commonly called a "post-conviction" proceeding, but also is called "habeas corpus" or "coram nobis." *See* D. WILKES, JR., FEDERAL AND STATE POST-CONVICTION REMEDIES AND RELIEF 283 app. A ("A Survey of Current Postconviction Remedies and Relief In Each of the Fifty States and the District of Columbia") (2d ed. 1987). The constitutional right to counsel to investigate, prepare, and litigate state capital post-conviction proceedings, by whatever names they are called, is the focus of this article.

10. 668 F. Supp. at 514-15. The district court first considered (a) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts," (b) "the complexity and difficulty of the legal work itself," and (c) the "fair inference that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." *Id.* at 513. The court then found that the institutional attorneys provided by Virginia serve as advisors but do not make factual investigations, sign pleadings, or appear in court; they function as "talking lawbooks." *Id.* at 514. "For death row inmates, more than the sporadic assistance of a 'talking lawbook' is required to enable them to file meaningful legal papers." *Id.* While Virginia courts are authorized to appoint counsel, *see* VA. CODE ANN. § 14.1-183 (1950 & Supp. 1988), such counsel are appointed *after* a petition is filed and only if the court finds it to be meritorious. 668 F. Supp. at 514-15. Noting that the pool of volunteer attorneys has been seriously depleted, the district court concluded that

> [t]he matter of a death row inmate's habeas corpus petition is too important—both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved—to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

Id. at 515.

11. Girrantano v. Murray, 668 F. Supp. 511, 517 (E.D. Va. 1986). Relying on Ross v. Moffitt, 417 U.S. 600 (1974), the district court declined to require the State to appoint counsel to seek certiorari in the United States Supreme Court. 668 F. Supp. at 516. Also, the district court, reasoning that prisoners could effectively use the arguments and papers already prepared by counsel during the earlier state proceedings and relying on the availability of appointed counsel in federal courts under 28 U.S.C. § 1915 (1982), refused to extend the relief granted to federal habeas corpus proceedings. 668 F. Supp. at 517.

A divided circuit court panel reversed.[12] Sitting en banc, however, the entire court affirmed the district court's decision.[13]

This article uses *Giarratano* as a vehicle for exploring and justifying the marriage of the access to court and due process analyses. Applying this combined analysis to the issue presently before the Court in *Giarratano*, this article concludes that death-sentenced prisoners are constitutionally entitled to the assistance of appointed counsel to investigate, prepare, and litigate capital post-conviction proceedings.[14]

In overview, Parts I and II of this article trace the separate development of the access to court and procedural due process rights. Part III re-examines the access right and concludes that the Supreme Court implicitly—but should have explicitly—justified it with a procedural due process analysis. Part IV applies this consolidated doctrinal analysis in the capital post-conviction context, identifying the death-sentenced prisoner's private interest in the appointment of counsel, the competing and complementary state interests, and the risk of error that results from *pro se* representation in capital post-conviction proceedings. Part V concludes that the balance of these factors requires automatic appointment of counsel to capital post-conviction petitioners. Part V then bolsters this conclusion by identifying how capital post-conviction petitioners' interests

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12. 836 F.2d 1421 (4th Cir. 1988). The panel opinion relied upon Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), decided after the district court rendered its decision, for the proposition that "there is no previously established constitutional right to counsel in state habeas corpus proceedings." 836 F.2d at 1424. Rejecting the district court's findings of fact as clearly erroneous, *id.* at 1423, the panel stated that "[t]he record additionally fails to establish that there is a unique legal complexity to death penalty cases." *Id.* at 1426. The panel opinion castigated the district court. "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.* at 1423.

13. 847 F.2d 1118 (4th Cir. 1988). The en banc opinion distinguished *Finley*, 481 U.S. 551, as follows:

> *Finley* was not a meaningful access case, nor did it address the rule enunciated in Bounds v. Smith. Most significantly, *Finley* did not involve the death penalty. . . . We do not, therefore, read *Finley* as suggesting that the counsel cannot be required under the unique circumstances of postconviction proceedings involving a challenge to the death penalty.

847 F.2d at 1122.

14. When this article generally refers to "the constitutional right to counsel" in capital post-conviction proceedings, it should be understood more specifically to mean the constitutional right to the assistance of counsel to investigate, prepare, and litigate state post-conviction proceedings (including all prehearing motions) to their conclusion. This article does not consider whether there is a comparable right to the assistance of counsel in the appeal of capital post-conviction cases or in federal habeas corpus proceedings. For the latter aspect, see *infra* notes 235-236.

in other constitutional rights—including interests derived from the sixth amendment, the eighth amendment, and the equal protection clause of the fourteenth amendment—should be included and weighed in the due process formula. Part VI analyzes and distinguishes *Pennsylvania v. Finley*,[15] in which the Supreme Court held that the procedural requirements governing withdrawal of counsel prescribed by *Anders v. California*[16] were inapplicable in noncapital post-conviction proceedings and, in so doing, questioned whether there is a right to counsel in such proceedings.[17]

I. THE ACCESS TO COURT CASES

In *Boddie v. Connecticut*[18] Justice Harlan began his analysis of the access right by describing the fundamental importance of the rule of law:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible . . . . Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."[19]

The assumptions underlying the rule of law are, first, that the law will be enforced and, second, that litigants will have access to the enforcement fora, primarily courts. The access cases, which incorporate these two assumptions, address the special measures that are necessary to assure that some members of society can obtain the hearing in court that is the predicate of the rule of law.

This said, much remains unsaid. When the Supreme Court has spoken, it has been about the access right of either special litigants or litigants who have special claims.[20] The special litigants to whom the Court has paid greatest attention are state prisoners.

The primary access principle embodied in the Court's prisoner

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15. 481 U.S. 551 (1987).
16. 386 U.S. 738 (1967).
17. 481 U.S. at 555.
18. 401 U.S. 371 (1971).
19. *Id.* at 374.
20. *See, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (state prisoners); Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce proceedings).

decisions has evolved in three phases. The Court first prohibited state action that directly obstructed access, then state action that indirectly interfered with access, and finally, state inaction: the state's failure to provide affirmative help to prisoners.

In phase one, the Court invalidated restrictions that literally denied prisoners the ability to lodge legal papers in a court of law. In *Ex parte Hull*[21] the Court held unconstitutional a prison regulation that authorized a legal investigator for the parole board to intercept prisoner habeas corpus petitions that were thought not to be properly drawn.[22]

In phase two, the Court held that the access right guarantees more than the literal right to file documents in court. In *Johnson v. Avery*[23] the Court held that unless the state or some other source provides legal help to indigent prisoners, the state may not *indirectly* obstruct access by preventing prisoner "writ writers" from "preparing writs," including writs of habeas corpus, for other indigent prisoners.[24]

Younger v. Gilmore[25] marked the beginning of phase three. In *Younger* the Court cryptically indicated[26] that the access right is not satisfied by state inaction or alleged neutrality, *i.e.*, when the state refrains from interfering—either directly or indirectly—with prisoner access to the courts. Instead, the access right requires, in some circumstances, that states provide affirmative help to indigent prisoners.[27]

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21. 312 U.S. 546 (1941).

22. *Id.* at 549 ("[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." (citations omitted)).

23. 393 U.S. 483 (1969).

24. *Id.* at 490 ("[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners." (footnote omitted)). Justice Fortas, writing for the Court, emphasized the "fundamental importance of the writ of habeas corpus in our constitutional scheme." *Id.* at 485 (citing Fay v. Noia, 372 U.S. 391 (1963)). "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* Justice Fortas found that "in the absence of any other source of assistance," preventing "writ writers" from helping "illiterate or poorly educated prisoners . . . file habeas corpus petitions" is the functional equivalent of forbidding them to file such petitions. *Id.* at 487.

25. 404 U.S. 15 (1971) (per curiam).

26. It affirmed, per curiam, the judgment of the three-judge district court in Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970). 404 U.S. at 15.

27. The district court in *Gilmore* said:

In *Bounds v. Smith*[28] the Court consolidated its prior access decisions by providing a specific description of the affirmative assistance that a state must provide all prisoners to implement the access right. Initially, the Court made the implicit *Younger* access holding explicit by expressly rejecting the argument that "this constitutional duty merely obliges states to allow inmate 'writ writers' to function" and imposes "no further obligation to expend state funds to implement affirmatively the right of access."[29] The Court held instead that the access right places an affirmative obligation on states to develop positive, "remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful."[30] The Court emphasized that "meaningful access" is the "touchstone" of the right.[31]

The Court then defined the nature of the affirmative remedial assistance due prisoners: "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[32] Although the Court held that, under the facts of *Bounds*, states may choose to provide either law books or legal services to prisoners,[33] Justice Marshall, writing for

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> "Access to the courts" . . . encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him . . . . Johnson v. Avery makes it clear that some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.

319 F. Supp. at 110.

The district court held that, in order to implement the prisoner access right, California was required to provide inmates with adequate law libraries or assistance from legally trained persons. *Id.* at 110-11. In this respect, the court noted that "[t]he alternatives open to the State are legion. It might authorize Public Defenders to help inmates in collateral proceedings. Or it could institute programs whereby law students and professors could aid the indigent convict." *Id.*

28. 430 U.S. 817 (1977).

29. *Id.* at 823.

30. *Id.* at 822.

31. *Id.* at 823 (citing Ross v. Moffitt, 417 U.S. 600 (1974)).

32. Bounds v. Smith, 430 U.S. 817, 828 (1977) (footnote omitted).

33. *Id.* at 830-31. *See* Note, *supra* note 2, at 1286 n.49 (author observed that, in *Bounds*, "there was no appeal of the lower court's decision that no attorneys were needed, and thus the issue [of whether effective access requires state-provided counsel] was not before the Court"). After the Supreme Court's decision in *Bounds*, the litigation continued as the prisoners renewed their claim that the law libraries were inadequate. *See* Smith v. Bounds, 610 F. Supp. 597 (E.D.N.C. 1985), *aff'd*, 813 F.2d 1299 (4th Cir. 1987), *aff'd on reh'g*, 841 F.2d 77 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 179 (1988) (reciting procedural history of the case). As stated in Harrington v. Holshouser, 741 F.2d 66 (4th Cir. 1984), *aff'd on reh'g*, 841 F.2d 77 (4th Cir.), *cert. denied*, 109 S. Ct. 179 (1988), an

the majority, observed that legal services programs are the wiser means of implementing the access right, even for prison inmates who are thought to be entirely capable of self-help.[34]

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appeal from the district court's dismissal of the action after the second remand, "seven years after the Supreme Court decision in Bounds v. Smith, the same legal action remains still unresolved on this appeal despite Harrington's efforts, through a series of petitions and motions, to ensure compliance with the Supreme Court's mandate." *Id.* at 67.

After further remand, the district court held that in view of the inadequacies of North Carolina's prison law library system, the State would be required to provide prisoners with, "in some form, the assistance of counsel." Smith v. Bounds, 610 F. Supp. at 606. *But see* Hooks v. Wainwright, 775 F.2d 1433, 1435 (11th Cir. 1985), *reh'g denied*, 781 F.2d 1550 (11th Cir.), *cert. denied*, 479 U.S. 913 (1986) ("Although it may take more decisions to ascertain exactly what the Supreme Court will decide is constitutionally required to assure 'meaningful access,' we know from the *Bounds* holding that the Supreme Court does not presently interpret those words to require the mandatory provision of legal services."). Judge Clark, joined by Judge Hatchett, dissented from the Eleventh Circuit's denial of the petition for rehearing in the *Hooks* case, stating that "[t]he Supreme Court in *Bounds* was not asked to compel assistance of counsel and thus did not decide the issue presented to the panel in this case." 781 F.2d at 1551 (Clark & Hatchett, JJ., dissenting) (footnote omitted).

34. 430 U.S. at 830-31. Justice Marshall said:

> Nearly half the States and the District of Columbia provide some degree of professional or quasi-professional legal assistance to prisoners. . . . Such programs take many imaginative forms and may have a number of advantages over libraries alone. Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consultant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices. Legal services plans not only result in more efficient and skillful handling of prisoner cases, but also avoid the disciplinary problems associated with writ writers. Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly.

Id. (footnotes omitted).

It should be noted that in assessing the adequacy of any access remedy the burden of justification is on the state. *See* Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980) ("The burden of proof of demonstrating adequate alternate means is on the jail authorities." (citation omitted)); Buise v. Hudkins, 584 F.2d 223, 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) ("It is well established . . . that the state bears the burden of demonstrating the adequacy of such an alternate means of access.") (citations omitted); Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977) ("[T]he state or state agency . . . has the burden of proving the existence of reasonable alternatives.").

This "burden of justification" is a heavy one. It is not the theoretical, but the actual availability of assistance to every prisoner that is required. In Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), *cert. denied*, 409 U.S. 968 (1972), the court required "the State to carry the burden of justifying its regulation against inmate assistance by producing evidence that establishes *in specific terms* what the need is for legal assistance on habeas corpus matters in the [Texas Department of Correction], and by demonstrating that it is

Although the *Bounds* Court suggested that the scope of the access right is broader,[35] it emphasized that "we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights."[36] The Court explained this special "concern": "[H]abeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."[37]

The dissenting Justices in *Bounds* criticized the majority for converting the access right from a shield (that prevents state interfer-

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reasonably satisfying that need." *Id.* at 664 (emphasis in original). *See also* Glover v. Johnson, 478 F. Supp. 1075, 1096 (E.D. Mich. 1979) ("The adequacy of a prisoner's right of access to the courts must be measured by the actual opportunity he or she has to raise a valid and meaningful claim before the courts." (citation omitted)).

35. The Court spoke of the "legal needs" of the prison population, 430 U.S. at 832, thus acknowledging that prisoners have many of the same legal problems, such as divorce and child custody disputes, as those at liberty. *See* Hadix v. Johnson, 694 F. Supp. 259, 295 (E.D. Mich. 1988) (prison legal assistance program to provide help in "domestic relations, personal injury, deportation, workers compensation, social security, detainer, wills and estates, and taxation").

36. Bounds v. Smith, 430 U.S. at 817, 827 (1977).

The literal language as well as the logic of *Bounds* demonstrates that such "original actions" include state post-conviction proceedings, and also establishes the minimum contours of the access right. In responding to the State's contention that the statutory provision for the appointment of counsel to indigents, *see* N.C. GEN. STAT. § 7A-451 (Supp. 1975), fully implemented the access right of prisoners in post-conviction cases, the Court pointed out that counsel were appointed only if the petition withstood an initial review by the court. 430 U.S. at 828 n.17. A belated appointment thus did not provide any assistance to a prisoner seeking to *prepare* a post-conviction petition. The Court added that "[m]oreover, this statute does not cover appointment of counsel in federal habeas corpus or state or federal civil rights actions, all of which are encompassed by the right of access." *Id.*

This observation was critical, for the Court employed it to distinguish Ross v. Moffitt, 417 U.S. 600 (1974). *Moffitt* held that the State was not required to provide counsel for an indigent criminal defendant seeking discretionary review in either the State's highest court or in the Supreme Court, as the petitioner seeking such review would be able to make use of the trial transcripts and the briefs filed in the intermediate appellate court as well as the opinion issued by that court. *Id.* at 615. The Court also relied on the fact that discretionary review is not primarily concerned with the correctness of the judgment below but rather with the direction of the law as a whole. *Id.* at 615-16. The *Bounds* Court noted that, unlike the actions discussed in *Moffitt*, petitions for post-conviction relief (as well as complaints of violations of civil rights) are indeed original actions. "Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues." 430 U.S. at 827.

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

Id. at 827-28 (footnote omitted).

37. 430 U.S. at 827 (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969)).

ence) to a sword (that commands state assistance), *i.e.*, for rejecting the concept of state "neutrality."[38] But this criticism is unfounded because in virtually no access context is the state a neutral actor.[39] Most clearly the state is not a neutral actor when it administers a criminal justice system. The state acts affirmatively with the full force of its constitutionally authorized powers when it convicts one of a crime and incarcerates that person. In so doing, the state physically separates the convicted person from potential sources of legal help and also creates the prisoner's standing to assert the underlying habeas corpus claim that is at the core of the *Bounds* access right. Moreover, during incarceration, the right to unconditional liberty is replaced with a significantly more qualified institutional "bill of rights."[40] Alleged state denials of these qualified freedoms during incarceration help produce the underlying civil rights claims that the

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38. 430 U.S. at 834-35 (Burger, C.J., dissenting); *id.* at 837 (Stewart, J., dissenting); *id.* at 839-40 (Rehnquist, J., dissenting). Then Justice, now Chief Justice, Rehnquist said:

> The prisoners here in question have all pursued all avenues of direct appeal available to them from their judgments of conviction, and North Carolina imposes no invidious regulations which allow visits from all persons except those knowledgeable in the law. All North Carolina has done in this case is to decline to expend public funds to make available law libraries to those who are incarcerated within its penitentiaries.

Id. at 839 (dissenting opinion).

39. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971). In *Boddie*, the Court held that states were required to waive the costs and fees charged indigent litigants in divorce cases because only an adjudication could produce the decree that is "the exclusive precondition to the adjustment of a fundamental human relationship." *Id.* at 382-83. Justice Brennan criticized the narrowness of the Court's holding. He said that "a State has an ultimate monopoly of all judicial process and attendant enforcement machinery." *Id.* at 387 (concurring in part). *Cf.* United States v. Kras, 409 U.S. 434, 450 (1973) (bankruptcy filing fees may be required). Justice Stewart would have allowed Kras to proceed without paying the fees. "[I]n the unique situation of the indigent bankrupt, the Government provides the only effective means of his ever being free of these Government-imposed obligations." *Id.* at 455 (dissenting opinion). *See* L. TRIBE, *supra* note 2, § 16-11, at 1462 ("[T]he state's rules of contract, and its laws against forcible self-help, make judicial decision the only lawful mechanism for securing a binding determination against a recalcitrant opponent in *any* case." (emphasis in original)). *See* Michelman—*Part I*, *supra* note 2, at 1178-85.

40. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285 (1948). *See also* Hudson v. Palmer, 468 U.S. 517, 530 (1984) (prisoners have no fourth amendment expectation of privacy in cells); Pell v. Procunier, 417 U.S. 817, 823-24 (1974) (prisoner's first amendment rights must be balanced against legitimate needs of correctional system). *See generally* A. BRONSTEIN & P. HIRSCHKOP, PRISONERS' RIGHTS (1979); S. KRANTZ, THE LAW OF CORRECTIONS AND PRISONER RIGHTS (3d ed. 1986); R. SINGER & W. STATSKY, RIGHTS OF THE IMPRISONED (1974).

Bounds access right also expressly protects.[41] Furthermore, the state, one of the most powerful opposing litigants, defends both habeas corpus and civil rights claims and, through litigation, seeks to validate the denials of unconditional liberty and qualified freedoms. Finally, the judiciary, another state agent, administers a dispute resolution monopoly that determines whether the state's denials of unconditional and qualified freedoms are legally justified and therefore should continue.[42] Under these circumstances, the state is not a neutral actor and does not have a legitimate claim to inaction when its wards seek the help that is minimally necessary to vindicate claims that may restore unconditional liberty and more qualified forms of personal freedom.

Former Chief Justice Burger summarized this consequential principle of involuntary commitment that partially underlies the *Bounds* access right:

> When a sheriff or a marshall takes a man from a courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.[43]

The fairer question about *Bounds* is not whether the state incurs an affirmative obligation to ensure prisoner access, but what is the scope of that obligation. The right to "meaningful" and "effective" access *Bounds* recognizes may be fatally eroded by the disjunctive remedy it assertedly provides: law books *or* legal help from those trained in the law. In the context of the facts before the Court, *Bounds* plainly can be read to require only law books for cognitively normal prisoners who wish to assert noncapital habeas corpus and civil rights claims.[44]

In *Bounds*, however, the Court seemed to recognize that the ac-

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41. In *Bounds* Justice Powell noted that "in Wolff v. McDonnell . . . we extended the right of access . . . to civil rights actions arising under the Civil Rights Act of 1871 . . . ." Bounds v. Smith, 430 U.S. 817, 833 (1977) (Powell, J., concurring) (citation omitted).

42. *See* Boddie v. Connecticut, 401 U.S. 371, 387 (1971) (Brennan, J., concurring in part) ("As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes. Resorts to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' " (quoting 401 U.S. at 376-77 (majority opinion))).

43. W. Burger, No Man is an Island 6 (1980) (speech to mid-year meeting of American Bar Ass'n) (on file at the Supreme Court, Washington, D.C.).

44. *But see supra* note 33.

cess remedy should vary to accommodate the context in which the right is asserted; it did not rigidify a right that had been evolving for decades. Indeed, it specifically rejected the State's argument that it had defined the full scope of the access right in its prior decisions. The State argued that by allowing prisoner "writ writers" to help indigent prisoners, it had done all it was constitutionally obligated to do by the Court's prior access cases. But the Court responded that it had not intended "to set forth the full breadth of the right of access"[45] in its prior cases, particularly *Johnson v. Avery*[46] and *Wolff v. McDonnell*.[47] In *Johnson* and *Wolff* the Court expressed unresolved concern about prisoners who were not capable of legal self-help. In *Johnson* the Court adopted the lower court's conclusion that " '[f]or all practical purposes, if such prisoners cannot have the assistance of a "jail house lawyer," their possibly valid constitutional claims will never be heard in any court.' "[48] In *Wolff* the Court reasoned similarly that "the recognition" of the "constitutional rights" of prisoners "would be diluted if inmates," who "often [are] 'totally or functionally illiterate,' " were not given assistance by others.[49]

Speaking of *Johnson* and *Wolff* later in *Bounds*, the Court said: "Neither case considered the question we face today and neither is inconsistent with requiring additional measures to assure meaningful access to inmates able to present their own cases."[50] Those ex-

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45. Bounds v. Smith, 430 U.S. 817, 824 (1977).

46. 393 U.S. 483 (1969).

47. 418 U.S. 539 (1974).

48. 393 U.S. at 487 (quoting Johnson v. Avery, 252 F. Supp. 783, 784 (M.D. Tenn. 1966)). Justice White, who dissented because he believed "writ writers" posed a security risk, acknowledged: "[T]he illiterate or poorly educated and inexperienced indigent cannot adequately help himself and . . . unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief." *Id.* at 498 (White, J., dissenting). Justice White expressed understandable doubts that there is a "fellow inmate who is competent to help." *Id.* at 499.

49. 418 U.S. at 579. By "others" the Court meant an inmate adviser and other inmates. *Id.* at 579-80.

50. Bounds v. Smith, 430 U.S. 817, 824 (1977). Circuit courts have understood that *Bounds* requires the state to provide "additional measures" to special categories of inmates who cannot effectively use libraries. The Third Circuit, like the Fourth, interpreted *Bounds* to mean that the state may be required to appoint counsel to death-sentenced prisoners. The Third Circuit said:

> [T]he Court in *Bounds* did not suggest that the right of access to the courts is always to be measured by a single invariant standard irrespective of the nature of the proceedings. It may well be that the scope of access to legal resources required under *Bounds* varies according to the proceeding. In proceedings directly implicating the validity of a death-sentenced prisoner's conviction, the availability of legal assistance from lawyers, rather than from other sources of legal knowledge, is more central to the vindication of prisoners' claims than in

press caveats, as well as the flexible analysis that the Court employed in *Bounds*,[51] contradict the notion that the *Bounds* Court intended to immobilize the access remedy in a static and inflexible form that ignores the context in which the right exists.

A critical question was left open by the *Bounds* Court: under what circumstances, if any, is a state constitutionally required to provide more than a law library to prisoners. The implicit analytic framework in *Bounds* suggests the answer to this profoundly important question.[52] Because it is the same analytic framework that is explicit in the procedural due process cases, those cases are considered first.

II. THE PROCEDURAL DUE PROCESS CASES

In the procedural due process cases, the Supreme Court has spoken about the process due a litigant in a pending or imminent

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other civil claims filed by a death-sentenced prisoner, such as, for example, those complaining of conditions of confinement.

Peterkin v. Jeffes, 855 F.2d 1021, 1047 (3d Cir. 1988) (remanding to district court to determine if *Bounds* violation exists). *See also* Valentine v. Beyer, 850 F.2d 951, 956-57 (3d Cir. 1988) (proposed change in prison legal services plan did not take into account needs of illiterate, non-English-speaking or "closed custody" prisoners); Harrington v. Holshouser, 741 F.2d 66, 69 (4th Cir. 1984), *aff'd on reh'g*, 841 F.2d 77 (4th Cir.), *cert. denied*, 109 S. Ct. 179 (1988) (prison regulations sufficiently allow access to libraries by prisoners on disciplinary segregation); Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980) (on remand district court to consider whether legal assistants are necessary to provide meaningful access for illiterate or non-English-speaking prisoners).

District courts also have concluded that the *Bounds* access remedy must be tailored to meet the needs of special categories of prisoners even if a constitutionally adequate prison law library exists. *See* Hadix v. Johnson, 694 F. Supp. 259, 294-95 (E.D. Mich. 1988) (legal assistance program including attorneys required to remedy, *inter alia*, deficiencies in access provided to illiterate or segregated prisoners); United States *ex rel.* Para-Professional Law Clinic v. Kane, 656 F. Supp. 1099, 1107 (E.D. Pa. 1987), *aff'd mem.*, 835 F.2d 285 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) (closing inmate-run legal clinic would violate rights of functionally illiterate prisoners); Knop v. Johnson, 655 F. Supp. 871, 881 (W.D. Mich. 1987) (deficiencies in providing access to law libraries for segregated prisoners); Cody v. Hillard, 599 F. Supp. 1025, 1061 (D.S.D. 1984) (women prisoners denied meaningful access to courts; equal protection claim not reached); Kendrick v. Bland, 586 F. Supp. 1536, 1551-52 (W.D. Ky. 1983) (attorneys required at women's prison because of absence of writ writers); Glover v. Johnson, 478 F. Supp. 1075, 1096-97 (E.D. Mich. 1979) (paralegal training required at women's prison); Wade v. Kane, 448 F. Supp. 678, 684 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1338 (3d Cir. 1979) (inmate legal clinic required to remain open to assist illiterate and Spanish-speaking prisoners).

51. *See supra* text accompanying notes 29-37.

52. *See* Mello, *supra* note 5, at 832-35. *See generally* Brief of the American Bar Ass'n as Amicus Curiae in Support of Respondents, Murray v. Giarratano, 109 S. Ct. 303 (1988) (No. 88-411).

proceeding.[53] Usually the jurisdiction of a court or an administrative agency has been invoked and a hearing is or will be scheduled. The question is whether the litigant is entitled to legal help at that hearing. In over a century of procedural due process cases, the Supreme Court has identified a variety of due process values[54] that help answer this question. These differing values have generated a succession of standards for determining due process,[55] the enduring hallmark of which is its flexibility.[56] Indeed, flexibility is its birthmark as well.

The right to due process "antedates the establishment of our institutions."[57] As has been recounted often, the parent of the due process clauses in our Constitution is the "law of the land" provision of the thirty-ninth chapter of the Magna Carta.[58] A respected

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53. *See, e.g.*, Lassiter v. Department of Social Servs., 452 U.S. 18, 32-33 (1981) (counsel for indigent parent in proceeding to terminate parental status not always required where proceeding is informal and questions presented are uncomplicated); Mathews v. Eldridge, 424 U.S. 319, 347-49 (1976) (evidentiary hearing not required prior to termination of disability benefits where administrative procedures comport with due process); Wolff v. McDonnell, 418 U.S. 539, 563-70 (1974) (prison disciplinary proceedings resulting in loss of good time credit or imposition of solitary confinement require written notice of claimed violation, 24-hour delay before hearing, written statement of factfinders, and restricted opportunity to call witnesses as well as assistance to illiterate inmates); Morrissey v. Brewer, 408 U.S. 471, 486-89 (1972) (parole revocation hearing requires probable cause determination, written notice, disclosure of evidence, opportunity to be heard and call witnesses, confrontation and cross-examination of adverse witnesses, and written statement by neutral factfinder); Goldberg v. Kelly, 397 U.S. 254, 266-70 (1970) (pretermination hearing required when public assistance payments discontinued; retained counsel allowed); Grannis v. Ordean, 234 U.S. 385, 394 (1914) (fundamental requisite of due process of law is opportunity to be heard).

54. L. TRIBE, *supra* note 2, § 10-7, at 663-77 (analyzing due process cases with reference to their recognition of the intrinsic—"the right to be heard from, and the right to be told why"—and instrumental—"the right to secure a different outcome"—values of due process); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 47 n.61 (1976) (describing the incorporation of "[d]ignitary or natural right, utilitarian, and egalitarian theories" in the due process cases).

55. *See infra* text accompanying notes 60-82.

56. " '[D]ue process,' unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place and circumstances . . . . '[D]ue process' cannot be imprisoned within the treacherous limits of any formula." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

57. Hurtado v. California, 110 U.S. 516, 539 (1884) (Harlan, J., dissenting).

58. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1885). *See also Hurtado*, 110 U.S. at 543 (Harlan, J., dissenting) ("Whether the phrase in our American constitutions, national or State, be 'law of the land' or 'due process of law,' it means in every case the same thing." (citation omitted)); Davidson v. New Orleans, 96 U.S. 97, 101 (1877) ("The equivalent of the phrase 'due process of law,' according to Lord Coke, is found in the words 'law of the land,' in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guarantees

English translation of *vel ser legem terre*, the "law of the land" provision, holds that it guarantees a "legal process or proceeding" that is "*adapted* by the law *to the nature of the case*."[59] The Supreme Court's procedural due process decisions evidence this context-specific sensitivity.

In one of its earliest cases involving the fourteenth amendment's due process clause, *Hurtado v. California*,[60] the Supreme Court acknowledged the important role of history in giving meaning to due process,[61] but rejected the argument that its source, the Magna Carta, froze the process constitutionally due American litigants in the forms provided by English common law.[62] The Court observed that "flexibility and capacity for growth and adaptation" are the essential characteristics of both the Magna Carta and the common-law method that gives meaning to its descendant, due process.[63] The Court added that the Constitution "was made for an undefined and expanding future" and that "[t]here is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and every age."[64]

Consistent with this historical focus on flexibility, the Supreme Court has crafted elastic tests to answer both questions that were intertwined in its early due process cases,[65] and have been separated in its more recent cases: (1) what interests are protected by due process, and (2) what process is due the interest-holders to protect those interests.

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of the rights of the subject against the oppression of the crown."). *See generally* Berger, *"Law of the Land" Reconsidered*, 74 NW. U.L. REV. 1 (1979).

59. *Hurtado*, 110 U.S. at 527 (citation omitted; emphasis added). In Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819), the Court gave a similarly fluid meaning to the words of the Magna Carta, observing that "they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Id.* at 244.

60. 110 U.S. 516 (1884). In *Hurtado* the Court held that a capital defendant was not constitutionally entitled to have a grand jury find that a murder charge was supported by probable cause. *Id.* at 538.

61. *Cf. Murray's Lessee*, 59 U.S. at 277 (Due process obtains its meaning from "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."). *See generally* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

62. 110 U.S. at 528.

63. *Id.* at 530.

64. Hurtado v. California, 110 U.S. 516, 531 (1884).

65. The early due process analysis collapsed the two questions into a "one step [analytic] process." L. TRIBE, *supra* note 2, § 10-8, at 678.

One early test of the liberty interests that were protected by due process was whether a principle was "fundamental" and advanced the "liberty and justice" that "lie at the base of all our civil and political institutions."[66] Once a protected interest was identified, another early test used to determine the process government owed the interest-holder was similarly general; for example, the process that was required to protect some interest-holders was one that "hears before it condemns; which proceeds upon inquiry, and renders judgment only after a trial."[67]

The definition of a liberty interest protected by due process has retained its flexibility for over a century. In 1923, for example, the Court held unconstitutional a state law forbidding the teaching of a modern language other than English in private and public schools.[68] The Court reasoned that the law denied children the right to "acquire useful knowledge"[69] and denied parents the means to discharge their "natural duty" to provide their children with an "education suitable to their station in life."[70] The Court spoke expansively about the "liberty" guaranteed by due process:

> [It] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy *those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.*[71]

In the decisions in which the Court struggled to define an acceptable standard that determined which provisions of the Bill of Rights were "incorporated"—made effective against the states—by the fourteenth amendment's promise of due process, the Court asked whether an asserted liberty interest was a component of "the very essence of a scheme of ordered liberty."[72] It measured the

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66. 110 U.S. at 535.

67. *See* Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819) (argument of Daniel Webster).

68. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).

69. *Id.* at 399.

70. *Id.* at 400.

71. *Id.* at 399 (citations omitted; emphasis added). *See* Ingraham v. Wright, 430 U.S. 651 (1977), in which the Court cited *Meyer* with approval, noting that the many "common law privileges" that the *Meyer* Court recognized as protected liberty interests included a child's interest in avoiding "unjustified intrusions on personal security." *Id.* at 673 (footnote omitted).

72. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

constitutionality of the process provided by a state to protect an accepted liberty interest by asking whether the process "offend[ed] those canons of decency and fairness which express the notions of justice of English-speaking peoples."[73]

In the 1970s the number of protected interests grew significantly. For example, in *Goldberg v. Kelly*[74] the Court required the State to provide public assistance recipients with a hearing prior to terminating their statutory benefits, signaling a decade of decisions that included within the interests protected by due process interests in "benefits," statutory "entitlements,"[75] and "mutually explicit understandings."[76]

Although these interests have been constricted by the decisions of the last decade,[77] the more limited and utilitarian due process test that the Supreme Court currently employs still recognizes a variety of protected "liberty interests."[78]

The Supreme Court's current due process test embraces a two-step analysis. First, the Court determines whether there is a "threshold interest" that due process protects. If so, the Court asks what process is due the litigent. In answering this second question, the Court employs a three-factor balancing test:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including

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73. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

74. 397 U.S. 254 (1970).

75. *Id.* at 262. *See also* Bell v. Burson, 402 U.S. 535, 539 (1971) ("Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." (citations omitted)).

76. Perry v. Sindermann, 408 U.S. 593, 601 (1972).

77. *See, e.g.*, cases cited *infra* note 90.

78. One authority, summarizing the Supreme Court's decisions, said:

> While the Court has not defined the exact scope of the liberties which are protected by the due process clauses, it is clear that they go beyond mere physical restraint or fundamental constitutional rights. The clauses also guarantee that each individual will have some degree of freedom of choice and action in all important personal matters.
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> . . . .
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> It would appear that whenever the government takes an action which is designed to deprive an individual . . . of the freedom to engage in some significant area of human activity, some procedure to determine the factual basis and legality for such action being taken is required by the due process clause.

2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.4, at 226-27 (1986) [hereinafter ROTUNDA].

> the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[79]

With respect to the provision of counsel, the Court begins its analysis with some assumptions and also a more formal presumption. The Court has said that the weighty individual interest in personal freedom presumptively tips the balance. Hence, if the underlying civil proceeding may result in the loss of personal freedom, the Court's weighing process is aided by a presumption that the litigant is entitled to counsel.[80]

The Court also assumes that the more formally adversarial the proceeding, the more likely the risk of error if one side is unrepresented.[81] This builds upon the basic assumption of the adversary process that a just result is produced by a vigorous contest of equally qualified opponents. The risk of error is most acute when a powerful governmental advocate opposes an unrepresented litigant in an adversarial proceeding.[82]

III. UNIFYING THE CONSTITUTIONAL SOURCES OF LEGAL HELP IN CIVIL CASES: THE DUE PROCESS-ACCESS TO COURT RIGHT

The Supreme Court has yet to recognize explicitly that the analytic framework of the access to court and procedural due process cases is the same. It should do so in *Giarratano*. The analyses ad-

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79. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citation omitted).

80. This presumption was stated by the Supreme Court as follows:

> [T]he Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

Lassiter v. Department of Social Servs., 452 U.S. 18, 26-27 (1981). *See also* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); *In re* Gault, 387 U.S. 1, 41 (1967).

81. *See, e.g.*, *Gault*, 387 U.S. at 36 ("The probation officer cannot act as counsel for the child. His role in the adjudicatory hearing . . . is as arresting officer and witness against the child. Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved."). *Cf. Lassiter*, 452 U.S. at 28 ("If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests might become unwholesomely equal.").

82. *See* Michelman—*Part I*, *supra* note 2, at 1177-78; Note, *supra* note 2, at 1297 (heightened due process safeguards are required when an individual faces the government).

dress variants of the same question: when is there a constitutional right to legal help in civil cases? These qualified rights to legal help are the indispensable means by which both sets of right-holders vindicate fundamental underlying rights. One guarantees "meaningful access"[83] to the courts; the other guarantees an "opportunity to be heard"[84] once access is obtained. They are the beginning and end of the same constitutional promise.

Merging the two concepts does not require the Court to import an analytic framework from the procedural due process cases that is foreign to the access to court analysis. Rather, it requires only explicit recognition of what is inescapably implicit. For in the access cases the Court implicitly has applied a procedural due process analysis.

A. The Bounds *Court Identified Constitutionally Protected Liberty Interests*

The first step in the *Bounds* Court analysis was the identification of a constitutionally protected liberty interest. The *Bounds* Court held that a noncapital prisoner's interests in "habeas corpus and civil rights actions" are constitutionally adequate threshold liberty interests to command affirmative "measures" to protect them.[85] The plain import of *Bounds* is that these interests are constitutionally protected liberty interests. They meet the first test in the two-step due process analysis and, therefore, trigger the balancing test that determines the assistance—*usually* a law library in the prison context—that the state must provide to safeguard these interests.

Why are a noncapital prisoner's interests in habeas corpus and civil rights actions protected liberty interests? They are protected because "original actions seeking new trials, release from confinement, or vindication of fundamental civil rights," which "frequently raise heretofore unlitigated issues, . . . directly protect our most valued rights."[86] Habeas corpus and civil rights actions are the enforcement mechanisms for protecting these rights.

When a petitioner files a federal habeas corpus or state post-conviction proceeding in which the petitioner seeks to vindicate a fair trial right, the petitioner's ultimate interest is in the "unconditional liberty" to which the prisoner had a pre-existing right, and

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83. Bounds v. Smith, 430 U.S. 817, 828 (1979).
84. Grannis v. Ordean, 234 U.S. 385, 394 (1914).
85. 430 U.S. at 827.
86. *Id.*

has an existing right, if the fair trial claim is meritorious. The fair trial right and the unconditional liberty interest it protects are derived explicitly from the Constitution and the centuries of common law that give meaning to "due process."[87]

Concededly, a criminal conviction affirmed on direct appeal, however illegal or unconstitutional it *allegedly* may be, creates a presumption that the resulting denial of unconditional liberty is valid.[88] This presumption properly allocates the *burden of proof* to the petitioner.[89] But this presumption is not irrebuttable and it does not diminish the interest in the claim that it was wrongfully taken.[90]

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87. *See, e.g.*, Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365 (1891).

88. Barefoot v. Estelle, 463 U.S. 880, 887 (1983) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence."). For a discussion of *Barefoot*, see *infra* text accompanying notes 199-207.

89. *See, e.g.*, D. WILKES, JR., *supra* note 9, § 1-7, at 7-8 (standard of proof in post-conviction proceedings is generally preponderance of the evidence).

90. If the criminal conviction is in fact invalid because unconstitutionally obtained, the prisoner's liberty interest is "unconditional" in the sense that the state cannot illegally impose *any* restraint, including incarceration, on personal liberty.

The asserted invalidity of the state's authority to incarcerate distinguishes this interest in unconditional liberty from two other possible types of liberty, "conditional" and "aspirational." Prisoners enjoy a state-created interest in conditional liberty when the state, after obtaining a *valid* criminal conviction, voluntarily chooses to grant prisoners freedom despite its legitimate authority to impose or continue incarceration. The Supreme Court has held that this lesser liberty interest, triggered by a court's decision to place a convicted person on probation or by the state's decision to grant parole, is entitled to some due process protection. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

The interest in unconditional liberty differs even more fundamentally from an interest in "aspirational liberty," which consists merely of a prisoner's desire to be free despite the fact that the state has obtained a *valid* criminal conviction *and* has chosen to exercise, not to forego, its legitimate authority to require or maintain his or her incarceration. The Supreme Court consistently has rejected the claim that aspirational liberty triggers procedural due process protection, holding that no protectable liberty interest is created by an executory parole release decision that was reversed before the prisoner was released, *see* Jago v. Van Curen, 454 U.S. 14, 21 (1982); a "[prisoner's] appeal for clemency," *see* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); the "possibility" of discretionary release on parole, *see* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 11 (1979); *but see id.* at 12 (finding a protected threshold liberty interest in specific statutory language that provided more than a unilateral expectation of release upon good behavior); or a prisoner's hopes that he or she would be allowed to remain in either a lesser security institution within a prison system, *see* Meachum v. Fano, 427 U.S. 215, 224 (1976), or within any particular prison itself, *see* Montanye v. Haymes, 427 U.S. 236, 242-43 (1976). The Court refused to give these interests constitutionally protected threshold status because the prisoners had no pre-existing right or entitlement to, or reasonable expectation that they would receive, the forms of liberty in which they asserted interest. That is, the release decisions were subjective, discretionary, or

In holding unconstitutional the requirement that indigent prisoners pay a fee to file a state post-conviction petition, the Supreme Court, prior to *Bounds*, emphasized the fundamental interest in the restoration of unconditional liberty that survives conviction and appeal and is protected both by federal habeas corpus and state post-conviction proceedings:

> Ever since the Magna Charta, man's greatest right—personal liberty—has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its "privilege . . . shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I § 9. Its principle is imbedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention. Over the centuries it has been the common law world's "freedom writ" by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired" and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise.[91]

In sum, *Bounds* properly gave the prisoner's liberty interest in "original proceedings seeking new trials," and the unconditional liberty such proceedings may restore, constitutionally protected status.[92]

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predictive decisions that were not based upon enforceable criteria. *See* L. TRIBE, *supra* note 2, § 10-10, at 694-96.

Hence, while a valid conviction extinguishes a prisoner's interest in unconditional liberty, and leaves him or her with only the lesser interests of conditional or aspirational liberty, the prisoner's interest in unconditional liberty remains active so long as he or she has a claim that the underlying conviction actually is not valid.

91. Smith v. Bennett, 365 U.S. 708, 712-13 (1961) (footnote and citation omitted; emphasis added). For the Habeas Corpus Act of 1679, see 31 Car. 2, ch. 2.

92. By comparison, that interest is at least as substantial as an organization's interest in preventing the government from labeling the organization "communist," *see* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 175 (1951) (Douglas, J., concurring); a student's interest in avoiding a disciplinary "paddling," *see* Ingraham v. Wright,

B. The Bounds *Court Implicitly Performed A Procedural Due Process Balancing Test*

Having identified the requisite threshold liberty interests, the Court in *Bounds* then performed a procedural due process balancing test without explicitly referring to it as such. It again gave great weight to the prisoner's private interest in habeas corpus and civil rights claims,[93] declined to give much weight to the State's contrary interest in avoiding expenditures,[94] and found that, without law books or legal assistance, there was an increased risk of error: valid claims would be lost because they would not be pled properly.[95] Moreover, while the *Bounds* Court did not expressly identify it as a procedural due process assumption, it also emphasized that government, with its formidable powers, is the adversary in both habeas corpus and civil rights actions.[96]

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430 U.S. 651, 674 (1977); a prisoner's interest in avoiding the loss of "good time" credits that would reduce the length of his or her incarceration, *see* Wolff v. McDonnell, 418 U.S. 539, 558 (1974); a parent's interest in avoiding termination of his or her parental status, *see* Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981); or a prisoner's interest in avoiding "adverse social consequences" such as "stigma" and "compelled treatment" that accompany transfer to a mental institution, *see* Vitek v. Jones, 445 U.S. 480, 492-93 (1980). With respect to the latter case, it would be fundamentally irrational if the transfer of a prisoner to a mental institution triggers a right to legal help (state-appointed counsel in the view of four of the justices in the plurality, *see* 445 U.S. at 496-97), but the death-sentenced prisoner's interest in capital post-conviction litigation does not.

93. Bounds v. Smith, 430 U.S. 817, 827-28 (1977).

94. *Id.* at 825 ("[E]conomic factors may . . . be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial.").

95. *Id.* at 825-28 (emphasizing prisoner's need to know law to understand whether a colorable claim exists; to plead "jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant," to assess whether new legal principles apply retroactively, to respond to state pleadings, thus avoiding dismissal of valid claims).

In Johnson v. Avery, 393 U.S. 483 (1969), the Court implicitly engaged in the same procedural due process analysis, identifying and balancing the same interests. It accepted that prison "writ writers" "are sometimes a menace to prison discipline" and are often so "unskillful" that their petitions unduly "burden" the courts. *Id.* at 488. But the Court found that implementing the access right and vindicating the "fundamental" claims that it protects outweigh the admittedly significant state interests. *Id.* at 488-90.

Similarly, in Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam), the lower court identified the "imperative" prisoner interest in effective access to the courts and the real risk that *pro se* litigants would lose valid constitutional claims that they could not articulate and plead without help. *Id.* at 109-10. It weighed these interests against the "insufficient" asserted state interests in "economy and standardization." *Id.* at 111.

96. *See Bounds*, 430 U.S. at 826 ("[I]f the State files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument."). *See also* Note, *supra* note 2, at 1297 ("The state government, as a litigant, has superior power to control procedures and share evi-

IV. THE DEATH-SENTENCED PRISONERS' RIGHT TO COUNSEL TO INVESTIGATE, PREPARE, AND ASSERT POST-CONVICTION CLAIMS: AN APPLICATION OF THE DUE PROCESS-GROUNDED ACCESS TO COURT RIGHT

The context-specific, coherent right to counsel recognized in *Giarratano*[97] derives, as it should, from the special circumstances of capital post-conviction petitioners and the extraordinary significance of capital post-conviction proceedings.[98]

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dence, and typically has greater litigational resources than does its individual opponent.").

97. It is the right to the assistance of counsel in investigating, preparing, and litigating capital post-conviction claims in state proceedings. 847 F.2d 1118, 1121-22 (4th Cir. 1988) (en banc). *See also supra* note 10.

98. The eroded distinction between "civil" and "criminal" cases should not determine whether there is a right to counsel in capital post-conviction proceedings. Post-conviction proceedings are called by both names. D. WILKES, JR., *supra* note 9, at 283 app. A. Thus, insofar as the labels are significant, post-conviction's label is ambiguous.

Its true identity is a hybrid. The post-conviction process enforces constitutional criminal trial rights, restores unconditional liberty, and sometimes shares the qualities of a criminal appeal. *See infra* text accompanying notes 116-120. It has become a more integral part of the criminal process. *See infra* note 119. In these respects, its identity evokes the spirit and an important interest in the letter of the right to counsel provision of the sixth amendment to the United States Constitution. *See infra* text accompanying notes 263-286.

On the other hand, in a post-conviction proceeding the prisoner is the petitioner and has the burden of proving constitutional violations, usually by a preponderance of the evidence. D. WILKES, JR., *supra* note 9, § 1-7, at 7-8. It also is an integral part of the collateral process that includes federal habeas corpus proceedings, which have been traditionally considered civil in nature. Fay v. Noia, 372 U.S. 391, 423-24 (1963). Generally, habeas corpus petitioners cannot raise federal claims in federal court unless they have "exhausted" them in—presented them to—an appropriate state court. *See* 28 U.S.C. § 2254(b), (c) (1982). Thus, those federal claims that cannot be asserted on the direct appeal of a state case must be presented to a state post-conviction court. Conversely, if they are not presented to the state post-conviction court, generally they are waived and may not be presented to the federal habeas corpus court. *See* D. WILKES, JR., *supra* note 9, § 8-24, at 193-201. In this sense, state post-conviction is a civil proceeding that is shaped by its criminal law enforcement function.

The more appropriate "right to counsel" inquiries are not whether the proceeding is denominated "civil" or "criminal," but whether the liberty interests which are the subject of adjudication or agency action are important enough to warrant the protections provided by counsel, whether there are strong countervailing state interests, and whether the risk of error attendant to *pro se* representation is tolerable. *See, e.g.*, Allen v. Illinois, 478 U.S. 364 (1986); Addington v. Texas, 441 U.S. 418 (1979); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); *In re* Gault, 387 U.S. 1 (1967). The answers to these questions resolve the right to counsel issue when it implicates the due process clause as well as define the scope of the right to counsel guaranteed by the sixth amendment. *See infra* text accompanying notes 263-286.

A. The Private Interest

The weighty private interest that death-sentenced prisoners have in the automatic appointment of post-conviction counsel is a more substantial variant of that identified in *Bounds*. It is the interest in vindicating, in an original action, a capital fair trial claim that, if successful, may preserve life. This interest *both* satisfies the threshold due process requirement *and* weighs heavily in the balancing test.

1. The Immediate Private Interest in Capital Post-conviction Proceedings.—a. The Interest in the Enhanced Capital Fair Trial Right.—A capital post-conviction proceeding often restores a capital defendant's constitutional right to a fair capital trial and sentencing proceeding when it has been denied.[99] It is, for example, the usual means by which a capital post-conviction petitioner enforces his or her right to effective assistance of counsel. This right is the predicate of a fair trial.[100] A capital proceeding is vigorously adversarial. The procedural protections made available to capital defendants are enhanced to assure the "reliability" and "certainty" that are premises of the constitutionality of the death penalty.[101] If defense counsel's performance falls below constitutionally imposed minimal standards and prejudices the result of a capital proceeding,[102] a defendant has been denied his most basic right.

Other constitutionally imposed assumptions also bolster the foundations of the fair trial right. One assumption is that prosecutors will disclose exculpatory evidence to defense counsel, as re-

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99. *See* cases cited *infra* notes 108-112.

100. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair."). *Strickland* grounded the effective assistance requirement in the adversarial system recognized by the sixth amendment as a whole, not just on the counsel clause. *Id.* at 684-85.

Because trial counsel are disinclined to attack their own competency and because proof that trial counsel were constitutionally ineffective often depends on what was *not done*—omissions that are not reflected in the trial record—trial and direct appeal courts usually are unable to enforce this fundamental right. Indeed, whether trial counsel was constitutionally effective normally is not an issue that can even be raised on direct appeal. *See* cases cited *infra* note 116.

101. *See infra* text accompanying notes 154-194.

102. The *Strickland* Court stated that a capital sentencing proceeding is "sufficiently like a trial in its adversarial format . . . [so] that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." 466 U.S. at 686-87 (citations omitted).

quired by *Brady v. Maryland*[103] and its progeny.[104] Another assumption is that the state will not engage in secret misconduct that prejudices the fair trial right.[105]

The successful capital post-conviction cases provide evidence of the extraordinary value of both the state (and interrelated federal[106]) post-conviction enforcement mechanism and the enhanced capital fair trial rights that it enforces.[107] These cases also demonstrate the need for appointed counsel; they identify a range of complex investigative, legal research, and litigation tasks that *pro se* litigants simply cannot manage.

Capital post-conviction attorneys have discovered nonrecord facts that established prejudicial misconduct by the state[108] and violations of the constitutionally imposed disclosure rule in *Brady v. Maryland*;[109] these discoveries have required reversals of a significant number of death penalties. Capital post-conviction attorneys have demonstrated the ineffectiveness of trial counsel by discovering evidence of the defendant's mental illness and disorder,[110]

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103. 373 U.S. 83 (1963).

104. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 678 (1985) (constitutional error exists and conviction must be reversed if evidence is material in sense that its suppression by prosecution undermines confidence in outcome of trial); United States v. Agurs, 427 U.S. 97, 114 (1976) (prosecutor's failure to disclose victim's prior criminal record did not raise sufficient doubt as to respondent's guilt); Giglio v. United States, 405 U.S. 150, 154-55 (1972) (prosecutor's promise of leniency to key witness important evidence of non-credibility of witness; failure to disclose required new trial).

105. *See, e.g.*, Amadeo v. Zant, 108 S. Ct. 1771, 1774 (1988).

106. *See supra* note 98.

107. *See* cases cited *infra* notes 108-112.

108. *See, e.g., Amadeo*, 108 S. Ct. at 1774 (discovery of document in which prosecutor directed jury commissioner to discriminate against blacks and women in compiling jury lists required reversal of death penalty); Brown v. Wainwright, 785 F.2d 1457, 1464-66 (11th Cir. 1986) (discovery of prosecutor's knowing use of perjured testimony required reversal of death penalty).

109. 373 U.S. 83, 86 (1963). *See, e.g.*, McDowell v. Dixon, 858 F.2d 945, 950-51 (4th Cir. 1988) (discovery of failure of prosecutor to disclose, *inter alia*, police report indicating sole eyewitness to capital murder initially had identified assailant as white male required reversal of death penalty imposed against black male defendant); Lindsey v. King, 769 F.2d 1034, 1042-43 (5th Cir. 1985) (en banc) (discovery of failure of prosecutor to disclose a police report indicating eyewitness had initially been unable to identify capital defendant required reversal of death penalty); Chaney v. Brown, 730 F.2d 1334, 1357-58 (10th Cir. 1984) (discovery of prosecutor's failure to disclose potentially mitigating Federal Bureau of Investigation reports required reversal of death penalty).

110. *See, e.g.*, Evans v. Lewis, 855 F.2d 631, 639 (9th Cir. 1988) (discovery of evidence indicating that defendant had been suicidal and mentally ill established ineffective assistance of counsel, requiring reversal of death penalty); Middleton v. Dugger, 849 F.2d 491, 494-95 (11th Cir. 1988) (discovery of evidence of mental illness and other mitigating circumstances, including a discharge summary from a state mental hospital, the testimony of two psychiatrists, and records from various juvenile services agencies and a

mental retardation,[111] and other compelling mitigating circumstances.[112] They have retained and consulted the experts whose testimony often is essential to establish the ineffectiveness of trial counsel.[113] They have reduced these facts and expert opinions to writing and pled them in the carefully drawn post-conviction petitions and supporting affidavits that are required to adequately raise state post-conviction claims and preserve them for federal habeas corpus review.[114] They have argued points of law and participated

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prison health services division, supported finding of ineffective assistance of counsel, requiring reversal of the death penalty); Stephens v. Kemp, 846 F.2d 642, 652-55 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 189 (1988) (discovery of evidence of mental illness supported finding of ineffective assistance of counsel, requiring reversal of death penalty); Holmes v. State, 429 So. 2d 297, 300-01 (Fla. 1983) (failure of trial counsel to produce existing evidence of "psychological disturbance" was constitutionally ineffective, requiring reversal of death penalty); Curry v. Zant, 371 S.E.2d 647, 649 (Ga. 1988) (new evidence from three mental health experts and other witnesses demonstrated mental retardation and mental illness, supporting finding of ineffective assistance of counsel and requiring that guilty plea and death sentence be set aside).

111. *See, e.g.*, Armstrong v. Dugger, 833 F.2d 1430, 1432-33, 1436 (11th Cir. 1987) (discovery of evidence demonstrating epilepsy and mental retardation helped establish ineffective assistance of counsel, requiring reversal of death penalty); Jones v. Thigpen, 555 F. Supp. 870, 879-80 (S.D. Miss. 1983), *modified on other grounds*, 741 F.2d 805 (5th Cir. 1984), *cert. denied*, 497 U.S. 1087 (1987) (discovery of evidence of mental retardation helped establish ineffective assistance of counsel, requiring reversal of death penalty).

112. *See, e.g.*, Thomas v. Kemp, 796 F.2d 1322, 1324-25 (11th Cir. 1986), *cert. denied*, 479 U.S. 996 (1986) (testimony of high school faculty members about mental and physical abuse of capital defendant by parents along with other evidence indicating he was a slow learner, hard worker and mentally ill, established ineffective assistance of counsel, requiring reversal of death penalty); Tyler v. Kemp, 755 F.2d 741, 745-46 (11th Cir. 1985), *cert. denied*, 474 U.S. 1026 (1986) (discovery of mitigating evidence that capital defendant had no criminal record, had a good work record, had been abused by her husband, and was a good mother established ineffective assistance of counsel, requiring reversal of death penalty); People v. Ledesma, 43 Cal. 3d 171, 223, 729 P.2d 839, 872, 233 Cal. Rptr. 404, 437 (1987) (trial counsel failed to investigate evidence of drug-induced diminished capacity, demonstrating ineffective assistance and requiring vacation of death-sentenced petitioner's conviction); People v. Frierson, 25 Cal. 3d 142, 164, 599 P.2d 587, 599-600, 158 Cal. Rptr. 281, 293 (1979) (same); Zant v. Hamilton, 251 Ga. 553, 555, 307 S.E.2d 667, 669 (1983) (failure to provide testimony of relatives at sentencing proceeding established ineffective assistance, requiring reversal of death penalty).

113. *See, e.g.*, *Middleton*, 849 F.2d at 494 (testimony of psychiatrist and lawyer); *Armstrong*, 833 F.2d at 1434 (testimony of an expert on mental retardation and brain damage); *Thomas*, 796 F.2d at 1325 (testimony of psychiatrist); *Curry*, 371 S.E.2d at 648-49 (testimony of mental health experts).

114. Failure to preserve the claim can be disastrous. In Smith v. Baker, 624 F. Supp. 1075 (E.D. Va. 1985), a *pro se* noncapital habeas corpus petitioner's failure to coherently state a claim of ineffective assistance of trial counsel in his first petition in the state courts led the Virginia Supreme Court to reject his "successor" petition on the ground that the petitioner had knowledge of the facts upon which he based the claim at the time he filed his first petition. This in turn led the federal district court to conclude that the Virginia court's finding of a procedural bar was an adequate and independent state

in vigorously adversarial post-conviction evidentiary hearings in both state and federal courts.[115]

b. The Interest In the Post-conviction Enforcement Device.—It is by filing a post-conviction petition, not through a direct appeal, that a (represented) capital defendant can enforce a fair trial right when, as is frequently the case, the facts that establish denial of the right are not in the record or if they are, the alleged denial of the right is not an issue that can be raised on direct appeal.[116] In these instances, the post-conviction proceeding is the first means of vindicating such fair trial rights. A post-conviction proceeding is even more important than a direct appeal when a fair trial claim asserted in it, unlike claims usually asserted on direct appeal, has not been presented to any court before, even the trial court.

Although the Supreme Court has held that a direct appeal is not constitutionally compelled,[117] and never has held that a state post-conviction proceeding is required,[118] each, depending upon

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ground prohibiting federal habeas corpus review of the merits. *Id.* at 1077-78. *See also* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (failure to make timely objection to admission of inculpatory statement may bar federal habeas corpus review of *Miranda* claim).

115. *See, e.g.*, Evans v. Lewis, 855 F.2d 631, 639 (9th Cir. 1988) (state post-conviction and federal habeas corpus hearings); Stephens v. Kemp, 846 F.2d 642, 652-55 (11th Cir. 1988) (same); Lindsey v. King, 769 F.2d 1034, 1039 (5th Cir. 1985) (en banc) (federal habeas corpus hearing wherein court-appointed attorney cross-examined state prosecutor, revealing *Brady* violation).

116. *See* Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987) (rarely can ineffective assistance of counsel be raised on direct appeal since claim usually is dependent on nonrecord facts); State v. Williamson, 389 So. 2d 1328, 1331 & n.5 (La. 1980) (ineffective assistance claims heard on habeas corpus review because of focus on nonrecord facts); Payne v. Commonwealth, 364 S.E.2d 765, 768 (Va. App. 1988) (ineffective assistance of counsel usually not cognizable on direct appeal because facts relevant to claim not contained in trial record and trial counsel had no opportunity to defend or explain conduct); State v. Byrd, 30 Wash. App. 794, 800, 638 P.2d 601, 605 (1981) ("personal restraint petition" rather than direct appeal appropriate means for asserting ineffective assistance of counsel when claim based on nonrecord facts). *See generally* D. WILKES, JR., *supra* note 9, at 264 app. A. *See also* Atkinson v. United States, 366 A.2d 450, 452-53 (D.C. 1976) (motion for relief from sentence appropriate where errors are not correctable on direct appeal or where "exceptional circumstances" exist); McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983) (matters raised on appeal or which could have been raised on appeal not cognizable on motion for post-conviction relief).

117. *See* McKane v. Durston, 153 U.S. 684 (1894). *McKane* stated that "review by an appellate court of the final judgment in a criminal case . . . was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review." *Id.* at 687. But "[e]ven though states may not be required to create an appellate system, any appellate system must comply with the principles of due process." 2 ROTUNDA, *supra* note 78, § 17.9, at 273 n.15 (citing Evitts v. Lucey, 469 U.S. 387 (1985)).

118. In Young v. Ragen, 337 U.S. 235 (1949), the Court faced the "recurring problem

the claim, is the means of restoring the constitutional right to a fair trial when it is denied. Both have become "integral part[s] of the . . . system for finally adjudicating the guilt or innocence of a defendant."[119] In both, issues that are not preserved may not be further reviewed; death-sentenced prisoners may assert on appeal only those claims that they have properly preserved at trial; death-sentenced prisoners may assert in federal habeas corpus proceedings only those issues that have been first raised in state post-conviction hearings.[120] Thus, the ability of a death-sentenced prisoner to effectively investigate, evaluate, and assert state post-conviction claims very directly affects not only the prisoner's chance to immediately vindicate his or her fair trial right but also his or her ability to preserve fair trial issues for later consideration by a federal court.

In the vast majority of criminal appeals, resolution of issues will not have life and death consequences. It *always* will have such consequences in capital post-conviction proceedings. Yet there is a constitutional right to counsel in *all* direct appeals from criminal convictions in noncapital as well as capital cases.[121]

There obviously are differences between direct appeals and post-conviction proceedings; more issues can be raised on direct appeal, and this is the more common means of correcting unconstitutional trial errors.[122] That "norm," however, is of little solace to a

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of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised." *Id.* at 236. The Court indicated "that prisoners [must] be given some clearly defined method by which they may raise claims of denial of federal rights," stating that this "requirement must be met." *Id.* at 239. Because of an apparent change, however, in the state court's interpretation of its habeas corpus provisions, the court did not have to rule on this issue. *But see* Pennsylvania v. Finley, 481 U.S. 551 (1987), in which the Court noted that "[s]tates have no obligation to provide [post-conviction] relief . . . ." *Id.* at 557 (citing United States v. MacCollom, 426 U.S. 317, 323 (1976)). For a discussion of *Finley*, see *infra* text accompanying notes 306-326.

119. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) (describing appellate review). *See* A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POSTCONVICTION REMEDIES 1 (Tent. Draft 1967) ("Postconviction review has become an established part of the criminal process."). The Court in *Bounds* recognized the integral role of the post-conviction process when it noted that among the most vital underlying claims that are protected by the access right are "unlitigated issues" raised in "original" actions. Bounds v. Smith, 430 U.S. 817, 827 (1977). *See supra* text accompanying notes 36-37.

120. *See supra* note 114.

121. *See* Douglas v. California, 372 U.S. 353, 357 (1963). In rejecting the argument that the discretionary appointment of counsel to indigents on appeal was adequate, the Court said that "[w]hen an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Id.*

122. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983).

death-sentenced prisoner who *cannot* complain on direct appeal that nonrecord facts establish that his or her lawyer "was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment"[123] during his or her capital trial or sentencing proceeding, or that the prosecutor had secretly directed the jury commissioner to discriminate against blacks and women,[124] or that the prosecutor withheld evidence that indicated he or she should not have been convicted or given the death penalty.[125] Such "collateral" challenges by *represented* death-sentenced prisoners often have been the means by which courts enforced these enhanced capital fair trial rights.[126]

2. The Ultimate Private Interest in Capital Post-conviction Proceedings.—While both prisoners and society have compelling interests in the enforcement of constitutional guarantees, the ultimate interest of a capital post-conviction petitioner is far more tangible: the incomparable interest in life. This interest readily distinguishes capital and noncapital post-conviction cases.[127] It is a far greater interest than those to which the *Bounds* Court gave constitutional

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123. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

124. Amadeo v. Zant, 108 S. Ct. 1771, 1780 (1988).

125. *See* cases cited *supra* note 109.

126. *See* Mello, *infra* note 142, at 521 (indicating 60 to 73.2% success rate in "capital habeas" litigation in federal courts during 1976-1986). *See also* Barefoot v. Estelle, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) ("[E]xperience shows that prisoners on death row have succeeded in an extraordinary number of their appeals."); Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 917-18 (1982). There do not appear to be comparable data indicating the success rate in state capital post-conviction proceedings.

127. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. For other important distinctions between prisoner interests in capital and noncapital post-conviction proceedings, see *supra* text accompanying notes 99-115 & *infra* text accompanying notes 128-134. There are still additional distinctions, however, that often are obscured by the stark life and death dichotomy. Noncapital prisoners usually have a lifetime, or at least a significant part of it, to develop and assert a post-conviction claim. If they belatedly unearth compelling evidence of innocence, they generally can belatedly seek to prove it in court. They can ameliorate the loss of a fair trial right in a number of ways other than by filing a post-conviction petition. They can seek parole, participate in work and other release programs that incrementally restore their freedom, and develop a record of prison accomplishments that over the years may earn them a pardon or commutation (as well as parole). The nature of the death penalty places these remedies well out of the reach of death-sentenced prisoners and therefore underscores and heightens their interest in the remedy that *is* available: a capital post-conviction proceeding.

protection as threshold liberty interests.[128]

The Supreme Court has incorporated the extraordinary value of life in its death penalty jurisprudence. To reduce the risk of unconstitutional arbitrariness in capital proceedings,[129] the Supreme Court has required states to provide enhanced procedural protections that ensure heightened decisional reliability and certainty in capital cases.[130]

This "death is different" principle most plainly commands enhanced constitutional protections at the capital trial and sentencing proceeding.[131] This principle, however, retains vitality until the moment of execution.[132] In short, because "execution is the most irre-

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128. The prisoner interest in a capital post-conviction proceeding is of far greater magnitude than the prisoner interests in civil rights cases that *Bounds* protects. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 413-14 (1979) (qualified right of prisoner to send and receive uncensored mail vindicated in civil rights action).

The prisoner interest in a capital post-conviction proceeding also is more significant than the interests in federal habeas corpus proceedings *Bounds* protects because life is at stake in the capital post-conviction proceeding (and was not an interest before the Court, or discussed by the *Bounds* Court).

129. Arbitrariness in its imposition led the *Furman* Court to invalidate the death penalty under then-existent sentencing procedures in 1972. In the memorable words of Justice Stewart, "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concurring). *See infra* text accompanying notes 159-168.

130. *See* Thompson v. Oklahoma, 108 S. Ct. 2687, 2710 (1988) (O'Connor, J., concurring) ("The court has . . . imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality."). *See also* Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976) (plurality opinion).

131. *Thompson*, 108 S. Ct. at 2710 (O'Connor, J., concurring); Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."); California v. Ramos, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (footnote omitted)). In Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion), the Supreme Court stated:

> From the point of view of the defendant, [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion.

Id. at 357-58 (plurality opinion).

132. In Ford v. Wainwright, 477 U.S. 399 (1986) (plurality opinion), the Court stated that because mentally incompetent prisoners may not be executed, prisoners who may be incompetent have a due process right to a hearing to assess and determine competency. *Id.* at 417-18 (plurality opinion). Ford had exhausted *all* of his state and federal post-conviction remedies without obtaining relief when he filed a "successor" habeas corpus petition asserting that he was incompetent to be executed. *Id.* at 420 n.1 (Powell,

mediable and unfathomable of penalties,"[133] the private interest in the accuracy of a proceeding in which life is an issue is "almost uniquely compelling."[134]

B. The Risk of Error From Pro Se *Representation*

1. The Required Investigation and Preparation of Capital Post-conviction Cases.—Evidence outside the record of the capital proceeding often is relevant in evaluating and establishing, *inter alia*, ineffective assistance of counsel,[135] *Brady* violations,[136] prosecutorial misconduct,[137] and other capital post-conviction claims; therefore, preparation of a post-conviction petition requires a substantial, fresh inquiry. Experienced attorneys who have volunteered to represent capital post-conviction petitioners, and who are supported with the full complement of resources that the biggest law firms in this country routinely provide, consistently express the most profound professional dismay at the complexity and demands of capital post-conviction legal work. The Brief of the American Bar Association, participating as amicus curiae in *Murray v. Giarratano*,[138] summarizes "several comprehensive surveys of attorneys who have represented death row prisoners in state post-conviction (and federal habeas corpus) proceedings."[139] One survey indicated that the median time spent by volunteer attorneys on state post-conviction cases was

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J., concurring in part and concurring in the judgment). In the Court's plurality opinion, Justice Marshall stated that the "heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life" is not abandoned until "the final fact antecedent to execution has been found." *Id.* at 414.

By comparison, a capital post-conviction proceeding is a much more integral part of the capital adjudication process. It is the *only* means to enforce some rights that are essential components of a constitutional capital trial. *See supra* text accompanying notes 116-126. If the proceeding is successful, a death penalty is reversed, not postponed until competency is restored. *Cf. Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment) ("[T]he only question raised is not *whether*, but *when*, his execution may take place. This question is important, but it is not comparable to the antecedent question whether petitioner should be executed at all." (emphasis in original; footnote omitted)).

For these reasons, capital post-conviction petitioners have at least as strong a claim to the heightened protection of the "death is qualitatively different" principle as those who assert incompetence to be executed.

133. *Ford*, 477 U.S. at 411-12 (plurality opinion).

134. Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

135. *See* cases cited *supra* notes 110-111.

136. *See* cases cited *supra* note 109.

137. *See* cases cited *supra* note 108.

138. 109 S. Ct. 303 (1988).

139. Brief of the American Bar Ass'n as Amicus Curiae in Support of Respondents at 29, Murray v. Giarratano, 109 S. Ct. 303 (1988) (No. 88-411).

665 hours.[140] "For those who could document their time, the median was 963 hours."[141]

One attorney expressed the sentiments of many who were polled:

> Post-conviction cases can have a devastating effect on an attorney both financially and emotionally. It consumes overwhelming amounts of time, energy and work . . . . For example, preparing the Motion for Appropriate Relief in state trial court took two full weeks of my time, that is, working all day, evenings, and weekends for two weeks on one case. The reason it takes such a lot of time is that you're scared to death that if you leave out an issue which a federal court in another district may decide favorably on the next day, you waived the issue forever.[142]

What is particularly troubling about the idea of forced *pro se* representation is that courts in many capital post-conviction cases (in which the petitioner had post-conviction counsel) have found trial counsel ineffective for failing to investigate and produce compelling evidence of mental illness or retardation.[143] Such evidence is uniquely relevant in a capital sentencing proceeding.[144] Assum-

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140. *Id.* This included work on the trial, state supreme court, and certiorari phases of a post-conviction case. *Id.* at 30. The source of this information is A.B.A. Sec. on Individual Rights & Responsibilities, Post-Conviction Death Penalty Representation Project, Time and Expense Analysis in Post-Conviction Death Penalty Cases (Feb. 1987).

141. Brief of the American Bar Ass'n at 31, *Giarratano*.

142. *Id.* at 35. Another experienced attorney said: "No case I have ever handled compares in complexity with my Florida death penalty case. . . . [T]here is nothing more difficult, more time-consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction." *Id.* Many others agreed. "Death penalty litigation is unique in 'every aspect' of the case: research, investigation, time, length of pleadings, etc."; "[this was] the most difficult and time-consuming case that I have handled in over 20 years of practice." *Id.* at 31-33. *See* Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 554-63 (1988) (documenting time and expenses for volunteer, *pro bono*, and public defender attorneys in capital post-conviction litigation nationwide).

143. *See, e.g.*, cases cited *supra* notes 110-112.

144. Evidence of a mental disability can bear on several statutory mitigating circumstances, *see, e.g.*, Fitzpatrick v. State, 490 So. 2d 938, 940 (Fla. 1986) (evidence of mental disorders relevant to three statutory mitigating circumstances), as well as non-statutory mitigating circumstances, *see* Lockett v. Ohio, 438 U.S. 586 (1977). (For discussion of *Lockett*, see *infra* text accompanying notes 169-171.) Fully developed, evidence of a mental disability can support a state supreme court's finding that the death penalty is disproportionate and may not be imposed. *See, e.g., Fitzpatrick*, 527 So. 2d at 811-12 (evidence in second sentencing hearing of defendant's extreme emotional disturbance outweighed aggravating circumstances, rendering death sentence inappropriate). It can help to convince a capital sentencer that the defendant did not have the "reckless indifference to human life," *see* Tison v. Arizona, 481 U.S. 137, 158 (1987), that along with

ing, *arguendo*, that any death-sentenced prisoner has *pro se* capacity, it is the capital post-conviction petitioners, who have the *strongest* claims that trial counsel was constitutionally ineffective for failing to produce evidence of mental illness, who will be *least equipped* to assert them *pro se*. A post-conviction court will not be able to discern from the then-existing record of the capital proceeding the critical nonrecord evidence of mental illness or retardation (nor any other nonrecord evidence of constitutional violations). Plainly, a court cannot make the necessary inquiry to unearth such evidence, at least without radically altering its constitutionally imposed role of neutrality. Even if it could, "the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation."[145]

2. The Complexity of Capital Post-conviction Law.—To investigate and plead post-conviction claims, a capital post-conviction petitioner must understand some of the most complicated, dynamic, and at times inconsistent bodies of law that exist.

There are at least three dimensions to this death penalty law: (1) the legal principles that govern the capital trial and sentencing proceeding; (2) the legal principles that measure whether trial counsel provided the constitutionally required effective assistance of counsel; and (3) the legal principles that govern stays of execution, waiver, and procedural default, and thus determine whether, and at what pace, petitioners will be able to litigate post-conviction claims.

a. Substantive Death Penalty Law.—*Pro se* death-sentenced prisoners are not capable of obtaining from law books even the first dimension of requisite knowledge of the applicable substantive law. Such law includes the texts and judicial interpretations of state and federal constitutions, statutes, and rules. The principles that a death-sentenced prisoner must extract from these disparate sources and plead in a post-conviction petition interact and assert dominance in the dynamic legal environment of federalism.[146]

These principles are relatively new and usually are stated in the

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"major participation" makes one who did not kill or intend to kill constitutionally eligible for the death penalty. *Id.* In its most aggravated form, mental incompetency alone can halt a scheduled execution. Ford v. Wainwright, 477 U.S. 399, 408-10 (1986).

145. Bounds v. Smith, 430 U.S. 817, 826 (1977).

146. *See infra* note 154 (summaries of the 10 death penalty cases decided by the Supreme Court last term).

most general terms.[147] They lack the clarity that comes over time with legislative amendment and refined judicial interpretation. Moreover, this collection of substantive legal principles is unique. Although judges can call upon related constitutional, criminal law, criminal procedure, and evidence principles to help resolve issues in death penalty cases,[148] it is idiosyncratic death penalty principles, sometimes alone and sometimes in hybrid forms, that control. The extent to which principles from other legal fields should be borrowed to help resolve issues in capital adjudication itself is a difficult issue.[149] For example, unique death penalty principles govern the selection of a jury,[150] the admissibility of evidence,[151] the substance of minimally permissible argument,[152] and the sharing of sentencing responsibility between judge and jury[153] in capital proceedings, among other aspects of death penalty litigation.

These characteristics of substantive death penalty law make it uniquely dynamic as well as complex.[154] It also is inherently incon-

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147. *Id. See also infra* text accompanying notes 155-194. (analysis of cases that produce tension between "limited discretion" and "particularized consideration" principles).

148. *See, e.g.*, Tison v. Arizona, 481 U.S. 137, 150-51 (1987) (constitutional test of culpability that makes a capital defendant who did not kill or intend to kill eligible to die is whether defendant had major participation in crime and "reckless indifference to human life"); Poland v. Arizona, 476 U.S. 147, 155-56 (1986) (double jeopardy does not bar second capital sentencing when, on appeal from first sentencing, court finds evidence does not support sole aggravating circumstance); Zant v. Stephens, 462 U.S. 862, 884 (1983) (one aggravating circumstance found by capital sentencer was later held unconstitutional, *see* Stromberg v. California, 283 U.S. 359 (1931), but did not require reversal of death penalty); Bullington v. Missouri, 451 U.S. 430, 444-46 (1981) (imposition of death sentence at second capital trial of defendant sentenced to life imprisonment at first trial held barred by double jeopardy clause); Green v. Georgia, 442 U.S. 95, 97 (1979) (Georgia hearsay rule unconstitutional insofar as it limited scope of mitigating evidence that Lockett v. Ohio, 438 U.S. 586 (1978), allows jury to consider).

149. *See, e.g.*, cases cited *supra* note 148.

150. Wainwright v. Witt, 469 U.S. 410, 412 (1985) (relevant inquiry in excluding juror for cause is whether juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (quoting Adams v. Texas, 448 U.S. 38, 45 (1980))); Witherspoon v. Illinois, 391 U.S. 510, 521-23 (1968) (jury from which persons with general or religious objections to the death penalty were excluded not considered impartial arbiter).

151. Booth v. Maryland, 107 S. Ct. 2529, 2536 (1987) (introduction of "victim impact statements" at sentencing proceeding of capital trial violates eighth amendment).

152. Darden v. Wainwright, 477 U.S. 168, 181 (1986) (test for impropriety of prosecution's closing argument is whether comments " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process' " (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974))); Caldwell v. Mississippi, 472 U.S. 320, 338-40 (1984) (*Donnelly* does not render *all* prosecutorial remarks immune from federal due process challenge).

153. Spaziano v. Florida, 468 U.S. 447, 464-65 (1984) (no constitutional requirement that death sentence be imposed by jury rather than judge).

154. For example, in the last term alone, the Court decided 10 death penalty cases. In

sistent. An illustrative example is the unresolved tension between

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most of these cases, the Court addressed new questions or gave new content to issues it had visited before. For example, in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), a plurality of the Court held that states may not constitutionally execute those capital defendants who were younger than 16 at the time of the crime. *Id.* at 2700. Justice O'Connor concurred in the judgment in a narrower opinion that she based on both the "result" allowed by the interplay of the two relevant Oklahoma statutes—the execution of 15-year-old defendants—which she said was of "dubious constitutionality," *and* the fact that those statutes lacked "the earmarks of careful consideration" the Court has "required for other kinds of decisions leading to the death penalty." *Id.* at 2711.

In Mills v. Maryland, 108 S. Ct. 1860 (1988), the Court in a 5-4 decision held unconstitutional a capital sentencing scheme that did not sufficiently inform a sentencing jury that it could find evidence to be mitigating and weigh it against aggravating evidence even if the 12 jurors could not unanimously agree that the same aspect of the offense, or of the offender's record or character, was mitigating. *Id.* at 1870.

In Ross v. Oklahoma, 108 S. Ct. 2273 (1988), the Court in another 5-4 decision held that the State did not abridge Ross's sixth and fourteenth amendment rights to an impartial jury in a capital case when defense counsel was required to use one of nine available peremptory challenges to strike a death-prone juror whom the trial judge should have disqualified for cause pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 410 (1985). 108 S. Ct. at 2278. The four dissenting Justices complained that the trial judge had "arbitrarily take[n] away one of the defendant's peremptory challenges," *id.* at 2280, thus unconstitutionally affecting the composition of the jury panel in violation of Gray v. Mississippi, 481 U.S. 648 (1987). (In *Gray*, decided one year earlier, the Court in a plurality opinion held that the improper exclusion of a single juror who was not irrevocably committed to the death penalty denied that capital defendant's constitutional right to an impartial jury and could not be harmless error. 481 U.S. at 668.)

In Lowenfield v. Phelps, 108 S. Ct. 546 (1988), the Court held that Lowenfield's death penalty was not unconstitutional merely because the single aggravating circumstance that the sentencing jury found was identical to an element of the capital crime. *Id.* at 553. The Court found that Louisiana properly narrowed the class of death-eligible defendants by limiting those who could be found *guilty* of capital murder. *Id.* at 555. Three dissenting Justices argued, *inter alia*, that by relegating the "narrowing" function to the guilt phase, Louisiana had vested the sentencing jury with unconstitutionally unrestricted discretion at the sentencing phase. *Id.* at 561. *See infra* text accompanying notes 155-194.

In Franklin v. Lynaugh, 108 S. Ct. 2320 (1988), a plurality of the Court discussed, without deciding, whether there may be a quantum of doubt—"residual doubt"—that is not extinguished by a capital conviction and thus is potentially mitigating in the sentencing phase. *Id.* at 2326-27. The plurality was disinclined to recognize such doubt as a constitutionally compelled mitigating circumstance. Justices O'Connor and Blackmun, who concurred in the judgment, concluded that "[o]ur cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt." *Id.* at 2334.

See also Johnson v. Mississippi, 108 S. Ct. 1981, 1986 (1988) (holding unconstitutional the use of a prior invalid felony conviction to establish an aggravating circumstance); Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988) (holding unconstitutionally vague an "especially heinous, atrocious, or cruel" aggravating circumstance that the state court had not limited through interpretation); Satterwhite v. Texas, 108 S. Ct. 1792, 1798 (1988) (holding that admission at a capital sentencing proceeding of psychiatrist's testimony based in part on an examination he conducted of

the root principles of "limited discretion" and "particularized consideration."

The death penalty is constitutional because the discretion of capital sentencers is limited[155] and, conversely, because capital sentencers may give particularized consideration to the broadest array of mitigating evidence, including non-statutory factors.[156] The "tension"[157] between these two principles has forced the Court "from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed."[158]

The seeds of still unresolved disagreement about the interplay of these two principles were sown in the nine separate opinions, consuming 233 pages, in *Furman v. Georgia*.[159] In *Furman* the Court held unconstitutional the "system of capital punishment then in

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a capital defendant without complying with the *Miranda*-based rule announced in Estelle v. Smith, 451 U.S. 454 (1981), could not be presumed harmless constitutional error); Amadeo v. Zant, 108 S. Ct. 1771, 1778 (1988) (holding petitioner established requisite "cause" for failing to raise in the state trial court a constitutional challenge to the composition of his grand jury, trial jury, and sentencing jury when he established that his trial lawyers would have mounted such a challenge if they had known about a previously undisclosed memorandum from the district attorney to the jury commissioner that directed commissioner to intentionally discriminate against blacks and women in compiling master jury list); Yates v. Aiken, 108 S. Ct. 534, 538 (1988) (holding retroactive the decision in Francis v. Franklin, 471 U.S. 307 (1979), which held unconstitutional an instruction that shifted to defendant the burden of proving element of a crime).

In sum, in one term *Thompson*, *Johnson*, *Lowenfield* and *Mills* applied eighth and fourteenth amendment principles to establish important new death penalty rules; *Ross*, *Yates*, *Satterwhite*, *Amadeo* and *Maynard* clarified prior death penalty and habeas corpus decisions in important respects; dicta in *Franklin* suggests a possible issue for future litigation.

155. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976) (plurality opinion) (construing Furman v. Georgia, 408 U.S. 238 (1972)).

156. Lockett v. Ohio, 438 U.S. 586, 604-05 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion).

157. Franklin v. Lynaugh, 108 S. Ct. 2320, 2331 (1988).

158. *Lockett*, 438 U.S. at 629 (Rehnquist, J., concurring in part and dissenting in part).

159. 408 U.S. 238 (1972). Chief Justice Burger later observed that "the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accordance with the Eighth Amendment." *Lockett*, 438 U.S. at 599. Some states distilled from *Furman* the requirement that their death penalty statutes eliminate discrimination entirely. These states enacted mandatory death penalty statutes that required capital sentencers to impose the death penalty upon convictions of listed capital crimes. Mandatory sentencing schemes were struck down in Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion), and Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion). Other legislatures read *Furman* to require only that their death penalty statutes limit the discretion of capital sentencers, not that the statutes remove the capital sentencing decision entirely from them. "Limited discretion" sentencing schemes were upheld by plurality opinions in Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976). *See infra* text accompanying notes 162-167.

existence in this country"[160] because it allowed capital sentencers unlimited discretion to decide when the death penalty was appropriate.[161]

Four years after *Furman*, the Court upheld the capital sentencing statutes of Georgia,[162] Florida,[163] and Texas.[164] The Court found that the death penalty statutes in these states adequately limited the discretion of capital sentencers. At the same time, the Court held unconstitutional the mandatory death penalty statutes of North Carolina[165] and Louisiana.[166] The Court held that these mandatory death penalty statutes were unconstitutional, *inter alia*, because they failed to allow the capital sentencer to give more expansive "particularized consideration" to "the character and record of each convicted defendant" before deciding whether to sentence that defendant to death.[167]

In the intervening twelve years, the Court has labored to further define the "limited discretion" principle and reconcile it with the "particularized consideration" principle.[168] The inability to reconcile the near irreconcilable is more than a subtle undercurrent in the Court's jurisprudence. One of these principles has survived

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160. Zant v. Stephens, 462 U.S. 862, 907 (1983) (Marshall, J., dissenting) (discussing *Furman*).

161. *Furman*, 408 U.S. 238 (1972). *See also* Zant v. Stephens, 462 U.S. at 874 ("A fair statement of the consensus expressed by the Court in *Furman* is that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' " (quoting Gregg v. Georgia, 428 U.S. 153, 189 (1986) (plurality opinion))). The dissenting Justices in *Furman* contended that the consensus in *Furman* itself was an abrupt change in the law that reversed the Court's then relatively recent decision in McGautha v. California, 402 U.S. 183 (1971), which had validated the exercise of discretion by capital sentencers. *See, e.g.*, 408 U.S. at 387-88 (Burger, C.J., dissenting).

162. Gregg v. Georgia, 428 U.S. 153 (1976).

163. Proffitt v. Florida, 428 U.S. 242 (1976).

164. Jurek v. Texas, 428 U.S. 262 (1976).

165. Woodson v. North Carolina, 428 U.S. 280 (1976).

166. Roberts v. Louisiana, 428 U.S. 325 (1976).

167. *Woodson*, 428 U.S. at 303.

168. In Lockett v. Ohio, 438 U.S. 586 (1978), Chief Justice Burger retrospectively identified the divisions on the 1976 Court that would make reconciliation difficult:

> Four years after *Furman*, we considered Eighth Amendment issues posed by five of the post-*Furman* death penalty statutes. Four Justices took the position that all five statutes complied with the Constitution; two Justices took the position that none of them complied. Hence, the disposition of each case varied according to the votes of three Justices who delivered a joint opinion in each of the five cases upholding the constitutionality of the statutes of Georgia, Florida and Texas, and holding those of North Carolina and Louisiana unconstitutional.

Id. at 600-01 (footnote omitted).

conflict with the other to become the basis of decision in many cases.

In *Lockett v. Ohio*,[169] for example, the Court applied the "particularized consideration" principle to reverse a death penalty. The Ohio statute precluded the capital sentencer from considering, "*as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense . . . ."[170] The Court held that the discretion of the capital sentencer had been improperly limited to consideration of evidence relevant only to statutory mitigating circumstances.[171]

Five years later, in *Zant v. Stephens*[172] the Court cited the "particularized consideration" principle not as an expansive grant of discretion, but as one of only two *limits* on the power of a capital sentencer to "select" a capital defendant for execution.[173] In *Zant* the Court acknowledged that in Georgia "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."[174] This, however, did not render the statute unconstitutional.

The Court concluded that there are two phases in Georgia's death penalty process: a "definition" phase and a "selection" phase.[175] When the capital sentencer finds an aggravating circumstance, it "defines" the capital defendant as death eligible. The need to find at least one statutory aggravating circumstance thus limits the sentencer's discretion to place capital defendants in the death-eligible pool.[176] The aggravating circumstances, however, do not and need not limit the "selection" for execution of any convicted defendant in the death-sentenced pool, as long as the capital sentencer makes its decision as the result of "an individualized determination" based on "the character of the individual and the circumstances of the crime," and as long as that determination is

169. 438 U.S. 586 (1978).

170. *Id.* at 604 (plurality opinion) (emphasis in original).

171. *Id.* Justice White, in dissent, stated that "the Court has now completed its about-face since *Furman*" because "the sentencer may constitutionally impose the death penalty only as an exercise of his unguided discretion after being presented with all circumstances which the defendant might believe to be conceivably relevant . . . ." *Id.* at 622 (concurring in part and dissenting in part).

172. 462 U.S. 862 (1983).

173. *Id.* at 878-80.

174. *Id.* at 874.

175. *Id.* at 875.

176. Zant v. Stephens, 462 U.S. 862, 877-78 (1983).

subject to appellate review.[177]

In 1986 the Court underscored the discretion-enhancing component of the "particularized consideration" value in *Skipper v. South Carolina*,[178] holding that a capital defendant was constitutionally entitled to place before a capital sentencer evidence of his or her good behavior in prison subsequent to the crime.[179]

Last term, however, in *Franklin v. Lynaugh*[180] the Court upheld the refusal of a Texas sentencing court to instruct the sentencing jury that they could consider, and give independent mitigating weight to, the defendant's unblemished behavior during seven years of incarceration without *limiting* their consideration of that evidence to a single "special issue": the future dangerousness of the defendant.[181] A plurality of the Court held that so limiting the jury's consideration of the evidence did not unconstitutionally deny Franklin his right to have the sentencing jury consider and weigh "any relevant mitigating evidence."[182] The plurality said the Court had never answered the question: "relevant to what?"[183] Under these circumstances, relevance could be limited to predicting dangerousness.

The *Franklin* plurality acknowledged, in understated terms, the source of disagreement in many cases: "Arguably [the 'particularized consideration' and 'limited discretion' lines of cases] are some-

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177. *Id.* at 879-80. Justices Marshall and Brennan now complained about the limitless "particularized consideration" power, arguing that after the "threshold finding" that a convicted defendant is death eligible, the jurors are "left completely at large with nothing to guide them but their whims and prejudices." *Id.* at 910 (Marshall & Brennan, JJ., dissenting). The dissenters concluded that Georgia's sentencing scheme therefore authorizes the same "standardless jury discretion" that was condemned as unconstitutional in *Furman* and *Gregg*. Justice Marshall said:

> Today we learn for the first time that the Court did not mean what it said in Gregg v. Georgia. We now learn that the actual decision whether the defendant lives or dies may still be left to the unfettered discretion of the jury. Although we were assured in *Gregg* that sentencing discretion was "to be exercised . . . by clear and objective standards" . . . we are now told that the State need do nothing whatsoever to guide the jury's ultimate decision whether to sentence a defendant to death or spare his life.

Id. (citation omitted).

178. 476 U.S. 1 (1986).

179. *Id.* at 49.

180. 108 S. Ct. 2320 (1988) (plurality opinion).

181. *Id.* at 2324 n.3. Under Texas law, that special issue and one unrelated to the "good behavior in prison" mitigating evidence—whether "the murder was committed deliberately and with the reasonable expectation that death would result"—were the only questions the *Franklin* sentencing jury was asked to answer. Because the jury answered both questions in the affirmative, the death penalty was imposed. *Id.* at 2325.

182. *Id.* at 2330.

183. *Id.*

what in 'tension' with each other."[184]

The complexity produced by this basic jurisprudential conflict is aggregated by other considerations. For example, the rules derived from this principle, and other conflicting principles,[185] often are announced in plurality opinions,[186] which means that in order to discern the rules they announce, a capital post-conviction petitioner must be able to identify the "holding of the Court . . . as that position taken by those members who concurred in the judgments on

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184. Franklin v. Lynaugh, 108 S. Ct. 2320, 2331 (1988) (citing California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring)). Justice Stevens argued that the "plurality turns its decision in *Skipper* on end"; evidence of "past conduct often provides insight into a person's character that will evoke a merciful response . . . even though it may shed no light on what may happen in the future." *Id.* at 2336 (Stevens, J., dissenting). Justice Stevens did not deny the "tension" identified by the plurality but criticized the plurality for resolving that tension by "blinding" the jury "to relevant evidence" in order to limit its discretion. *Id.* at 2340. Justice O'Connor, joined by Justice Blackmun, concurred in the judgment because, in her view, the mitigating evidence was relevant to the future dangerousness "special issue" and therefore the jury was able to consider and give effect to it. *Id.* at 2333-34. She left undecided, for another case, whether a "jury's inability to give effect" to mitigating evidence that is not relevant to a special issue would amount "to an Eighth Amendment violation." *Id.* at 2333 (O'Connor, J., concurring).

185. Another example of conflict is the unresolved debate about the degree of enhanced reliability that is constitutionally necessary to support imposition of the death penalty. In Caldwell v. Mississippi, 472 U.S. 320 (1984), a prosecutor in a death penalty case argued in his closing remarks to the sentencing jury that their decision was not final, but was subject to review by the courts. The Court held that those remarks might have reduced the sense of "awesome responsibility" a sentencing jury must accept in a capital case. *Id.* at 329-30 (quoting McGautha v. California, 402 U.S. 183, 208 (1971)). It is this sense of responsibility, in part, that limits discretion and assures enhanced reliability in death penalty proceedings. In his dissenting opinion, Justice Rehnquist warned that the Court should avoid turning "perceived departure from what it conceived to be optimum procedure in a capital case into a ground for constitutional reversal." *Id.* at 351.

This debate was revisited in Darden v. Wainwright, 477 U.S. 168 (1986). In *Darden* the prosecutor gave an inflammatory closing argument in which he referred to the defendant as an "animal" who should not have been let out of his prison cell (on a weekend furlough prior to the capital crime) "except on a leash" with a "prison guard at the other end of that leash." *Id.* at 180 n.12. In response to the Court's conclusion that these comments did not erode the reliability of Darden's death penalty, Justice Blackmun, dissenting, said:

> [T]his Court has stressed repeatedly in the decade since *Gregg* . . . that the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life. Today's opinion, however, reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.

Id. at 188-89 (footnote and citations omitted).

186. *See, e.g.*, Thompson v. Oklahoma, 108 S. Ct. 2687 (1988); Franklin v. Lynaugh, 108 S. Ct. 2320 (1988); Ross v. Oklahoma, 108 S. Ct. 2273 (1988); Ake v. Oklahoma, 470 U.S. 68 (1985); Woodson v. North Carolina, 428 U.S. 280 (1976).

the narrowest grounds,"[187] because "no single rationale supporting the result commands a majority of the court."[188]

In addition, to plead ineffective assistance of counsel claims, petitioners must not only be able to extrapolate from confusing opinions how substantive law properly applies to their particular cases; petitioners also must be able credibly to explain how and when their lawyers who failed to raise such claims ought to have reasonably been able to foresee the ostensibly favorable development of the law.

For all of these reasons, substantive death penalty law which often is too elusive to support "predictability" by "legislatures, trial courts, and appellate courts,"[189] is beyond the intellectual reach of even the most sophisticated death row inmate.

b. Law Governing Ineffective Assistance of Counsel.—Assuming, *arguendo*, that a capital post-conviction petitioner is able to understand these substantive principles, the petitioner must learn the second dimension of death penalty law: the different set of legal principles that determine whether capital trial counsel's failure to assert one or more of these principles "fell below an objective standard of reasonableness,"[190] and if so, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[191]

The petitioner's attempt at self-education begins in the face of the Supreme Court's observation that "collateral review will frequently be the only means through which an accused can effectuate the right to counsel" because "[a] layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case."[192]

In order to appreciate how his or her lawyer might have been constitutionally ineffective, a capital post-conviction petitioner must understand the normative standard of defense in a capital trial. In the sixth amendment cases that have established the right to counsel

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187. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

188. *Franklin*, 108 S. Ct. at 2336 n.1.

189. Lockett v. Ohio, 438 U.S. 586, 629 (1977) (Rehnquist, J., concurring in part and dissenting in part).

190. Strickland v. Washington, 466 U.S. 668, 688 (1984).

191. *Id.* at 694.

192. Kimmelman v. Morrison, 477 U.S. 365, 378 (1986).

at trial (even in a misdemeanor prosecution in which a defendant faces as little as a day in jail),[193] the Supreme Court found that a criminal defendant does not possess such knowledge and, thus, "requires the guiding hand of counsel at every step in the proceeding against him."[194]

c. Procedural Death Penalty Law.—The third complex dimension of death penalty law, which itself has at least two components, is procedural. The first level of procedural complexity is produced when state officials set execution dates for capital defendants who have not yet filed, or have not completed, post-conviction litigation.[195] Frequently, a petitioner then must simultaneously litigate a capital post-conviction case in a federal and state forum, often before more than one court in each, in order to stay the execution.[196] This sometimes involves a literal race from court to court to meet deadlines. A state post-conviction case can move, in this manner, from state trial court, through the highest state court, and (then as a federal habeas corpus case) through the federal district court and circuit court and United States Supreme Court in a matter of days.[197]

This "photo-finish" appellate review[198] was sanctioned to a significant degree by the Supreme Court in *Barefoot v. Estelle*.[199] In *Barefoot* the Court announced several "guidelines" that govern the pace at which collateral capital litigation may proceed.[200] Although these guidelines govern the pace of *federal* habeas corpus litigation, they have their counterparts in state practices and procedures that

193. Argersinger v. Hamlin, 407 U.S. 25 (1972).

194. Powell v. Alabama, 287 U.S. 45, 69 (1933).

195. *See* Mello, *supra* note 142, at 546-48.

196. *Id.*

197. *Id.* at 548 (citing 3D CIR. R. 29(3)(b); 5TH CIR. R. 8).

198. *Special Project: Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1208 (1984).

199. 463 U.S. 880 (1983).

200. *Id.* at 892-96. The first guideline is that "[t]he primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause." *Id.* at 892-93. Second, "[w]hen a certificate of probable cause is issued . . . petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal." *Id.* at 893. This necessitates a stay of execution. *Id.* at 893-94. Third, the circuit courts may adopt local rules authorizing expedited procedures for habeas corpus appeals. *Id.* at 894. The fourth guideline suggests a different standard for second and "successive" petitions. "The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." *Id.* at 895. Finally, "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the court of appeals that has denied a writ of habeas corpus." *Id.*

govern the pace of state capital post-conviction proceedings.[201]

The most troublesome guideline, in the view of the dissenting justices, was the third one, which authorized federal circuit courts to "adopt expedited procedures in resolving the merits of [capital] habeas appeals, notwithstanding the issuance of a certificate of probable cause."[202] The Court added that pursuant to expedited procedures, the "merits of an appeal may be decided upon the motion for a stay."[203] That is, courts can require capital post-conviction petitioners to litigate whether an imminent execution should be stayed along with all the substantive and procedural issues that constitute the normally complex merits of a federal habeas corpus appeal.[204] Even though the district court may have granted a certificate of probable cause, which requires a "substantial showing of the denial of [a] federal right,"[205] the circuit court can summarily resolve the case after argument and even dismiss it as frivolous.[206]

Approval of expedition was premised, in part, on the "secondary" role the Court accorded capital federal habeas corpus:

> The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error.[207]

The Court's concern with the important goal of finality in capital cases is understandable. *Barefoot*, however, does authorize an adjudication pace in capital habeas corpus cases that, at least sometimes, makes exceedingly difficult "any fine-tuned inquiry into

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201. *See* Mello, *supra* note 142, at 569-85.

202. 463 U.S. at 894. *See id.* at 906 (Marshall and Brennan, JJ., dissenting).

203. Barefoot v. Estelle, 463 U.S. 880, 884 (1983).

204. *Id.* at 894-95.

205. Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972), *quoted with approval in* Barefoot v. Estelle, 463 U.S. 880, 893 (1983).

206. 463 U.S. at 894.

207. *Id.* at 887-88. The Court then quoted Lambert v. Barrett, 159 U.S. 660, 662 (1895): "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." 463 U.S. at 888.

the actual merits."[208] That capital post-conviction litigation may proceed at this accelerated pace enhances the risk of error attendant to *pro se* representation and, correspondingly, makes the early provision of counsel to death-sentenced prisoners in state post-conviction proceedings essential.

It is not only the short time frames and unnerving quality of stay litigation in capital post-conviction proceedings that make it procedurally complex; in order to draft his or her petition, the petitioner also must understand the complicated rules governing waiver and procedural default to determine which issues trial counsel preserved and which were waived.[209] No evaluation of a potential ineffectiveness claim, or virtually any other capital post-conviction claim, can proceed without this knowledge.[210]

Capital fair trial rights that are "inherently personal [and] fundamental . . . can be waived only by the [capital] defendant and not by his attorney."[211] This is, however, a very limited category of preferred rights.[212] All other capital fair trial rights can be waived through inaction by counsel, before trial, during trial, or on appeal.[213] To draft a capital post-conviction petition, the death-sentenced prisoner must be able to (1) understand the unique substantive principles that define the rights a defendant has in a capital trial and sentencing proceeding; (2) identify those fair trial rights that were asserted (and therefore preserved) and those that were not asserted; (3) in the latter respect, determine if counsel has a legitimate excuse for failing to assert these rights that allows the petitioner to assert them;[214] (4) determine, alternatively, whether counsel's failure to assert those rights was unreasonable;[215] and (5) determine, after careful assessment of all the evidence and alleged errors in the case, whether counsel's unreasonable performance prejudiced the case, rendering the assistance of counsel constitu-

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208. Shaw v. Martin, 613 F.2d 487, 492 (Phillips, Cir. J., 4th Cir. 1980).

209. *See generally* D. WILKES, JR., *supra* note 9; Robson & Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty*, 76 CALIF. L. REV. 89 (1988).

210. *See generally* D. WILKES, JR., *supra* note 9.

211. Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring). *See also* Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1973).

212. "These rights include (1) the right to plead guilty, (2) the right to trial by jury, and (3) the right to testify personally." D. WILKES, JR., *supra* note 9, § 8-24, at 200.

213. *Id.*

214. One such excuse might be whether the right, at the time it might have been asserted, was a novel constitutional right. *Id.* at 200.

215. Strickland v. Washington, 466 U.S. 668, 687-91 (1984).

tionally ineffective.[216]

If the *pro se* petitioner fails to properly identify and clearly raise a fair trial claim that can be raised in a capital post-conviction proceeding, he or she presumptively waives it.[217] That claim cannot be asserted in a federal habeas corpus petition unless there is "cause" for having failed to assert it in the state post-conviction proceeding and waiver of the issue would result in "prejudice."[218] An assertion that death-sentenced prisoners have the capacity to understand these complex procedural rules and apply them, often expeditiously, to the equally complex substantive law governing death penalty cases is virtually self-refuting.

3. Learning the Law And Preparing a Capital Post-conviction Case While Awaiting Death.—To be effective *pro se* litigants, death-sentenced prisoners would have to teach themselves the three dimensions of death penalty law and investigate and prepare their cases as they await death or more actively prepare to die. There is little doubt that the consciousness of impending death can be immobilizing. In *Furman v. Georgia*[219] Justice Brennan said:

> [W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death . . . . As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."[220]

This opinion has been widely shared and expressed by other justices,[221] prison wardens,[222] psychiatrists and psychologists,[223] and

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216. *Id.* at 691-96.

217. D. WILKES, JR., *supra* note 9, § 8-24, at 193-201.

218. *Id.* at 196-98 (explaining Wainwright v. Sykes, 433 U.S. 72 (1977)).

219. 408 U.S. 238 (1972).

220. *Id.* at 288-89 (quoting People v. Anderson, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972)).

221. *See, e.g., Furman*, 408 U.S. at 382 (Burger, C.J., dissenting) (acknowledging that "a man awaiting execution must inevitably experience extraordinary mental anguish"); Solesbee v. Balcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("[T]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.").

222. *See, e.g.*, C. DUFFY, 88 MEN AND 2 WOMEN 254 (1962) ("The men of death row live in fear and hopelessness, and their thoughts are never off the glass-walled enclosure that waits for them six floors below. This is not justice but torture . . . .").

223. *See, e.g.*, Strafer, *Volunteering For Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 872 (1983) (describing the "unusually high incidence of self-mutilation and other psychological problems" of

writers.[224]

Impending death need not produce insanity in death-sentenced inmates to be a "risk of error" factor.[225] The more limited, relevant inquiry is whether it significantly impairs death-sentenced prisoners' capacities as *pro se* litigants. It is difficult to contend otherwise.[226] Indeed, the Court's description in *Ford v. Wainwright*[227] of the importance to the death-sentenced prisoner, "after conviction,"[228] of the psychiatric "representative" applies with at least equal force to counsel in capital post-conviction cases: "[W]ithout any adversarial assistance from the prisoner's representative . . . the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision."[229]

C. *The State's Disinterest in Denying Counsel*

Inherently, enforcement of the access right is *in government's* interest. Unlike most other constitutional rights that are intended to, and do, limit governmental sovereignty, the access right asserts governmental sovereignty. When implemented, the access right allows

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death-sentenced inmates at Mecklenburg Prison in Virginia); Note, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1342 (1968) ("[I]nsanity . . . is a common result of confinement pending execution" (citing, *inter alia*, testimony of medical doctor and study conducted by psychiatrist)); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 829 (1972) ("The observable result of mental suffering inflicted on the condemned prisoner is destruction of spirit, undermining of sanity, and mental trauma . . . ." (reviewing psychological and psychiatric studies and data)).

224. *See, e.g.*, A. CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 205 (1966) ("As a general rule, a man is undone waiting for capital punishment well before he dies.").

225. Psychologist L. Rainey, however, summarized one "relatively large-scale study of cancer patients"—a group of cognitively and emotionally normal people—that revealed that "46 percent of the patients manifested a psychiatric disturbance (according to the criteria of the *Psychiatric Diagnostic and Statistical Manual*) and the incidence rate rose considerably in those patients with more advanced disease." Rainey, *The Experience of Dying*, in DYING: FACING THE FACTS 137, 149 (2d ed. 1988) (summarizing Derogatis, *The Prevalence of Psychiatric Disorders Among Cancer Patients*, 249 J. A.M.A. 751 (1983)). Rainey concluded that "a sizable proportion of terminally ill patients, but by no means all patients, will manifest marked emotional dysphoria, changes in mental status, characterologic problems, or severe interpersonal conflict." *Id.* at 150.

It was the imminence of death, not their physiological conditions, that provoked these emotional and psychological problems in a random sample of normal well-adjusted people who were being treated, with the support of family and friends, in three of the best and most caring hospitals in the country.

226. Giarratano v. Murray, 668 F. Supp. 511, 513 (E.D. Va. 1986) (factual finding of district court).

227. 477 U.S. 399 (1986) (plurality opinion).

228. *Id.* at 414.

229. *Id.*

litigants to enforce the United States Constitution, state constitutions, statutes enacted by Congress and state legislatures, rules adopted by executives, and the common-law decisions of courts. By helping vest the jurisdiction of courts over disputes, it animates Article III of the United States Constitution and its state counterparts. Thus, by enforcing the access right, a state enforces its own law. The state's obligatory interest in enforcing its law is one of its most compelling governmental interests; it originated in the birth of legitimate government.[230]

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230. The access right was conceived as a coherent and whole right to legal help in civil cases that was in the interest of the poor, and insofar as it helped extend the King's law throughout the realm, in the deep interest of the state as well.

By the 15th century in England and Scotland, the Crown had assured that there were attorneys available to help at least some of the poor *both* draft pleadings and litigate claims in court. Their common and most important legal ancestor was Rome. *See* 5 R. POUND, JURISPRUDENCE 704 (1959). *See generally* R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953). In Rome, the poor person's advocate in court was the patrician head (*patronus*) of the Roman household. *Id.* at 44-45.

With the disintegration of the Roman Empire, the law of the Church became authoritative. Clerical advocates were the *defensores pauperum* ("defenders of the poor") who represented *miserabiles personae* ("wretched persons"), first in ecclesiastical courts and later, along with lay advocates, in secular courts. H. COHEN, HISTORY OF THE ENGLISH BAR 24-29, 159 (1967). Their "business" was "that of advocates at law to defend the rights of the poor and the liberties of the Church against all aggressors and invaders." *Id.* at 24.

With the conversion of England to Christianity, Rome's legal aid tradition preserved by the Church gradually became part of England's ecclesiastical court practice. By the 9th and 10th centuries in England, churchmen were authorized to represent orphans and widows in secular courts, as well as the poor generally in ecclesiastical courts. *Id.* at 158.

During the 13th, 14th, and 15th centuries, the English Crown, recognizing that "[t]he notion of personal sovereignty carried with it a paternal, or at least a proprietary, duty to enforce fairness and right between subject and subject," *see* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 366 (1923), sponsored numerous reforms intended to make justice equally available to rich and poor. Maguire summarizes these three centuries, saying: "The humanitarianism of the English kings from 1216 to 1495 is rather surprising. They did or meant to do much more toward helping their poor subjects enforce legal claims than many of our states are doing today." *Id.* at 370.

The culmination of these reforms was the enactment, in 1495, of 11 Hen. 7, ch. 12. The right to counsel granted by the text of the Act was broad. It applied to "every pouer persone . . . [who] . . . shall have cause of accion" against "any persone" who may be "within the realme." It required the appointment of "lerned Councell and attorneyes," both to draft and prepare writs and litigate the cases. It governed in "all such suytes to be made afore the Kingis Justices," "Barons of his Eschequer," "and all other Justices in Courtes of Recorde." Maguire, *supra*, at 373.

Remarkably, this statute, in partnership with 23 Hen. 8, ch. 15 (which exempted indigent litigants from liability for costs), remained the backbone of the English legal aid system for almost 400 years. Maguire, *supra*, at 377. *See also* E. MATTHEWS & A. OULTON, LEGAL AID AND ADVICE 1-22 (1971).

Similarly, in 15th century Scotland, the then-independent Scottish Parliament provided that the King shall "ordain" judges to appoint advocates, "persons knowledgeable

In our constitutional democracy, the access right serves its highest purpose when those seeking to invoke the protections that the law provides are the least popular litigants. This description applies with full force to death-sentenced prisoners. Because of the extraordinary private interest at stake in a capital post-conviction proceeding, the grave risk of erroneous deprivation of life absent legal assistance, and the state's inherent interest in enforcing the rule of law, even a most extraordinary, specifically identified state interest in withholding counsel could not justify its denial. No such countervailing interest exists.

The state has a strong finality interest in enforcing its criminal judgments, including its capital judgments.[231] But the state's interest in finality *presumes* a constitutional conviction and sentence. It therefore has no interest in enforcing those judgments against death-sentenced prisoners who have been unconstitutionally convicted or sentenced to death. To the contrary, "[b]oth society and affected individuals have a compelling interest in insuring that death sentences have been constitutionally imposed."[232]

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in law," to represent the poor in civil cases. C. STODDART, THE LAW AND PRACTICE OF LEGAL AID IN SCOTLAND 1 (1979). The appointment of advocates for those "[poor] creatures" who lacked "cunning" and "expenses," Scot. Parl. Acts 1424, ch. 24, helped discharge the "duty of a king to give special hearing and protection to the weak." AN INTRODUCTION TO SCOTTISH LEGAL HISTORY 330 (1958). King James I had an enlightened "preoccupation with the impartial ministering of justice." *Id.*

Implementation of the legal aid value was inconsistent and at times arbitrary. Maguire, *supra*, at 371-72. It is far more significant that the legal aid value thrived so long ago and persisted in what were brutal societies by contemporary measures.

In the end, the *advocati pauperum* vindicated not only the rights of the poor, but also the rule of law. By discharging their legal aid duty, early governments helped fulfill their primary law-giving purpose.

231. Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring in the judgment and concurring in part). Capital post-conviction claims in state proceedings, unlike federal habeas corpus claims, have usually not been rejected before by any court. Insofar as the state's finality interest is enhanced when a court already has rejected a claim that a litigant contends should be afforded procedural protections, a post-conviction petitioner begins with a clean or relatively clean slate. *See supra* text accompanying notes 116-117. In comparison, when the petitioner files a federal habeas corpus petition, the fair trial claims of the petitioner have been rejected at least once, and often two or more times. This is because federal habeas corpus claims have been "exhausted" through the state system and therefore have been considered by either (1) a trial court and the state's highest court (on direct appeal); or (2) a post-conviction court and possibly a state appellate court (on state collateral review). *See* D. WILKES, JR., *supra* note 9, §§ 8-15 to -21, at 177-91 (discussing exhaustion of state remedies requirement for federal habeas corpus review).

Thus, despite *Bounds's* well-justified reverence for federal habeas corpus, the state has a less significant finality interest in denying counsel to state post-conviction petitioners.

232. Giarratano v. Murray, 847 F.2d 1118, 1122 (4th Cir. 1988) (en banc). The

The Supreme Court has recognized the special governmental responsibility, which is not fully shared by a private litigant, to temper advocacy with the governmental "interest in the fair and accurate adjudication of criminal cases."[233] This interest does not end after direct appeal.[234]

While it might appear initially that implementing a federal access right requiring affirmative state action raises problems of federalism, the legitimate federalism-derived interests of the state are served, rather than retarded, by the provision of counsel to capital post-conviction petitioners. The recently enacted Federal Anti-Drug Abuse Act of 1988[235] highlights this state interest. This Act requires the appointment of counsel to death-sentenced *state* prisoners when they are eligible to file federal habeas corpus petitions.[236] Newly appointed counsel will assert all potentially meritorious claims for habeas relief. As a result, *state* court adjudication of post-conviction claims may be affected in a variety of ways.

First, the federal court might strictly construe the *pro se* state pleadings and require the petitioner, now represented by counsel, to further exhaust state remedies, in which case the now-represented petitioner must go through the state post-conviction process again,[237] although the court could waive the exhaustion requirement.[238] Alternatively, the federal court might hold an evidentiary

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Supreme Court in Gardner v. Florida, 430 U.S. 349 (1977), said that "[f]rom the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 357-58.

233. Ake v. Oklahoma, 470 U.S. 68, 79 (1985). *See also* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 814 (1987) (prosecutors acting as state officials with "the power to employ the full machinery of the state . . . [must] be guided solely by their sense of public responsibility for the attainment of justice").

234. Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).

235. Pub. L. No. 100-690, 102 Stat. 4181, *reprinted in* 44 Crim. L. Rep. (BNA) 3001 (Nov. 2, 1988).

236. Pub. L. No. 100-690, § 7001, 102 Stat. 4393-94 (to be codified at 21 U.S.C. § 848(q)(4)(B)). The Act also provides, somewhat enigmatically, that "in *every criminal action in which a defendant is charged with a crime which may be punishable by death*," an indigent defendant is entitled to the appointment of counsel whether the need arises before or after judgment. *Id.*, 102 Stat. 4393 (to be codified at 21 U.S.C. § 848(q)(4)(A)) (emphasis added). Once counsel is appointed under either section, the attorney must represent the defendant through every subsequent stage of available judicial proceedings. *Id.*, 102 Stat. 4394 (to be codified at 21 U.S.C. § 848(q)(8)).

237. Rose v. Lundy, 455 U.S. 509, 520-21 (1982).

238. 28 U.S.C. § 2254(b) (1982). Whether exhaustion of state remedies prior to entertaining the federal petition is required is viewed as a question of comity and not as a constitutional prerequisite to the exercise of federal judicial power. *See* Fay v. Noia, 372 U.S. 391, 425-26 (1963).

hearing,[239] either because the state court held no evidentiary hearing or because the absence of counsel undermined the accuracy of the state post-conviction court's factfinding.[240] Or the federal court might liberally construe the *pro se* state pleading and resolve the federal habeas corpus issues on the merits, even though the *pro se* petitioner had presented them adequately to exhaust them but too obscurely for the state courts fairly to consider them.[241]

Each of these possibilities *undermines* a legitimate state interest, whether that interest is in finality or in the opportunity for plenary consideration by state courts of important state-federal issues.[242] Appointed counsel during the initial state proceedings would help assure that capital post-conviction petitioners raise all potentially meritorious issues, present them clearly for plenary state court consideration, and identify those that merit review by a federal court. This would ultimately promote finality and efficiency as well as fairness and accuracy.

The realization that early state provision of counsel often operates to *protect* state interests motivated twenty-two states to file an amicus curiae brief supporting expansion of the right to counsel in *Gideon v. Wainwright*.[243] That same realization today has motivated nineteen of the thirty-six states which authorize capital punishment to make appointment of counsel mandatory, either upon request of an inmate prior to his or her filing a post-conviction petition, or upon his or her filing in conjunction with an opportunity to amend the petition thereafter.[244] Combined with the new federal mandate

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239. 28 U.S.C. § 2254(d) (1982) gives a presumption of correctness to state post-conviction court factfinding unless, *inter alia*, "the fact finding procedure . . . was not adequate to afford a full and fair hearing," the "material facts were not adequately developed," the state court failed to appoint counsel for an indigent applicant "in deprivation of his constitutional right," or "the applicant did not receive a full, fair, and adequate hearing." *Id.* at (d)(2), (3), (5), (6).

240. *Id.* at (d)(5).

241. *See* 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 49 (1988).

242. If the complicated interplay between state and federal courts caused post-conviction petitioners to waive or default issues, *see, e.g.*, Smith v. Murray, 477 U.S. 527, 531-32 (1986); Murray v. Carrier, 477 U.S. 478, 482-84 (1986), that result is not in the legitimate interest of a state whose primary obligation is to enforce the rule of law, not expedite executions on a criterion—*pro se* ineffectiveness—that bears no relation to the legitimate goals of capital punishment.

243. 372 U.S. 335 (1963). Being forced to manage and try capital post-conviction cases without the benefit of counsel for the petitioner also is plainly not in the state post-conviction court's interest.

244. Wilson & Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, JUDICATURE (forthcoming 1989). In only 2 states (Georgia and New Hampshire) is there no right to counsel in the initial post-conviction proceeding; in 15 other states appointment is discretionary. *Id.*

to provide *all* state death-sentenced prisoners with appointed counsel in federal habeas corpus cases,[245] and the development of death penalty "resource centers" in a number of states,[246] the strong, developing view is that the state interest is in providing counsel.[247] The cost of providing counsel does not reverse that interest.[248]

V. STRIKING THE BALANCE

A. The Due Process-Based Access Analysis Uninformed by Other Constitutional Rights

The three relevant factors in the due process-access to court balance cannot be evaluated in isolation. It is the unique combination of them that strikes the balance in favor of providing post-conviction counsel to death-sentenced inmates.

Original capital post-conviction proceedings often provide the only available remedy for the violations of capital fair trial rights

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245. *See supra* note 236.

246. Wilson & Spangenberg, *supra* note 244. These resource centers, which are being developed or exist in 13 states, would provide the advice and counsel of expert death-penalty lawyers to attorneys handling capital post-conviction cases.

247. *Cf.* Thompson v. Oklahoma, 108 S. Ct. 2687, 2692 n.7 (1988) (plurality opinion) ("[C]ontemporary standards, as reflected by the actions of legislatures . . . provide an important measure of whether the death penalty is 'cruel and unusual.' "). The relevant inquiry in the due process analysis is not as far-reaching; it is, instead, whether state and national practices help define a state interest or help assess the weight that it should be given. Because this inquiry is more limited, the practices need not be as universal as they must be in order to support the finding that a practice is barred completely by the eighth amendment.

248. *See* Bounds v. Smith, 430 U.S. 817, 825 (1977); Argersinger v. Hamlin, 407 U.S. 25, 43 (1972); (Burger, C.J., concurring in the result); Gideon v. Wainwright, 372 U.S. 335, 344 (1963). On December 31, 1987, there were 915 prisoners on death rows in the 17 states that do not provide for the mandatory appointment of counsel on post-conviction. *See* Wilson & Spangenberg, *supra* note 244. U.S. Dep't of Justice, *Capital Punishment 1987*, BUREAU OF JUST. STATISTICS BULL., July 1988. Many of those prisoners are not at the state post-conviction stage of capital litigation. Of those who are, many will have either appointed or volunteer counsel. *See* Mello, *supra* note 142, at 555-61. More importantly, the total number of new death sentences imposed during 1987 was 299. The state appellate courts will reverse some of these death sentences on direct appeal. Some of those sentenced to death will commit suicide or be killed while in prison. U.S. Dep't of Justice, *supra*, at 7. Assuming, however, that all 299 prisoners will become capital post-conviction petitioners, the cost of providing post-conviction counsel in state proceedings to that number of persons each year is not a significant burden. *See Argersinger*, 407 U.S. at 37 n.7 (rejecting argument that the cost of providing lawyers to indigent misdemeanants militated against holding that no defendant could be incarcerated without having been afforded counsel). *See also* Scott v. Illinois, 440 U.S. 367, 372-73 (1979) (discussing *Argersinger*) ("[These arguments] were rejected in much larger part because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed . . . unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule.").

that can be least tolerated: intentional or at least reckless misconduct by prosecutors and the plainest breaches of the responsibilities of an advocate by defense counsel.[249] Even this is not enough; the violations must prejudice the result.[250] When prejudice is evident, capital post-conviction petitioners have the deepest interest in remedying the violations. But they cannot without legal help.

A capital post-conviction petitioner simply cannot master the three complicated, dynamic, and often inconsistent dimensions of death penalty law. He or she cannot investigate, prepare, file, and litigate a post-conviction case to completion, sometimes within a matter of weeks or months, while facing imminent death, or living with the disabling consciousness that comes from daily movement, even if it is orderly movement, towards execution.

When the extraordinary private interest and real risk of error are weighed against the attenuated state interest in denying counsel, and more appropriately weighed *with* the state interest in providing counsel, the appropriate balance is clear.

What is necessary, and constitutionally warranted, is an *automatic* right to counsel in state capital post-conviction cases. Counsel, not a counsel substitute,[251] must be appointed to represent death-sentenced prisoners as soon as the direct appeal is decided.

The representation of death-sentenced prisoners in capital post-conviction proceedings intimidates the most experienced lawyers.[252] It is not a task for law students or lay advocates.[253] As the Supreme Court said in *Powell v. Alabama*,[254] "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to

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249. *See* cases cited *supra* notes 108-109; D. WILKES, JR., *supra* note 9, § 1-5, at 4 ("[P]ostconviction relief usually is available only on grounds involving egregious error . . . .").

250. *See supra* note 191 and accompanying text.

251. *Cf.* Vitek v. Jones, 445 U.S. 480, 497 (1980) (Powell, J., concurring in part) (refusing to read plurality's requirement of "qualified and independent assistance" to indigent state prisoner threatened with involuntary transfer to mental hospital as demanding appointment of attorney).

252. *See supra* text accompanying notes 139-142.

253. When the Court has approved lay advocates as constitutionally mandated counsel substitutes, it has authorized them to provide help to clients in quasi-adversarial proceedings in which there are important interdisciplinary issues within the competence of the lay advocate. *See e.g.*, *Vitek*, 445 U.S. at 500 (Powell, J., concurring in part) ("I do not think that the fairness of an informal hearing designed to determine a medical issue requires participation by lawyers."). Capital post-conviction litigation, however, cannot be characterized as informal and nonadversarial.

254. 287 U.S. 45 (1933).

prepare his defense, even though he have a perfect one."[255]

Discretionary appointment of counsel in post-conviction proceedings—appointment of counsel if the court decides the *pro se* petition is meritorious—is not an adequate remedy for several reasons. Because nonrecord evidence is so often required to establish the capital fair trial violations and cannot be produced by *pro se* petitioners, a judge cannot identify from the existing record the potentially meritorious cases in which counsel should be appointed.[256] The distinctive features of a capital post-conviction case—*e.g.*, its inordinate complexity, the imminence of the petitioner's death, the fact that it is an "original proceeding," its potentially accelerated pace, and the ultimate interest at stake—predict an unacceptable risk of error if courts are required to divine merit from *pro se* petitions. The mentally ill or retarded petitioner would be at a special disadvantage.

A discretionary appointment system, moreover, would revive an inherently flawed jurisprudence that was properly laid to rest when the Court replaced *Betts v. Brady*[257] with *Gideon v. Wainwright*.[258] A re-invention of *Betts* in the context of capital post-conviction proceedings would frustrate finality and undermine judicial efficiency in precisely the same ways that it did for two decades.[259] It consistently would require a federal court to second-guess the state court's failure to appoint counsel and thus do significantly more damage to the states' federalism interests than would an automatic appointment rule.[260]

Finally, a discretionary appointment rule is inconsistent with *Bounds v. Smith*.[261] The Court held in *Bounds* that prisoners were en-

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255. *Id.* at 69.

256. *See* cases cited *supra* notes 108-112.

257. 316 U.S. 455 (1942).

258. 372 U.S. 335 (1963).

259. For commentary on *Betts*, see Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213 (1959); Kamisar, *The Right to Counsel and The Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962); *The Right to Counsel: A Symposium*, 45 MINN. L. REV. 693 (1961).

260. In their amicus curiae brief in *Gideon*, 22 states observed that "[i]t is now most unrealistic to expect that the trial judges, looking ahead, can accomplish that which has obviously been so disturbing to this Court from the vantage point of looking back," determining if "special circumstances" require the appointment of counsel. Brief of Amicus Curiae in Support of Petitioner at 18, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155). The states added that *Betts* was "already an anachronism when [it was] handed down," and it "spawned twenty years of bad law." *Id.* at 24. These are the only reasonable predictive consequences of re-instituting *Betts* in capital post-conviction cases.

261. 430 U.S. 817 (1977).

titled to the State's help—under the facts of *Bounds*, a law library—in *preparing* state post-conviction proceedings.[262] In the context of capital post-conviction litigation, the scope of the right to "affirmative measures" is the same, but the appropriate remedy is appointed counsel, not a law library.

B. The Weight of Other Constitutional Rights in the Due Process Analysis

In the unique context of capital post-conviction litigation, the outcome of the balancing test is influenced by other constitutional rights. The procedural due process analytic framework reaches beyond doctrinal borders and draws strength from other constitutional rights that support the access right.

1. The Sixth Amendment Right to Counsel: A Fundamental Interest and an Informative Analog.—Capital post-conviction proceedings frequently vindicate the sixth and fourteenth amendment right to the effective assistance of counsel.[263] The Supreme Court decisions that define the scope and value of the underlying sixth amendment right to counsel[264] highlight the extraordinary value of the liberty interest in these capital post-conviction proceedings and provide immediate guidance about how the three factors in the procedural due process/right to counsel equation should be weighed and balanced in all capital post-conviction cases.

In *Powell v. Alabama*,[265] *Gideon v. Wainwright*,[266] and *Argersinger v. Hamlin*,[267] the Court recognized and refined a right to counsel in criminal cases that now attaches in every criminal prosecution in which a defendant faces incarceration—even a sentence of one day in jail.[268] In *Strickland v. Washington*[269] the Court reiterated the constitutional requirement that counsel be effective.[270] Thus, the complete right is not just the right to a lawyer but to the effective assistance of counsel.

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262. *Id.* at 828.

263. *See, e.g.*, cases cited *supra* notes 110-112.

264. *See infra* text accompanying notes 272-280.

265. 287 U.S. 45 (1932).

266. 372 U.S. 335 (1963).

267. 407 U.S. 25 (1972).

268. *Id.* at 37. *See also* Scott v. Illinois, 440 U.S. 367, 369 (1979) (no constitutional error where counsel not appointed for defendant and imprisonment authorized but not imposed).

269. 466 U.S. 668 (1984).

270. *Id.* at 686. *See also* McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . .").

When an attorney fails to provide effective assistance of counsel to a capital defendant, that defendant's sixth amendment right has been unconstitutionally denied.[271] When that death-sentenced prisoner seeks to file a post-conviction petition to challenge that denial, he or she primarily is interested in the underlying sixth amendment right to effective assistance that the post-conviction process may restore. The post-conviction proceeding is the enforcement device; the right to the effective assistance of counsel is the right that it enforces. The compelling value of enforcing the sixth amendment is an extraordinary private interest in the procedural due process analysis.

In *Powell v. Alabama*[272] the Court held that the right to counsel is the predicate of a fair trial: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[273] The right "to be heard by counsel" is especially important where, as in *Powell*, defendants stand "in deadly peril of their lives."[274]

Similarly, in less serious felony cases, "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."[275] And even in misdemeanor cases where the possible penalty is one day in jail, "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."[276] Even the right to a jury trial, "while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel."[277]

If the right to counsel is a fundamental interest when it prevents the arbitrary imposition of, for example, a weekend jail sentence for drunk driving, a fortiori it is of fundamental importance when it may help restore a capital defendant's fair trial right that was unconstitutionally denied.

The sixth amendment decisions also identify an unacceptable risk of error in *pro se* criminal trials that exists to a far greater extent

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271. *See Strickland*, 466 U.S. at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.").

272. 287 U.S. 45 (1932).

273. *Id.* at 68-69.

274. *Id.* at 71.

275. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

276. Argersinger v. Hamlin, 407 U.S. 25, 31 (1972). Justice Powell, concurring in the result, identified other protected private interests jeopardized by misdemeanor trials in addition to the loss of liberty, including loss of employment, loss of a driver's license, social stigma, and civil disabilities resulting from conviction. *Id.* at 47-48.

277. *Id.* at 46 (Powell, J., concurring in the result) (footnote omitted).

in capital post-conviction proceedings. Justice Sutherland, speaking for the *Powell* Court, described the impossibility of even an intelligent capital defendant conducting an adequate *pro se* defense:

> He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect.[278]

Misdemeanor prosecutions evoke a need for defense counsel to prevent erroneous convictions not only because the defendant "is opposed by a law-trained prosecutor,"[279] but also because such misdemeanors "often bristle with thorny constitutional questions"[280] that laypersons cannot understand. Capital post-conviction litigation is far more complex and adversarial.[281]

Finally, in the sixth amendment decisions, the Court balances the defendant's interest in appointed counsel and the risk of *pro se* error against the collective interest of the states in avoiding man-

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278. Powell v. Alabama, 287 U.S. 45, 69 (1932).

279. Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (Burger, C.J., concurring).

280. *Id.* at 33 (plurality opinion). The example of a "thorny constitutional question" cited by the Court was Papachristou v. Jacksonville, 405 U.S. 156 (1972), which held that a city vagrancy ordinance classifying the offense as a misdemeanor was void for vagueness. *Id.* at 162. The *Argersinger* plurality also cited a study that found " 'misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.' " 407 U.S. at 36 (quoting American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970)).

281. *See supra* text accompanying notes 146-218. In order to understand just one—the second—of the three complex dimensions of "death penalty" law, a post-conviction petitioner must comprehend all components of a capital proceeding and *then* make a separate determination of whether trial or appellate counsel adequately discharged his or her responsibilities as an advocate. *See supra* text accompanying notes 190-194. The sixth amendment jurisprudence reveals that this first level of understanding is beyond the reach of a layperson. The second level is even more complicated. *See supra* note 192 and accompanying text. It requires retrospective analysis of a trial lawyer's judgments, which inherently are subjective and personal, and the sorting of legitimate tactical from inadequately justified motivations. The normally and understandably defensive, and perhaps hostile, trial lawyer must be interviewed and then examined at the post-conviction hearing to establish the "state of mind" as well as the objective components of inadequate performance. If this elusive first "prong" of ineffective assistance of counsel is established, *see* Strickland v. Washington, 466 U.S. 668, 687 (1984), then the post-conviction petitioner must conduct the sophisticated, holistic inquiry into all the evidence and issues in the case that will determine if the second prong—prejudice—can be established. *Id.* In total, the *Strickland* inquiry is a complicated multi-level investigation, but it is premised upon one level of legal knowledge that the sixth amendment cases have already demonstrated convincingly that a layperson cannot master.

dates that require them to provide counsel to thousands of capital defendants,[282] tens of thousands accused of felonies,[283] and hundreds of thousands of alleged misdemeanants.[284] In every one of these sixth amendment cases, the states had a more substantial fiscal interest in denying counsel to defendants than do the states who today refuse to automatically provide counsel to post-conviction petitioners.[285] In every one of these sixth amendment cases, the "balance" generated a right to counsel.

Writing in *Argersinger*, Justice Powell summarized the "evolving concept" that is embodied in the right to counsel and revealed the explicit analytic bridge between the sixth and fourteenth amendment-derived rights to counsel, stating: "When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process."[286]

2. The Right of Equal Protection: A Weighed and/or Aggregated Interest.—The capital post-conviction petitioner's private interest also is heightened by the fundamental interest in nondiscrimination that is reflected in *Griffin v. Illinois*[287] and *Douglas v. California*.[288] There is a strong argument that equal protection is an independent source of the right to counsel in capital post-conviction proceedings,[289] one that is compelling when post-conviction proceedings have the characteristics of direct appeals, or even trial motions.

But the interest in equal treatment need not generate a constitutional argument that a court would accept as an independent ground for decision for this interest to be weighed in the due process equation. When life is at stake and representation by counsel makes such a difference, the state's refusal to provide appointed counsel to those death-sentenced prisoners who are poor is a possibly fatal form of intolerable discrimination based on poverty that is cognizable in the due process balance.

An important part of a capital post-conviction petitioner's ulti-

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282. Powell v. Alabama, 287 U.S. 45 (1932).

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

284. Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972) (estimating that "between 1,575 and 2,300 full-time counsel would be required to represent *all* indigent misdemeanants, excluding traffic offenders" (emphasis in original)).

285. *See supra* note 248.

286. *Argersinger*, 407 U.S. at 48 (Powell, J., concurring in the result) (footnote omitted).

287. 351 U.S. 12 (1956) (plurality opinion).

288. 372 U.S. 353 (1963).

289. *See supra* text accompanying notes 116-126.

mate interest is the interest in not being selected from an otherwise similarly situated "pool" of death-eligible prisoners simply because he or she is too poor to hire an attorney (or too unlucky to obtain a volunteer attorney[290]) who can assert a meritorious fair trial claim. This right to life has an egalitarian component. The death-sentenced prisoner's "interest" in more egalitarian treatment, whether or not it amounts to an independent constitutional violation, is substantial.

Cases identifying an equal protection component of the fifth amendment's due process clause have long established that inequality is one species of unconstitutional arbitrariness that is prohibited by due process.[291] At a minimum, due process should provide the capital post-conviction petitioner's interest in equality with the lesser protection of weighing it as a liberty interest in the due process equation.

The Supreme Court has not been reluctant to aggregate due process and equal protection values to justify the invalidation of state barriers to effective access to the courts. In *Griffin v. Illinois*[292] and *Douglas v. California*[293] the Court held unconstitutional, respectively, the State's failure to provide indigent appellants with free transcripts of their trials[294] and the State's failure to provide ap-

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290. Giarratano v. Murray, 668 F. Supp. 511, 515 (E.D. Va. 1986) ("The evidence conclusively establishes that today few—very few—attorneys are willing to voluntarily represent death row inmates in post conviction efforts.").

291. The source of both equal protection and due process is "an American ideal of fairness." Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the fifth amendment's due process clause rendered unconstitutional racial discrimination in education). Prior to the adoption of the fourteenth amendment, courts recognized an equal protection right in "law of the land" and "due process" provisions of state constitutions. *See, e.g.*, Reed v. Wright, 2 Greene 15 (Iowa 1849); Holden v. James, 11 Mass. 396 (1814); Sears v. Cottrell, 5 Mich. 252 (1858); State Bank v. Cooper, 10 Tenn. (2 Yer.) 539 (1831); Vanzant v. Waddell, 10 Tenn. (2 Yer.) 230 (1826). The primary architects of the fourteenth amendment understood that "the absolute equality of all, and equal protection of each" are "principles in our Constitution that derive from the promise that 'no person shall be deprived of life, liberty, or property, without due process of law.'" CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857) (comments of Rep. Bingham). *See also* CONG. GLOBE, 39th Cong., 1st Sess. 2539 (1866) (comments of Rep. Farnsworth); CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (comments of Rep. Poland). The fact that the drafters of the Civil War amendments added an equal protection clause to the fourteenth amendment does not mean that they meant to drain the egalitarian value from due process. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964); Gideon v. Wainwright, 372 U.S. 335, 341 (1963); Powell v. Alabama, 287 U.S. 45, 65-67 (1932); Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

292. 351 U.S. 12 (1956).

293. 372 U.S. 353 (1963).

294. *Griffin*, 351 U.S. at 19 (plurality opinion) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defend-

pointed counsel on appeal.[295] In *Ross v. Moffitt*[296] the Court observed that "[t]he precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."[297] In *Evitts v. Lucey*[298] the Court specifically identified a due process rationale for the right to counsel in criminal appeals. It said that by allowing one's financial capacity to be a determinative factor in criminal appeals, a state violated not only the equal protection clause, but "also violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved."[299]

Although the due process and equal protection rationales have been viewed as alternative grounds of decision in these cases,[300] the historic, theoretical, and functional interrelationship of the two values[301] suggests that the Court also may have recognized, or should in the future, a *consolidated* equal protection-due process liberty interest. That interest generated a constitutional right to counsel in *all* criminal appeals; such an interest clearly exists in capital post-conviction proceedings as well.

3. The Eighth Amendment's Prohibition of Cruel and Unusual Punishment: Quantification of the Very Limited Acceptable Risk of Error.—Eighth amendment jurisprudence highlights the "almost uniquely compelling" private interest in life.[302] In so doing, the eighth amendment's "death is different" principle[303]—certainly the still powerful variant of that principle that influenced the due process balance in *Ford v. Wainwright*[304]—also greatly limits the *quantity* of risk of error that is tolerable. In some due process contexts, the quantity of tolerable risk is significant; not in this context.

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ants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

295. *Douglas*, 372 U.S. at 357 ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between the rich and the poor.").

296. 417 U.S. 600 (1974).

297. *Id.* at 608-09.

298. 469 U.S. 387 (1985).

299. *Id.* at 404.

300. *See* Ross v. Moffitt, 417 U.S. 600, 609 n.8 (1974).

301. *See supra* note 291.

302. Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

303. *See* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). *See also infra* note 127.

304. 477 U.S. 399 (1986).

When the extraordinary risk of error attendant to *pro se* representation in capital post-conviction proceedings is calculated, the eighth amendment helps quantify the minimum amount of risk that is constitutionally tolerable.[305]

VI. DISTINGUISHING PENNSYLVANIA V. FINLEY

In *Pennsylvania v. Finley*[306] the Supreme Court considered whether the procedural requirements governing withdrawal of appointed counsel that were established in *Anders v. California*[307] were applicable to noncapital post-conviction proceedings. The Court held that the *Anders* protection against arbitrary withdrawal does not extend to all convicted defendants who seek post-conviction relief.[308] The Court, extending *Ross v. Moffitt*,[309] stated that "since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review . . . he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process."[310] And, absent a right to counsel, the *Anders* protection is inapposite.

In part because the Court's overbroad language obscures different potential sources of the right to counsel,[311] it is not the death

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305. In Mello, *supra* note 5, at 813-14, the author argues that the right to counsel in capital post-conviction proceedings is a "complex" right that draws aggregate strength from several constitutional sources. He adds one source to those identified in this article: "[T]he necessity of counsel in the postconviction system could be viewed as a requirement for the meaningful operation of [federal] habeas corpus, especially as the law of habeas has developed over the last decade into an increasingly complex body of law." *Id.* at 814.

306. 481 U.S. 551 (1987).

307. 386 U.S. 738 (1967). *Anders* held that withdrawal from a case on appeal would be allowed if, after "conscientious examination" of the record, appellate counsel were to find the case to be "wholly frivolous." *Id.* at 744. Thereafter, counsel may request the court's leave to withdraw but must accompany that request "by a brief referring to anything in the record that might arguably support the appeal." *Id.* The indigent appellee would then be furnished with a copy of the brief and allowed time to raise additional issues. The court would then determine whether to allow withdrawal or to appoint another lawyer to argue the cause. *Id.* The *Anders* Court viewed this procedure as a protection of the equal protection right to effective assistance of appointed appellate counsel. *Id.* at 745.

308. 481 U.S. at 554-55.

309. 417 U.S. 600 (1974). *See also* Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam) (because respondent had no right to counsel, failure of retained counsel to file petition for discretionary review in state court was not ineffective assistance). *But see id.* at 589 (Marshall J., dissenting) (although sixth amendment right to effective assistance may not have been infringed, respondent was denied due process).

310. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (citing Boyd v. Dutton, 405 U.S. 1, 7 n.2 (1972) (Powell, J., dissenting)).

311. Indeed, the remedial legal assistance evoked by the due process-access to court

knell for the due process-based access to court right that the *Giarratano* courts implicitly recognized[312] for several reasons. These reasons are best organized by examining the Court's reasoning through the due process analytic lens in the capital post-conviction context.[313]

First, the private interest at stake in capital post-conviction proceedings is significantly more substantial than the interest that was at stake in *Finley*. Even though Finley was sentenced to life imprisonment (apparently with eligibility for parole) for, *inter alia*, second degree murder,[314] her interest in vindicating a fair trial right is significantly less than that of a death-sentenced inmate.[315] In addition, she was neither litigating her post-conviction claim as part of an accelerated process that makes careful consideration of issues difficult, nor was she litigating *pro se* in the shadow of imminent death. Although she lost her case, she is still alive and able to invoke other

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right does not necessarily entail the same "incidental" *Anders* (or effective assistance of counsel) rights. *See* Whitley v. Muncy, 823 F.2d 55, 56 (4th Cir. 1987) (after deciding *Giarratano*, Fourth Circuit rejected the argument that access-due process right to counsel in *Giarratano* gave sixth amendment right to effective assistance of counsel); Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984) ("[B]ecause postconviction proceedings are civil in nature, the sixth amendment right to effective assistance of counsel does not attach." (citations omitted)). For the purpose of "incidental" procedures or effective assistance, the latter being the core of the sixth amendment-based right to counsel, the eroded distinction between civil and criminal proceedings, *see supra* note 98, still retains relevance. Thus, recognition of a "limited" right to legal assistance, one that does not carry with it the "incidental" *Anders* right, would not have affected the outcome in *Finley*. The Court therefore had no occasion to consider whether the due process analysis suggested in this article constitutionally required the appointment of "limited" counsel in *Finley*. In fact, the *Finley* Court expressly rejected the suggestion that "a 'right to counsel' can have only one meaning, no matter what the source of that right." 481 U.S. at 556. Instead, the precise meaning and content of any right to counsel turn on "the source of that right . . . combined with the nature of the proceedings." *Id.*

312. Both the district court and the Fourth Circuit sitting en banc in *Giarratano* implicitly performed the due process analysis to arrive at the conclusion that capital post-conviction petitioners had a right to counsel. *See* Giarratano v. Murray, 668 F. Supp. 511, 513 (E.D. Va. 1986) (considering risk of error of *pro se* litigation); *id.* at 515 (considering and weighing the private and state interests); Giarratano v. Murray, 847 F.2d 1118, 1119-20 (4th Cir. 1988) (en banc) (considering and weighing these three factors).

313. *Finley*'s holding flows, not from a due process analysis but from the factually incorrect assumption that a post-conviction proceeding generally is an attenuated, marginal part of the criminal justice system in which petitioners raise issues that already have been decided adversely by several courts. Although the peculiar posture of *Finley* happens to fit the latter description, *see infra* text accompanying notes 317-320, most capital post-conviction proceedings do not. *See supra* text accompanying notes 116-126.

314. Pennsylvania v. Finley, 481 U.S. 551, 553 (1987).

315. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Brennan, J., concurring). *See also supra* note 127.

remedies that may restore her freedom.[316]

Second, the risk that unrepresented death-sentenced prisoners will erroneously be deprived of a fair trial right is far greater than the risk faced by Finley. Finley raised in her post-conviction complaint precisely "the same issues that the Supreme Court of Pennsylvania had rejected on the merits."[317] The *Finley* Court noted that it had previously held in *Ross v. Moffitt*[318] that because such a defendant had ready access to trial and first-appeal briefs and opinions, requiring that defendant to proceed *pro se* during discretionary appellate review produced no unacceptable risk of error.[319] In short, because Finley's only post-conviction claims had previously been fully briefed by counsel and decided on the merits, the Court in *Finley* concluded that, based on *Moffitt*, the "guarantee of 'meaningful access' [was not] violated *in this case*."[320]

In contrast, death-sentenced prisoners seek to assert the most complex original claims that have not been, and could not have been, adequately briefed or addressed on direct appeal.[321] The *Bounds* Court specifically found that the "need for new legal research or advice to make a meaningful initial presentation to a trial court . . . is far greater than is required to file an adequate petition for discretionary review."[322] The *Bounds* Court distinguished *Moffitt*, the parent of *Finley*, on this basis.[323]

Thus, while the provision of counsel to Finley would have contributed to the effectiveness of her post-conviction presentation only marginally given the uniquely repetitive nature of her claims, this situation constitutes an exception to both the findings in *Bounds* and the overwhelming experience in capital post-conviction proceedings.

Third, the countervailing state interest in not being required to

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316. *See supra* note 127.

317. 481 U.S. at 553.

318. 417 U.S. 600 (1974).

319. Pennsylvania v. Finley, 481 U.S. 551, 555-56 (1987). *See Moffitt*, 417 U.S. at 614-15.

320. *Finley*, 481 U.S. at 557 (emphasis added).

321. *See supra* text accompanying notes 116-121.

322. Bounds v. Smith, 430 U.S. 817, 828 (1977).

323. *See supra* note 36. *Bounds* also distinguished *Moffitt* on the ground that courts engaged in discretionary review generally "are not concerned with the correctness of the judgment below," 430 U.S. at 827, and therefore a *pro se* litigant seeking such review "need only apprise an appellate court of a case's possible relevance to the development of the law." *Id.* at 828. For death-sentenced prisoners, however, a post-conviction proceeding is quite often the "first line of defense against constitutional violations." *Id. See also supra* text accompanying notes 116-121.

appoint counsel for the relatively limited number of death-sentenced prisoners who are incarcerated in those states that do not provide them automatically with post-conviction counsel[324] pales in comparison with the state interest in avoiding like appointment for each of the tens of thousands of noncapital defendants who enter the Nation's prisons each year.[325] Conversely, the state interest "in insuring that death sentences have been constitutionally imposed" also is more compelling.[326]

CONCLUSION

Capital post-conviction petitioners should have an automatic right to counsel in state post-conviction proceedings. Counsel are necessary to enforce the petitioners' access to court right, which, although it draws strength from the sixth and eighth amendments and the fourteenth amendment's guarantee of equal protection, is rooted in due process.

Recognition of this right to counsel keeps the promise of our legal heritage that life must be protected by "the law of the land." The first settlers carried that promise to this country, embodied it in the organic charters, constitutions, and declarations of rights of the colonies and states,[327] and inscribed it in our federal Bill of Rights after we became a Nation.[328]

In our contemporary society, due process has extraordinary utilitarian value. It harnesses the provisions of the United States Constitution—the "Supreme Law of the Land"—to protect the life, liberty, and property of the least honored, and often the least honorable, among us from our sometimes arbitrary and excessive collective retributive anger. There is little doubt that, without counsel, the law that sorts those who should die from those who should not is inaccessible.

When the due process-based access analysis is applied to the extraordinary circumstances of capital post-conviction litigation, it generates a right to counsel. The capital post-conviction petitioner's interest is the extraordinary interest in enforcing enhanced capital fair trial rights that protect life. The risk of error attendant to

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324. *See supra* note 248.

325. In 1986 there were as many as 484,615 people confined in state prisons. J. THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 61 (1988).

326. Giarratano v. Murray, 847 F.2d 1118, 1122 (4th Cir. 1988) (en banc).

327. *See* Shattuck, *supra* note 87, at 368 (identifying "law of the land" provisions in 28 state constitutions and declarations of rights).

328. *Id.* at 382-86.

pro se representation is great. The three complicated, dynamic, and often inconsistent dimensions of death penalty law tax the competence and emotional capacity of the most experienced and specialized of lawyers. The circumstances of imminent death can further immobilize *pro se* petitioners.

There also is little question that the state has the most basic interest, one that it must honor if it is to be legitimate, in enforcing the rule of law, even when the laws it enforces are unpopular. Effective access to the courts that apply that law is the predicate of the rule of law. The state's interest in the finality of its judgments is an important interest. It is an interest, however, that presumes a sentence that has been constitutionally imposed and it is an interest that matures in increments. It is a particularly undeveloped interest with respect to state post-conviction proceedings that often provide the first opportunity to correct constitutional mistakes that occurred during a capital trial or sentencing proceeding. In such proceedings, the right to counsel claim is at least as strong as it is in criminal appeals.

In any event, neither the state's interest in finality nor its interest in the plenary consideration of issues that will later be presented to federal habeas corpus courts is advanced by the denial of counsel to capital post-conviction petitioners. That denial will obscure the issues presented in capital post-conviction pleadings, and increase the frequency with which federal habeas corpus courts will remand cases to state courts, hold their own evidentiary hearings, or decide issues that state courts might have first resolved if they had been more clearly presented. None of these results is in government's interest, which is one of the reasons that the majority of the states with death penalties automatically, or virtually automatically, provide counsel to state death-sentenced inmates in post-conviction proceedings, and the federal government now provides counsel to death-sentenced prisoners in federal habeas corpus proceedings.

Thus, the private interest of death-sentenced prisoners in obtaining counsel in post-conviction proceedings is extraordinary, the inherent state interest in providing counsel is strong, its disinterest (grounded in its legitimate interest in finality) is not advanced by denying counsel, and the risk of error attendant to uncounseled representation is omnipresent. At this stage in the due process analysis, the balance is clear.

Moreover, this balance is informed by other constitutional rights. The most important right that capital post-conviction proceedings often vindicate is the sixth amendment right to the effec-

tive assistance of counsel. The sixth amendment cases emphasize the fundamental importance of this right, which is the means of asserting other fair trial rights, and help identify the generally unacceptable risk of error attendant to *pro se* representation. The sixth amendment cases also help to quantify a state's interest, and its limited disinterest, in appointing counsel to capital post-conviction petitioners.

The eighth amendment also helps define the very limited risk of error that is constitutionally acceptable in capital post-conviction proceedings. The equal protection clause generates an interest in equal treatment—an interest in not having life denied arbitrarily—that merits consideration and weight in the due process equation.

In the end, however, the access right should rest on the central premise of due process. Justice Harlan described the "centrality" of due process in *Boddie v. Connecticut*:[329]

> [T]hose who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of . . . [our legal] system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.[330]

Recognition that capital post-conviction petitioners are constitutionally entitled to the assistance of counsel would be well-justified additional doctrinal "flesh" for the principle of due process. It is only through counsel that capital post-conviction petitioners can enforce the contemporary "law of the land" that will determine whether they live or die.

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329. 401 U.S. 371 (1971).
330. *Id.* at 375.