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EFFICIENCY v. JUSTICE: GIARRATANO AND THE CAPITAL PETITIONER'S RIGHT TO A "MEANINGFUL" POSTCONVICTION PROCESS

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INTRODUCTION

On June 23, 1989 the United States Supreme Court in *Murray v. Giarratano* held that indigent prisoners sentenced to death were not entitled to state-appointed attorneys beyond their first appeal.[1] By denying these defendants state-appointed representation, the Supreme Court decided that meaningful access to the courts for the indigent ends at the close of their direct appeal. Many would argue that this holding is in line with fostering a more efficient judicial system; the affirmance of a defendant's sentence on appeal should signal the end of the legal process. Of concern, though, is the fear that by denying impoverished capital claimants the opportunity for meaningful postconviction review, *Giarratano* permits the imposition of the death penalty without the guarantee of guilt.

This article addresses the need for counsel in capital postconviction proceedings beyond the first appeal. Part I discusses the typical capital prisoner, his progress through the legal system from trial to execution, and factors influencing the outcome of his journey. Part II examines the constitutional basis for the right to counsel in postconviction proceedings. Part III looks at the case of *Murray v. Giarratano*, which denied counsel to capital prisoners in state postconviction proceedings. Part IV analyzes

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1. Murray v. Giarratano, 492 U.S. 1 (1989). In 1979, Joe Giarratano was convicted and sentenced to death for the murder of a Virginia woman and the rape and murder of her daughter. In April 1980, the Virginia Supreme Court affirmed his conviction and sentence. Following this proceeding, Giarratano, along with other Virginia capital petitioners, filed a class action asserting that they had a constitutional right to attorney representation during postconviction review. The Supreme Court ultimately decided that death row inmates were not entitled state-appointed representation beyond their first appeal.

Giarratano's holding in light of prior case law. Part V examines the ramifications of *Giarratano*, and Part VI concludes this article.

I. THE DEATH ROW INMATE — HE IS DIFFERENT

A. *The Capital Petitioner*

According to the American Bar Association, 99% of all death row prisoners are impoverished.[2] In *Hooks v. Wainwright*,[3] the district court found that 95% of the general inmate population in custody of the Florida Correctional System were unable to afford counsel, and 50% had a gross monthly income of under $100 at the time they were arrested.[4] Couple this indigency with the average intelligence of a capital prisoner and the picture grows even more grim. Over 50% of Florida's inmates are illiterate with IQ's under 100.[5] Of those inmates falling below 100, 22% fell below eighty, which puts them in the borderline retarded range.[6] Over 50% of all inmates in the Florida Correctional System read below the seventh grade level.[7] The average grade level for the typical black male offender is 6.4 (just short of halfway through sixth grade), while the typical white male offender does marginally better at 8.5 (halfway through eighth grade).[8]

Together, these statistics portray a fairly accurate picture of the average death row inmate. He is impoverished, functionally illiterate, and as generally educated as the average eleven year old. From here we will examine his progress through our legal system to execution.

B. *The State Postconviction System: An Overview*

For the most part, the road through the courts taken by the indigent state petitioner varies only by location. Following a bifurcated trial and sentence, the typical capital offender files for appeal first to the state intermediate appeals court, then to the

2. Michael A. Mello, *Criminal Law: Is There A Federal Constitutional Right To Counsel In Capital Postconviction Proceedings?*, 79 J. CRIM. L. 1065, 1069 n.20 (1989).

3. 536 F. Supp. 1330, 1337-38 (1982).

4. *Id.* at 1338.

5. *Id.* at 1337. An IQ of 100 is generally indicative of average intelligence.

6. *Id.* at 1337, 1343. An IQ from 68 to 83 is considered borderline retarded.

7. *Id.* at 1337.

8. *Id.* at 1338.

state supreme court.[9] The state must provide the defendant with counsel through his first appeal but not beyond this point.[10]

Once the appeals process has been exhausted, an inmate may file a petition for certiorari to the United States Supreme Court. Should the Supreme Court deny his request for certiorari or affirm his sentence, the prisoner then may initiate the state habeas review process.[11] Following state habeas review, the petitioner again appeals to the state supreme court and then seeks certiorari in the Supreme Court a second time.[12] If, after exhausting the state system, relief has not been granted, the defendant then may initiate the federal appeals process.

C. *The Significance of the State Postconviction Process*

For the capital petitioner, state habeas corpus review is often the process which is most crucial to his case. Chief Judge Haynsworth writing for the Fourth Circuit in *Ross v. Moffit*,[13] stated, "in the context of constitutional questions arising in criminal prosecutions, permissive [habeas corpus] review in the state's highest court may be predictably the most meaningful review the conviction will receive."[14]

Virginia's system highlights the significance of the postconviction review process. In Virginia, many claims that ordinarily would have been heard on direct appeal are relegated to state habeas corpus. For example, claims that counsel provided constitutionally ineffective assistance at either the trial or appellate stage may be raised only during postconviction proceedings.[15] Should the court determine that the defendant was not adequately represented, review at this stage allows new counsel to raise claims that may have been barred on direct review due to prior counsel's ineffective assistance. As Justice Stevens wrote in his dissent in *Giarratano*, "A fresh look may reveal, for example, that a prior conviction used to enhance the defendant's sentence was invalid; or that the defendant's mental illness, lack of a prior record, or abusive childhood should have been introduced as evidence in mitigation at his sentencing hearing."[16]

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9. Lewis F. Powell, *Commentary: Capital Punishment*, 102 HARV. L.REV. 1035, 1039 (1989).

10. *Giarratano*, 492 U.S. at 1.

11. State habeas permits the defendant the opportunity to present claims of ineffective assistance of counsel or procedural defaults during the trial stage.

12. Powell, *supra* note 9, at 1039.

13. 417 U.S. 600 (1974).

14. *Id.* at 619 (citing 483 F.2d at 653).

15. *Giarratano*, 492 U.S. at 25.

16. *Id.*

The postconviction process in Virginia also provides an opportunity to rectify procedural defaults arising during the trial stage. Following proof of ineffective representation, the Virginia Supreme Court will consider previously defaulted claims on a showing that prior counsel failed to object to an error or assert a claim at trial.[17] This window of opportunity to correct defaulted claims provides a crucial chance to rescue valid assertions that would otherwise be barred from further review.[18]

Virginia postconviction proceedings are also the cornerstone for all subsequent attempts at relief in federal court. After a Virginia court determines a claim is barred, it may be reviewed in federal court only upon a showing that either "there was . . . cause for the default and resultant prejudice or that failure to review will cause a fundamental miscarriage of justice."[19] As Justice Stevens states, "In Virginia, therefore, postconviction proceedings are key to meaningful appellate review of cases."[20]

D. *Factors Influencing The "Fight"*

Once the conviction and sentence are affirmed on direct appeal, the capital petitioner in Virginia has thirty days to respond by filing for state habeas corpus.[21] The petition filed must contain a nonfrivolous claim for relief based on the facts of the case.[22] Failure to file a meritorious claim results in dismissal of the petition and denial of further postconviction relief. Additionally, all claims in which the facts are known to the claimant at the time of filing must be included in the petition or they cannot be raised in a subsequent filing, including federal habeas corpus.[23]

Attorney assistance in preparing the petition for relief is said to be essential because "a court may be unable to make a fair determination of whether a claim is meritorious on the basis of a pleading drafted without attorney assistance."[24] Judge Scott in *Hooks v. Wainwright* echoed this concern with respect to Florida's correctional system, writing,

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17. *Id.* at 25 n.15.

18. *Id.* Virginia does not allow claims that could have been raised on direct appeal to be asserted in successive petitions.

19. *Id.* at 26.

20. *Id.* at 25, 26.

21. VA. CODE § 53.1-232 as cited in 668 F. Supp. 511, 512 (1986).

22. *Id.* at 514, 515.

23. *Id.* at 514 n.2. Federal courts may not consider claims barred by Virginia procedural rules.

24. Raymond Y. Lin, *A Prisoner's Constitutional Right To Attorney Assistance*, 83 COLUM. L. REV. 1279, 1306 (1983).

> The evidence presented in this case with respect to the educational attainments and mental capacities of Florida's inmates has simply served to confirm what the Court has always suspected; that, although there are some exceptions, it is ludicrous to believe that Florida's prisoners are able to conduct meaningful legal research and effectively seek redress of their grievances without the aid of professional legal assistance.[25]

In Virginia, as in Florida, the functional illiteracy of most inmates places the ability to prepare a meaningful habeas corpus petition beyond their capacity.[26] As the Court in *Powell v. Alabama*[27] stated, "even the intelligent and educated layman . . . requires the guiding hand of counsel at every step in the proceeding against him."[28] Justice Stevens went even further in his dissent in *Giarratano* when he stated that the complexity of death penalty jurisprudence rendered it difficult for even an educated attorney to understand.[29] Apparently, Congress has also recognized the complexity of a habeas corpus proceeding. The 1988 Anti-Drug Abuse Act requires that counsel be provided for all capital prisoners convicted of drug offenses who seek federal postconviction relief.[30]

In addition to the complexity and time constraints associated with state habeas corpus, the death row inmate drafting his petition must deal with the overwhelming task of preparing to die. The District Court in *Giarratano* best summarized the emotional inability of a capital petitioner to prepare a viable postconviction petition. Judge Merhige stated,

> At the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so. The evidence gives rise to a 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 claim.[31]

The tremendous challenge, both intellectually and emotionally, that the postconviction process presents to the capital petitioner seems evident. Although the barriers to effective *pro se*

25. *Hooks*, 536 F. Supp. 1330, 1344 (M.D. Fla. 1982).
26. Lin, *supra* note 24, at 1306.
27. 287 U.S. 45 (1932).
28. *Id.* at 69.
29. *Giarratano*, 492 U.S. at 27.
30. 21 U.S.C. §§ 848(q)(4)(B) as cited in *Giarratano*, 492 U.S. at 19.
31. Giarratano v. Murray, 668 F. Supp. 511, 513 (E.D. Va. 1986).

representation stand out plainly, constitutional justification for state-provided counsel must exist before it can be mandated as a federal constitutional requirement.

II. CONSTITUTIONAL BASIS FOR REPRESENTATION

The Supreme Court has a long history of supporting the rights of indigent prisoners on appeal. In *Griffin v. Illinois*,[32] the Court invalidated an Illinois rule that foreclosed a convicted defendant from bringing an appeal if he could not afford to pay for a transcript of his trial. The Illinois rule stated that a convicted person could present his claims of trial error only if on appeal he produced a transcript of his trial.[33] Unfortunately, the rule did not provide a transcript for those unable to pay for one. The Court found this financial barrier to an appeal unacceptable, and invalidated the rule.

Subsequent cases followed the theme of *Griffin* by further breaking down financial barriers to the appellate system. In *Douglas v. California*,[34] the Court examined a prisoner's realistic ability to access the appellate system without attorney assistance. The Court held that simply providing a prisoner with a transcript did not fulfill a state's obligation to insure equal access to the appellate process. To provide prisoners with a genuine opportunity to appeal their conviction, the Court held that states were required to provide indigent prisoners with counsel on their first appeal of right.[35]

The cases beyond *Douglas* represent a marked departure from the Court's previous consistent policy of eradicating financial barriers to the judicial system. In a series of cases that when taken together are virtually irreconcilable, the Court evidences its difficulty with formulating a consistent policy regarding prisoner access to the state postconviction process.

In *Ross v. Moffit*,[36] the Court was faced for the first time with the issue of an indigent prisoner's right to representation during appeals following his first appeal of right. Although not a death penalty case, the issues presented in *Ross* were identical to those that would be evaluated fifteen years later in *Giarratano*. Justice Rehnquist began his opinion in *Ross* by discussing previous case law eliminating financial barriers to court access. He stated, "The decisions discussed above stand for the proposition that a

32. 351 U.S. 12 (1956).
33. *Id.* at 13 n.2.
34. 372 U.S. 353 (1963).
35. *Id.* at 356.
36. *Ross*, 417 U.S. at 600.

State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[37] Justice Rehnquist explained that the rationale behind the *Griffin* and *Douglas* line of cases stemmed from a combination of both Equal Protection and Due Process rights. To exemplify this rationale he referenced the opinion of the Court of Appeals which stated,

> There simply cannot be due process of the law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain professional assistance and to be benefitted by it. The same concepts of fairness and equality, which require counsel in a first appeal of right require counsel in other and subsequent discretionary appeals.[38]

Justice Rehnquist then evaluated the issue in *Ross* in light of both the Equal Protection and Due Process clauses and, unlike the Court of Appeals, concluded that neither one required North Carolina to provide counsel for defendants in discretionary appeals to the State Supreme Court.

Beginning his analysis with the Due Process clause, Justice Rehnquist explained that the function of due process was to insure fairness between the State and the individual confronting the State.[39] At the trial stage, the State initiates the adversary system to convert a person presumed innocent into a person guilty beyond a reasonable doubt. Due Process in that setting requires that the State provide counsel for a defendant "as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence. . . ."[40]

In contrast, on appeal the defendant initiates the adversary process. In this situation, Justice Rehnquist found that Due Process did not require States to provide prisoners with representation. He explained that the role of the attorney on appeal was not to provide the defendant with a "shield" but with a "sword" to overturn his prior conviction. According to Justice Rehnquist, because a State was under no obligation to provide an appeal, when one was provided it did not automatically follow that counsel must be provided as well.[41] Justice Rehnquist explained that denying a defendant counsel at this stage was not a denial of Due Process because petitioners were not being treated unfairly.

37. *Id.* at 607.
38. *Ross*, 417 U.S. at 609 n.8 (citing 483 F.2d at 665).
39. *Ross*, 417 U.S. at 608.
40. *Id.* at 611.
41. *Id.*

Unfairness, he stated, "results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty."[42]

Justice Rehnquist then evaluated the issue of counsel provision in light of the Equal Protection clause. Equal Protection requires that States not maintain unreasoned distinctions between arguably indistinguishable classes of people. He explained, "The State cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all by virtue of his indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal."[43] But Justice Rehnquist emphasized that the question was one of degrees, not absolutes. The state appellate system must be free of unreasoned distinctions, but did not require "absolute equality or precisely equal advantages."[44]

In the end Justice Rehnquist concluded that the Equal Protection clause did not require North Carolina to provide indigents with counsel for discretionary appeals such as state habeas corpus. Although "a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review"[45] might be helpful, Justice Rehnquist explained that the handicap presented by the attorney's absence in this situation was far less than it would be if an indigent was denied counsel on his first appeal of right.[46] He recounted that the State's duty was to insure the convicted defendant has "an adequate opportunity to present his claims fairly in the context of the State's appellate process."[47] The State was not required to duplicate the arsenal of forces a wealthy prisoner could marshal in the effort to reverse his conviction.

Justice Rehnquist found that the system as it existed fulfilled the obligation North Carolina owed its prisoners under the Constitution. He concluded that the "respondent was denied no right secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review."[48]

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42. *Id.*
43. *Id.* at 612.
44. *Id.*
45. *Id.* at 616.
46. *Id.*
47. *Id.*
48. *Id.* at 619.

In the subsequent case of *Bounds v. Smith*[49] the Court again addressed the rights of indigent prisoners on appeal. Here the Court confronted the issue of whether States were required to provide indigent prisoners with law libraries or alternative sources of legal knowledge to protect their right of access to the courts. Reaffirming the importance of a "meaningful appeal" brought out by Justice Rehnquist in *Ross*, the Court answered its inquiry in the affirmative. Writing for the Majority, Justice Marshall explained that ". . . recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful."[50] He recounted that this holding was in keeping with the Court's demonstrated high regard for postconviction proceedings. Justice Marshall continued, "As this court has 'constantly emphasized', habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."[51]

Justice Marshall rebuffed the argument that under the Constitution a State's only duty was to prevent a prisoner's right of access to the court system from being compromised. Instead, he stated, ". . . our decisions have consistently required States to shoulder *affirmative* obligations to assure all prisoners meaningful access to the courts."[52] Although he recognized that a petition for habeas corpus only required setting forth the facts that gave rise to the cause of action, Justice Marshall insisted that, ". . . a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a pro se petitioner."[53] Lastly, Justice Marshall addressed the financial concerns presented by the State. He concluded,

> The cost of protecting a constitutional right cannot justify its total denial . . . The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.[54]

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49. 430 U.S. 817 (1977).
50. *Id.* at 822.
51. *Id.* at 827.
52. *Id.* at 824.
53. *Id.* at 825.
54. *Id.*

Pennsylvania v. Finley[55] was the next case to consider the issue of State-provided counsel for indigents engaging in discretionary appeals. The issue before the Court involved the applicability of the *Anders* procedures[56] to collateral postconviction proceedings. The Court found these procedures inapplicable to collateral appeals because petitioners did not have the right to counsel required before these procedures could apply. Writing for the Court, Justice Rehnquist stated, "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."[57] As in *Ross*, Justice Rehnquist evaluated the issue of counsel provision in light of both the Due Process and Equal Protection clauses. With reference to Due Process, Justice Rehnquist explained, "States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."[58]

He then addressed the "meaningful access" concerns presented under the Equal Protection clause. Specifically referencing his opinion in *Ross*, he stated,

> In *Ross* we concluded that the defendant's access to the trial record and appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review. We think the same conclusion necessarily obtains with respect to postconviction review.[59]

III. *GIARRATANO*

A. *The District Court*

In *Murray v. Giarratano*[60] the issue was whether the state is required to provide prisoners sentenced to death with counsel during postconviction proceedings. Relying on the "meaningful access" language of *Bounds*, the district court held that prisoners sentenced to death in Virginia who requested counsel in state

55. 481 U.S. 551 (1987).

56. *Id.* at 554. These procedures provide a framework of operation for counsel wishing to withdraw from an appeal on the grounds that the case is frivolous.

57. *Id.* at 555.

58. *Id.* at 556.

59. *Id.* at 557.

60. 492 U.S. 1 (1989).

habeas corpus proceedings could have an attorney appointed if they could not afford to independently retain one.[61]

This ruling expanded *Bounds*, which held that states were obligated to provide prisoners with either adequate law libraries or some other form of trained legal assistance to assist with the preparation and filing of meaningful legal documents.[62] The district court in *Giarratano* expanded *Bounds* because it found the *Bounds* premise invalid with respect to Virginia inmates. In *Bounds* the Court assumed that the inmates would be capable of using law libraries to develop legitimate claims.[63] But in *Giarratano*, the district court found that the evidence indicated three reasons why this presumption did not hold up with regard to the Virginia prison population.

First, capital petitioners in Virginia have thirty days from the affirmance of their sentence in which to prepare and submit their writ of habeas corpus. Given the highly restrictive time period, the court found that it was unreasonable to presume that inmates could mount a valid attack absent legal assistance.[64] Second, the court found that the complexity and difficulty of the legal work was beyond the ability of most capital petitioners. Third, the court determined that the emotional constraints on an inmate preparing for death rendered him incapable of performing the complex work required in the compressed time period. Based on these considerations, the court concluded that only the continuous services of an attorney would accord capital petitioners "meaningful access."[65]

The district court's holding that only continuous assistance of counsel would satisfy the "meaningful access" requirement of *Bounds* resulted from an in-depth analysis of the types of assistance Virginia death row inmates were already provided. Two forms of trained legal assistance were available in Virginia at the time *Giarratano* was decided.

First, attorneys were assigned to the various penal institutions to assist inmates "in any matter related to incarceration."[66] At the time *Giarratano* was decided seven institutional attorneys were assigned to meet the legal needs of over two thousand prisoners and not one attorney had helped prepare the habeas corpus petition of a capital petitioner.[67] The evidence at trial

61. *Giarratano*, 668 F. Supp. at 517.
62. *Id.* at 512.
63. *Id.*
64. *Id.*
65. *Id.* at 514.
66. *Id.* at 513.
67. *Id.*

indicated that the these attorneys operated as "talking lawbooks"[68] and could not possibly meet the needs of a death row inmate.

The second form of assistance provided by Virginia granted free counsel to inmates who had been residents for a continuous period of six months and who had previously filed a petition containing at least one nonfrivolous claim.[69] Because prisoners were not receiving the assistance of the institutional attorneys when preparing their petitions, the probability of raising a nonfrivolous claim was extremely slim. Couple this with the fact that Virginia law stated that all claims known to the petitioner at the time of filing must be included in the petition or they may not be raised in a subsequent filing, and the inadequacy of the Virginia legal assistance system was apparent.

The district court concluded that the timing of counsel appointment was the primary problem with the Virginia system. By the time counsel was appointed, the inmate must already have submitted a petition containing all possible nonfrivolous claims. Therefore, he did not receive the assistance of counsel during the critical period of claim development.[70] The court summarized by stating that Virginia's pre-petition legal assistance program was too limited, while post-petition assistance was untimely.[71] Due to these limitations, Virginia's district court held that continuous assistance of counsel was required to truly give credence to the "meaningful access" mandate of *Bounds*.

B. *The Appeals*

On appeal, *Giarratano* was reversed by a panel of the Fourth Circuit with regard to providing counsel in state habeas corpus proceedings. Relying heavily on *Finley* (decided subsequent to the district court's ruling) the court concluded that the district court's extension of *Bounds* to mandate attorney representation for capital petitioners was constitutionally insupportable.[72]

But on reconsideration *en banc*, the Fourth Circuit reversed the panel decision and affirmed the district court. Unlike the panel, which refused to distinguish *Finley* on the ground that the case did not involve the death penalty, the *en banc* court found this distinction extremely significant. The court correctly pointed out that *Finley* did not involve "meaningful access" as dis-

68. *Id.* at 514.
69. *Giarratano*, 668 F. Supp. at 514, 515.
70. *Id.* at 515.
71. *Id.*
72. *Giarratano*, 836 F.2d 1421, 1423 (4th Cir. 1988).

cussed in *Ross* and expanded on in *Bounds*. But the most important difference between *Finley* and *Giarratano* was that *Finley* was not a death penalty case.[73] The court stated,

> Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post[-]conviction proceedings when a prisoner under the sentence of death could not afford an attorney.[74]

C. *The Supreme Court*

On appeal to the United States Supreme Court, the Fourth Circuit was reversed. Writing for the majority, Justice Rehnquist stated, "In *Finley* we ruled that neither the Due Process Clause of the Fourteenth Amendment nor the Equal Protection guarantee of 'meaningful access' required the State to appoint counsel for indigent prisoners seeking state postconviction relief."[75] The Court's opinion in *Giarratano* effectively affirmed the holding in *Finley*, although the rationale for the Court's holding in *Giarratano* differed slightly.

Initially, Justice Rehnquist addressed the defendants' first argument — that "the Constitution requires postconviction cases involving the death penalty to be treated differently from other postconviction cases."[76] Defendants argued that *Finley* was not dispositive of the issue of the respondents' right to counsel in habeas proceedings because *Finley* did not involve the death penalty. Along the same lines, defendants' stated that Due Process required that counsel be provided in postconviction proceedings "because of the nature of the punishment and the need for accuracy."[77]

Justice Rehnquist began his opinion by agreeing with the respondents in their contention that "death was different." He stated, "We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death . . . [t]he finality of the death penalty requires 'a greater degree of reliability' when it is imposed."[78] Justice Rehnquist then distinguished prior case law from the issue in *Giarratano* by explaining that the holdings to which he referred all dealt with the trial

73. *Giarratano*, 847 F.2d 1118, 1121 (1988).
74. *Id.* at 1122 n.8.
75. *Giarratano*, 492 U.S. at 10.
76. *Id.* at 12 n.4.
77. *Id.* at 13.
78. *Id.*

stage of adjudication. He noted, "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal."[79] Justice Rehnquist explained that at the trial stage, the safeguards provided by the Eighth Amendment assured the reliability of process by which the death penalty was imposed. Therefore, he concluded that *Finley* applied no differently in capital cases than it did in noncapital cases.[80]

Justice Rehnquist went on to address the other basis for the Fourth Circuit's *en banc* holding — the perceived tension between *Finley's* holding and the implications of *Bounds.* He stated that in reality no such tension existed because *Finley* was decided subsequent to *Bounds.* He recounted, ". . . it would be a strange jurisprudence that permitted the extension of that [*Bounds*] holding to partially overrule a subsequently decided case such as *Finley* which held that prisoners seeking judicial relief from their sentence in state proceedings were not entitled to counsel."[81] To dispel any remaining confusion, Justice Rehnquist concluded by stating, ". . . we now hold that *Finley* applies to those inmates under sentence of death as well as to other inmates, and that holding necessarily imposes limits on *Bounds.*"[82]

VI. *GIARRATANO* ANALYSIS: THE PAST SET THE STAGE

As should be apparent, an enormous amount of tension exists between the holdings of *Ross, Bounds, Finley* and *Giarratano.* Much of this disparity can be accounted for by taking note of the changing composition of the Court over the period in which these cases were decided. In *Ross,* the Majority consisted of Justices Rehnquist, Burger, Stewart, White, Blackmun and Powell. Justices Douglas, Brennan and Marshall dissented. In contrast the *Bounds* Majority consisted of Justices Brennan, Marshall, Blackmun, Powell, and White with Justices Rehnquist, Burger and Stewart dissenting. By *Finley,* the Majority consisted of Justices Rehnquist, White, Powell, Blackmun, O'Connor and Scalia with Justices Brennan, Marshall and Stevens dissenting.

Throughout this time period Justices Marshall and Brennan remained committed to expanding the rights of indigent defendants while Justices Rehnquist remained committed to restricting

79. *Id.* at 10.
80. *Id.*
81. *Id.* at 19.
82. *Id.* at 19, 20.

them. The outcomes of these cases reflect the shifts in the Court Majority from conservative to liberal and then back to conservative where it remains today. Therefore, the holding in *Giarratano* comes as no surprise given Court's current composition. What is surprising is that the holding was a plurality,[83] not a majority, which may signal the possibility of expanded indigent rights in the future.

The Supreme Court's holding in *Giarratano* represents the most successful attempt to date by Justice Rehnquist to increase judicial efficiency. But given the tension between *Ross*, *Bounds*, and *Finley*, one wonders how long Justice Rehnquist's reign will last.

A. Ross

The Court in *Ross* held that prisoners were not entitled to counsel beyond the first appeal of right. In his opinion, Justice Rehnquist outlined the meaning of both the Due Process and Equal Protection clauses, and found that neither provided a basis for postconviction provision of counsel. With reference to Due Process he stated, ". . . Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty."[84] In his Equal Protection analysis Justice Rehnquist explained, "The State cannot . . . extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have meaningful appeal."[85] He concluded that neither unfairness nor a meaningless ritual results when an indigent defendant is denied representation on discretionary appeal. Lack of attorney assistance merely meant that the petitioner was "somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding."[86] Further, Justice Rehnquist explained, this "handicap" was ". . . far less than the handicap borne by the indigent defendant denied counsel on his initial appeal of right in *Douglas*."[87]

As Justice Rehnquist stated, petitioners denied state-appointed counsel on collateral review are less compromised that they would be were counsel on direct appeal denied. The ques-

83. Justice White, Justice O'Connor, Justice Scalia and Justice Kennedy concurred with Chief Justice Rehnquist in reversing the *en banc* decision of the Fourth Circuit. Justice Stevens, Justice Brennan, Justice Marshall and Justice Blackmun dissented.

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

85. *Id.* at 612.

86. *Id.* at 615.

87. *Id.*

tion, though, should not concern the greater degree of disadvantage petitioners would endure in the absence of counsel on direct appeal. Rather, it seems Justice Rehnquist's analysis should have focused on whether it is fundamentally fair to allow indigent petitioners to proceed through state-provided appeals without appointed representation.

The State, just as a wealthy defendant, comes to court with "counsel assisting . . . in every conceivable manner at every stage in the proceeding."[88] To rationalize that the inequity borne of such an unbalanced confrontation is merely a "handicap" which is "far less" than that borne of a defendant denied counsel on his first appeal seems to ignore the issue at hand; namely that of insuring that the entire appellate process is "fundamentally fair." This concern was echoed by Justice Douglas in his dissent in *Ross*. He stated,

> Douglas v. California was grounded on concepts of fairness and equality. The right to seek discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the "same concepts of fairness and equality which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals."[89]

Denying counsel to this class of petitioner denies him the ability "to present his claims fairly in the context of the State's appellate process."[90] Admittedly, financial differences between classes of defendants exist that cannot be equalized by the courts or the legislatures. But non-representation on appeal should not be a cross indigent defendants alone must bear merely because they are indigent.

B. Bounds *Dissent*

The Court in *Bounds* held that states were required to provide indigent prisoners with access to the courts that is "adequate, effective and meaningful"[91] by providing them with law libraries or alternative sources of legal assistance. This holding was a clear move by the Court to eliminate financial barriers that denied prisoners their "fundamental constitutional right of access to the courts."[92] Justice Rehnquist, though, disagreed with

88. *Id.* at 611.
89. *Id.* at 620.
90. *Id.* at 616.
91. *Bounds*, 430 U.S. at 822.
92. *Id.* at 828.

the Majority and his dissent signaled the path the Court would take in the future. He stated,

> [I]f a prisoner incarcerated pursuant to a final judgement of conviction is not prevented from physical access to the federal courts . . . he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way.[93]

Despite his heated disagreement with the Majority's holding in *Bounds*, Justice Rehnquist admitted that state-appointed representation for prisoners seeking collateral review was "the logical destination of the Court's reasoning today."[94] But when the opportunity to extend *Bounds* arose in *Finley*, he made it clear that the Court's future direction would not include requiring states to provide attorneys for indigent petitioners engaged in discretionary appeals.

C. Finley

With frequent reference to *Ross*, Justice Rehnquist wrote the opinion for the *Finley* Majority, stating, "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."[95] His opinion concluded with the statement, "States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."[96]

In light of the language used by Justice Rehnquist in *Finley*, the holding in *Giarratano* seems little more than a foregone conclusion. Although *Finley* did not involve the death penalty, and did not have an indigent's right to counsel at issue, its holding clearly would govern subsequent cases. Justice Rehnquist's eagerness to address the issue of state-appointed counsel was apparent, and signaled that the Court would continue to travel the narrow path *Ross* began.

V. RAMIFICATIONS OF *GIARRATANO*

Instead of extending *Bounds* to allow counsel to be provided to indigents in post-conviction proceedings, the Court in *Giarratano* chose to limit meaningful access to the judicial system to,

93. *Id.* at 840.
94. *Id.*
95. *Finley*, 481 U.S. at 555.
96. *Id.* at 556.

at best, five percent of all inmates.[97] The words of Justice Marshall in *Bounds*, ". . . the cost of protecting a constitutional right cannot justify its total denial,"[98] had obviously fallen on deaf ears.

In her concurrence Justice O'Connor alludes to the substantive issue behind the *Giarratano* decision. She states, "Beyond the requirements of *Bounds*, the matter is one of . . . the allocation of *scarce legal resources*."[99] (emphasis added). The Court reduced the issue of attorney representation for a person sentenced to die to a question of fiscal prudence, despite the truth uncovered by the *Douglas* Court thirty years ago; "There can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"[100]

Although the fiscal ramifications of providing state-appointed attorneys do merit some consideration, as the district court in *Giarratano* stated, ". . . the cost of protecting a constitutional right cannot in itself be dispositive."[101] Even when the financial ramifications of providing counsel on discretionary appeals are evaluated, they fail to indicate that counsel should be denied.

The district court in *Giarratano* noted that the system already present in Virginia appointed counsel to inmates who were able to file habeas corpus petitions containing non-frivolous claims. Because of this fact, the court found that the added cost of providing attorneys for inmates who request them prior to filing their petitions "should not impose an onerous burden on the Commonwealth."[102] Consequently, the court concluded that, "[t]he stakes are simply too high for this Court not to grant, at least in part, some relief."[103]

In writing for the Majority in *Giarratano*, Justice Rehnquist clearly took a stand contrary to that of the district court. Fiscal concerns, although not articulated until Justice O'Connor's concurrence, were unquestionably at the forefront of the Court's consideration. The result of not requiring legal assistance during postconviction proceedings for indigent capital petitioners will be swift judicial review. Unfortunately, a substantial risk of

97. In *Hooks v. Wainwright*, the district court found that 95% of the general inmate population in custody of the Florida Correctional System were unable to afford counsel. 536 F. Supp. at 1338.

98. *Bounds*, 430 U.S. at 824.

99. *Giarratano*, 492 U.S. at 12.

100. Douglas v. California, 372 U.S. 353, 355 (1963).

101. *Giarratano*, 668 F. Supp. at 516 n.3.

102. *Id.* at 515.

103. *Id.*

error also accompanies the expedience sought by the *Giarratano* Court.

A commission on federal habeas corpus cases chaired by Justice Lewis Powell issued the statement, "Because, as a practical matter, the focus of review in capital cases often shifts to collateral proceedings, the lack of adequate counsel creates severe problems."[104] Justice Stewart, dissenting in *Bounds*, stated that in over twenty years of adjudicating *pro se* habeas corpus petitions he has found that law libraries rarely provide prison inmates with "meaningful access" to the federal courts.[105] *Giarratano* does promote judicial efficiency, but the price paid for it may be substantially higher than anticipated.

But the most disturbing finding on review of the *Giarratano* case may be the proposition made by Justice Rehnquist that *Finley* should apply equally to capital and noncapital cases.[106] The opinions of the lower courts in the *Giarratano* case alone accord credence to the argument that death penalty jurisprudence calls for a different standard of review in death penalty cases. *Giarratano* was a plurality,[107] not a majority, and the primary issue that set the Justices apart was the fact that the petitioner was sentenced to death.

This disparity between the Justices arises from well-founded concerns that death penalty cases should be evaluated differently. Historically, case law involving the death penalty has been anything but clearly affirmative of the compulsory application of noncapital holdings to capital cases. Time and again, courts have distinguished death. In *Woodson v. North Carolina* the Court stated that death was "quantitatively" different from prison, no matter what the length of incarceration happened to be.[108] Justice O'Connor, in *California v. Ramos*, observed that the Court recognized a "qualitative" difference between death and other punishments.[109] But the district court in *Giarratano* may have expressed the difference best, stating,

> The 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

104. JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 4 (1989).

105. 430 U.S. at 836.

106. 492 U.S. at 9.

107. *See supra* note 83.

108. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

109. California v. Ramos, 463 U.S. 992, 998-99 (1983).

— to leave to, what is at best, a patchwork system of assistance."[110]

In sum, only one argument needs to be made: due process of law requires counsel in postconviction proceedings involving the death penalty. Justice Stevens focused his entire dissent in *Giarratano's* on the fundamental unfairness inherent in forcing a capital petitioner to initiate postconviction appeals "without counsel's guiding hand."[111] First, he cited the fundamental difference between *Finley* and *Giarratano*. "These respondents, like petitioners in *Powell* but unlike respondent in *Finley*, have been condemned to die."[112]

Second, Justice Stevens addressed the difference between the collateral process at work in *Finley* and the one present in Virginia. As previously discussed,[113] in Virginia claims usually heard on direct review are adjudicated in postconviction proceedings. These postconviction proceedings often provide the first opportunity for the defendant to raise allegations that trial or appellate counsel provided constitutionally ineffective assistance. More importantly, Virginia's postconviction process is the first place that claims barred by prior counsel's ineffective assistance may be raised.

Last, Justice Stevens cited the difference between death row inmates and others in the prison population. *Finley*, he said, does not accurately reflect the plight of the death row inmate. Although the system may force an ordinary prisoner to mount his own postconviction attacks, the capital petitioner is in a different position. The complexity of this specialized area of the law requires the assistance of an attorney.[114]

Justice Stevens wrapped up his accurate dissent with the elegant, pointed conclusion, "Simple fairness requires that this judgment be affirmed."[115]

VI. CONCLUSION

By denying capital petitioners stated-appointed counsel beyond their first appeal, the Supreme Court advances the admittedly important goal of judicial efficiency. But the question remains, at what cost? Every evaluation undertaken by the Supreme Court must address jurisprudential concerns as well as

110. *Giarratano*, 668 F. Supp. at 515.
111. *Giarratano*, 492 U.S. at 19.
112. *Id.*
113. *Id.* at 25.
114. *Id.* at 27-28.
115. *Id.* at 32 (Stevens, J., dissenting).

pragmatic considerations. An evaluation which fails to attribute weight to either side risks advancing a societal norm contrary to the foundation on which our country was based. *Giarratano* erects a substantial barrier to postconviction access for the indigent capital petitioner, and the caseloads of state and federal courts across the country will be lighter as a result. But the likelihood of judicial inaccuracy in death penalty cases will be greater. If the price of potentially fatal inaccuracies was worth a faster system, the Court reached the right decision.