

Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings

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GIARRATANO IS A SCARECROW: THE RIGHT TO COUNSEL IN STATE CAPITAL POSTCONVICTION PROCEEDINGS

Eric M. Freedman†

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INTRODUCTION

In the apocryphal Case of the Kettle, one thing is plain: The defendant has no liability for the damage to the plaintiff's pot. This may be because he never borrowed it, or because it was cracked when he borrowed it, or because it was sound when he returned it.¹ *Murray v.*

† Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra University School of Law (lawemf@hofstra.edu). B.A., Yale University, 1975; M.A., Victoria University of Wellington (New Zealand), 1977; J.D., Yale University, 1979. As described in more detail *infra* note 17, I was peripherally involved as counsel in the *Giarratano* litigation. More recently, I served as Reporter for the American Bar Association's latest revision of its death penalty representation guidelines. See GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), reprinted in 31 HOFSTRA L. REV. 913, 915 (2003); see also *infra* notes 13–14 and accompanying text. The opinions expressed in this Article, however, are attributable solely to me.

This Article originated as a presentation at a scholarly conference entitled "The Great Writ: Developments in the Law of Habeas Corpus," which took place at Cornell Law School on April 2, 2005. The Article has benefited from the insights of my fellow participants, from the data collection efforts of Paul Morrow of the Tennessee Post Conviction Defender's Office and Federal Public Defender Randy Bauman, and from the skillful research support of Cindie Leigh of the Deane Law Library of Hofstra Law School, Richard Corbi of the Hofstra Law School Class of 2005, and Michael Weiner. The Article seeks to take account of developments through January 2006.

¹ See ROBERT C. CASAD ET AL., CIVIL PROCEDURE 466 (2d ed. 1989). The borrowed object has also appeared over the years as a lawn mower, see *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990) (Easterbrook, J.), a pail, see *Dawson v. Pogue*, 22 P. 637, 644 (Or. 1889) (per curiam), and a skillet, see *Rogers v. Ratcliff*, 48 (3 Jones) N.C. 225, 230 (1855).

*Giarratano*² is a similar case. Although courts continue citing to it for the proposition that there is no right to counsel in state capital post-conviction proceedings,³ when one reaches the legal bottom line by any of the several available routes that proposition proves to be as dead as “some ghoul in a late-night horror movie.”⁴ Indeed, I will argue that it was never alive in the first place. Like *Bowers v. Hardwick*⁵ before *Lawrence v. Texas* overruled it,⁶ *Giarratano* is a scarecrow, whether because in concrete instances the decision actually supports rather than negates the existence of the claimed right,⁷ or because legislative changes have made the case irrelevant,⁸ or because it should be overruled either as wrong when decided⁹ or wrong now.¹⁰

But unless judges, lawyers, and legislators recognize that *Giarratano* is an illusion, they will permit themselves to be scared off the path of basic justice, with fatal consequences in the real world.¹¹ The

² 492 U.S. 1 (1989).

³ See, e.g., *Morris v. Dretke*, 90 Fed. Appx. 62, 69 (5th Cir.) (per curiam) (upholding the lower court’s decision that because “there is no constitutional right to an attorney in state post-conviction proceedings, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings”), cert. denied, 543 U.S. 823 (2004); *King v. State*, 808 So. 2d 1237, 1245 (Fla. 2002) (per curiam) (holding that the “claim must fail because both Florida law and the Federal law makes clear that a defendant has no constitutional right to effective collateral counsel”).

⁴ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

⁵ 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶ 539 U.S. 558.

⁷ See *infra* Part IV; cf. Donald A. Dripps, *Bowers v. Hardwick and the Law of Standing: Noncases Make Bad Law*, 44 EMORY L.J. 1417, 1418 (1995) (noting that *Hardwick* did not face actual injury, and arguing that the Court would have reached the opposite result “in a concrete case in which an individual suffered actual injury solely on account of private consensual sexual behavior”).

⁸ See *infra* Part II; cf. *Lawrence*, 539 U.S. at 572–73 (noting that the number of states with statutes banning sodomy had fallen from twenty-five at the time of *Bowers* to thirteen at the time of *Lawrence*, and further noting that states that had retained such laws exhibited a “pattern of nonenforcement”).

⁹ Cf. *Lawrence*, 539 U.S. at 578 (holding that “*Bowers* was not correct when it was decided”).

¹⁰ See *infra* notes 80–83 and accompanying text; cf. *Lawrence*, 539 U.S. at 578 (holding that *Bowers* “is not correct today”); Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1358 (1997) (“As a doctrinal matter, the equal protection holding of *Romer v. Evans* [517 U.S. 620 (1996)] does not overrule the due process holding of *Bowers v. Hardwick*. But the *Bowers v. Hardwick* that decided all constitutional issues involving lesbians and gay men is dead.”); Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, Even Though Evans v. Romer Didn’t*, 49 DUKE L.J. 1559, 1561 (2000) (“[T]he premises relied upon by the Court in 1986 are no longer valid today.”); Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 82 (“It is . . . difficult to see how *Bowers*’s validation of same-sex sodomy laws survives the Court’s analysis [in *Romer*].”).

¹¹ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 726–27, 752 (1991) (holding that a capital petitioner had forfeited federal habeas corpus review because his counsel filed the petitioner’s appellate papers in state postconviction proceedings three days late, and rejecting the petitioner’s attack on the effectiveness of his counsel by stating: “There is no

purpose of this Article is to expose the *Giarratano* decision for the chimeras that it is.

Part I reviews the *Giarratano* litigation and several of the questions that the Supreme Court left unaddressed.

Part II describes the subsequent actions of the states, which are of considerable legal significance. Notably, every active death penalty state today, with the exception of Alabama, provides for the pre-filing appointment of counsel to assist indigent death row inmates in the preparation of postconviction petitions challenging their convictions and sentences.¹² The remaining Parts discuss legal theories, relying throughout on the current edition of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Because they represent the mainstream views of the legal profession,¹³ ABA standards in the criminal justice field have long been extremely influential with the Court,¹⁴ and this particular document provides significant empirical support for the arguments that follow.

Part III points out that *Giarratano* has been seriously overread. The controlling opinion of Justice Kennedy recognizes that capital postconviction petitioners have a right to counsel in certain circumstances, and those circumstances exist in today's world.

constitutional right to an attorney in state post-conviction proceedings. . . . Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings."). *Coleman* is not only "intellectually and practically" untenable but also "morally indefensible." Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 553, 568 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter AMERICA'S EXPERIMENT]. Recent DNA testing linking *Coleman* to the crime for which he was convicted, see James Dao, *DNA Ties Man Executed in '92 to the Murder He Denied*, N.Y. TIMES, Jan. 13, 2006, at A14, does not change this assessment. *Coleman* may well have had meritorious postconviction claims not dependent upon factual innocence, see generally JOHN C. TUCKER, MAY GOD HAVE MERCY (1997) (comprehensively describing the case), and in any event this testing should have been done before the execution rather than years afterward.

¹² See *infra* note 45.

¹³ The Acknowledgments and Introduction sections to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases list the numerous experts and institutions that contributed to the Guidelines' formulation. See GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), reprinted in 31 HOFSTRA L. REV. 913, 914-16 (2003) [hereinafter GUIDELINES]. The result of this extended process of consensus building was that the Guidelines arrived on "the floor of the ABA House of Delegates with the co-sponsorship of a broad spectrum of ABA entities and passed without a single dissenting vote." Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 912 (2003); see Russell Stetler, *Beyond Wiggins: Tipping Points And Evolving Standards*, THE CHAMPION (Wash., D.C.), July 2005, at 49 (noting the importance of the fact that the Guidelines "reflect the current consensus among practitioners committed to quality representation").

¹⁴ Such "standards [are ones] to which we long have referred as 'guides to determining what is reasonable'" when considering the performance of defense counsel. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); see *Rompilla v. Beard*, 545 U.S. ___, ___, 125 S. Ct. 2456, 2466 (2005).

Part IV focuses on due process issues. Part IV.A argues that the *Giarratano* Court should have applied the procedural due process framework of *Mathews v. Eldridge*.¹⁵ Had it done so, or were it to apply its more recent analysis of the due process right to counsel in criminal proceedings, or revive its older analysis based on equal protection, the constitutional right would be secure. Moreover, Part IV.B argues, once a state decides to create a statutory entitlement to capital post-conviction counsel, due process precludes it from arbitrarily divesting the right by providing ineffective counsel.

Part V discusses the Eighth Amendment and the changes in the legal and factual environments since *Giarratano*. These changes show the case to be inconsistent with contemporary standards of accuracy with respect to capital determinations.

Part VI considers whether *Giarratano* would pass muster under the legal norms applicable to the democracies of Europe and concludes that it would not.

The Article concludes by urging judges, lawyers, and legislators to recognize that *Giarratano* is a lifeless husk and calling upon the Supreme Court to inter it.

I

FROM GIARRATANO TO *GIARRATANO*

Giarratano began when Joseph M. *Giarratano*, a Virginia death row inmate and remarkable human being,¹⁶ commenced a § 1983 action in the United States District Court for the Eastern District of Virginia on behalf of himself and his fellow prisoners in which he asserted their constitutional right to counsel in collateral challenges to their capital convictions and sentences.¹⁷ Spurred into action by

¹⁵ 424 U.S. 319 (1976).

¹⁶ See Colman McCarthy, *Prisoner's Life Is Radically Different from Time of His '79 Conviction*, VIRGINIAN-PILOT, Feb. 26, 2004, at B11.

¹⁷ *Giarratano* filed the complaint on July 3, 1985. See Complaint and Jurisdiction at 1, *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986) (Civ. A. No. 85-0655-R) (on file with author), *aff'd en banc*, 847 F.2d 1148 (4th Cir. 1988), *rev'd*, 492 U.S. 1 (1998). The filing became official on August 6, 1985, when the judge entered an order permitting *Giarratano* to go forward *in forma pauperis*. See *Giarratano v. Murray*, Civ. A. No. 85-0655-R (E.D. Va. Aug. 6, 1985) (on file with author). The order required the defendant, the Director of the Virginia State Department of Corrections, to respond by August 26, and it granted *Giarratano* twenty days from receipt of the response to reply. See *id.*

On August 19, 1985, *Giarratano* wrote to the assigned district judge, Robert R. Merighe, Jr., regarding the transfer of one of his co-plaintiffs, Earl Washington, Jr., to another facility in anticipation of his September 5 execution. See Letter from Joseph M. *Giarratano* to Judge Robert R. Merighe, United States District Court (Aug. 19, 1985) (on file with author). As *Giarratano* told the judge,

Mr. Washington has all of his State post-conviction remedies open to him: unfortunately Mr. Washington is mentally incapable of acting in his own behalf. The Virginia Supreme Court has denied a request to appoint coun-

this development, pro bono lawyers who had been considering options for systemic attacks on death penalty systems in various jurisdictions decided to advance Giarratano's proposition in the form of a class action and proceeded to reconfigure his original lawsuit accordingly.¹⁸

Giarratano's § 1983 case was tried before Judge Mehrige on July 10–11, 1986. He heard extensive testimony from defense lawyers, capital prisoners, government officials, institutional attorneys designated to assist death row inmates, as well as from Deans and Giarratano himself. The testimony, supplemented by various affidavits, was essentially undisputed. Postconviction representation was both critical to the inmates' cases and legally very complex.¹⁹ The government employed private lawyers on a part-time basis to "assist," but not actually represent, Virginia's prisoners,²⁰ and, in fact, these lawyers had never

sel to assist him in persuing [sic] a petition for state habeas corpus; or to stay the mandate. Because of his indigency he cannot retain counsel.

Ms. Marie Deans, Director of the Virginia Coalition on Jails and Prisons, has spoken with well over 50 attorneys in hopes that one would assist on a *pro bono* basis. To date all of these efforts have failed. The situation as described above has become common here of late.

Id. at 1. Regarding the schedule set by the court, Giarratano noted, "[i]t seems that my plaintiff will be executed before any response by me could be filed; or before any proper State relief could be sought." *Id.* On September 5, the court entered an order deeming this letter to be an amendment to the complaint. *See Giarratano v. Murray*, Civ. A. No. 85-0655-R (E.D. Va. Sept. 5, 1985) (on file with author).

Meanwhile, Giarratano brought Washington's plight to the attention of Martha Geer, then a junior associate at the New York law firm of Paul, Weiss, Rifkind, Wharton and Garrison, and now a judge on the North Carolina Court of Appeals. *See MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR. 83–84 (2003)*. I was a senior associate at the same firm, and Geer raised the matter with me. As described in Eric M. Freedman, *Earl Washington's Ordeal*, 29 *HOFSTRA L. REV.* 1089, 1099 (2001), I thereupon became part of a legal team that obtained a stay of Washington's execution on August 27, 1985, nine days before it was to occur. *See EDDS, supra*, at 92; Freedman, *supra*, at 1110–11. Sixteen years of further proceedings led to his exoneration on the basis of DNA testing and, after the intervention of two Governors, resulted in his release on February 12, 2001. *See Freedman, supra*, at 1111–12. Washington subsequently filed a civil rights suit against Virginia officials for fabricating the case against him. *See Washington v. Wilmore*, 407 F.3d 274 (4th Cir. 2005); *Va. Dep't of State Police v. Washington Post*, 386 F.3d 567 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1706 (2005). This suit is ongoing and, along with a number of co-counsel, I continue to represent him.

Because of my involvement in Washington's case, I frequently consulted with both the legal team representing the *Giarratano* class and the one representing Giarratano individually in his efforts to win relief from his own conviction and death sentence. The Governor of Virginia subsequently commuted that sentence, *see B. Drmmmond Ayres Jr., Virginia Governor Blocks an Execution*, *N.Y. TIMES*, Feb. 20, 1991, at A16, and I am now assisting counsel seeking to secure his release on parole.

¹⁸ *See Giarratano*, 668 F. Supp. at 512; EDDS, *supra* note 17, at 84–87.

¹⁹ *See Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law* at 13–18, *Giarratano*, 668 F. Supp. 511 (Civ. A. 85-0655-R) (on file with author).

²⁰ Lawyers sometimes provided inmates with photocopies of specifically requested cases, *see id.* at 44–45, but they could not actually appear as counsel for the inmates, *see id.* at 36–38.

filed a postconviction petition on behalf of a death row inmate, many of whom had been without representation for long periods.²¹ Moreover, the lawyers' "jurisdiction" did not extend to inmates in the "Death House," a basement in the Virginia State Penitentiary in which prisoners were housed for the fifteen days prior to execution.²² Inmates only had access to full-fledged legal representation if a trial judge, after reviewing a pro se petition for legal merit, exercised discretion to appoint counsel.²³ Thus, as the responsible Virginia Attorney General admitted on the witness stand, if Paul, Weiss had not intervened, the state would have executed Earl Washington, a mentally retarded man who could not file a pro se petition.²⁴ In short, the testimony revealed that the only actual prefiling representation death row inmates obtained was from volunteer members of the private bar.

This lack of legal representation viewed in light of the complex and often frenzied legal work required to avert an execution²⁵ led the district court to rule that Virginia failed to provide the meaningful access to the courts that the Constitution requires.²⁶ Accordingly, the court ordered the state to provide for the prefiling appointment of

²¹ See Plaintiffs' Post-Trial Memorandum of Law at 9, *Giarratano*, 668 F. Supp. 511 (Civ. A. No. 85-0655-R) (on file with author).

²² See *id.* at 10 n.6; Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law, *supra* note 19, at 31.

²³ See Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law, *supra* note 19, at 36, 49. If the inmate had obtained volunteer counsel to file the petition, the Government would object to an appointment on the grounds that it was unnecessary. See *id.* at 33.

²⁴ See Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law, *supra* note 19, at 31-32; Plaintiffs' Post-Trial Memorandum of Law, *supra* note 21, at 8 n.5; Edds, *supra* note 17, at 94 (quoting transcript); Geraldine Szott Moohr, Note, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 765 n.5 (1990).

²⁵ See Freedman, *supra* note 17, at 1098 (noting that staying Washington's execution required a team of Paul, Weiss attorneys to work "a virtually sleepless week" in order to file "a 1600-page petition for state habeas corpus, along with several applications for ancillary relief"); see also EDDS, *supra* note 17, at 89-92 (detailing the Paul, Weiss attorneys' grueling schedule and rigorous work leading up to the stay in Washington's execution).

²⁶ See *Giarratano*, 668 F. Supp. at 513-15 (relying on *Bounds v. Smith*, 430 U.S. 817 (1977)). In its very spare opinion, the district court chose to confine itself to this legal theory although a number of others had been pressed upon it. See *Giarratano v. Murray*, 847 F.2d 1118, 1120 & n.2 (4th Cir. 1988) (en banc), *rev'd*, 492 U.S. 1 (1989).

The Supreme Court plurality later denigrated the factors relied upon by the district court as unworthy of the status of factual findings. See *Murray v. Giarratano*, 492 U.S. 1, 11-12 (1989) (plurality opinion). In light of the extensive evidentiary record below, this treatment was, as the dissent noted, disingenuous at best. See *id.* at 27 n.19 (Stevens, J., dissenting). The plurality's approach was based upon a concern that if local circumstances were given weight, "a different constitutional rule [might] apply in a different State if the district judge hearing that claim reached different conclusions." *Id.* at 12 (plurality opinion). But the plurality did not explain what would be anomalous about ruling that one state met its access obligations while another did not.

counsel for indigent death row inmates desiring to file state habeas corpus petitions.²⁷

A divided Fourth Circuit panel reversed the district court's decision,²⁸ and then in a vote of six to four, the en banc court reinstated it.²⁹ Relying on the factual record compiled below, the en banc majority determined that the district court had correctly required the pre-filing appointment of an attorney because "only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights could provide death row inmates the meaningful access to the courts guaranteed by the Constitution."³⁰ The Fourth Circuit's only real hesitation stemmed from the Supreme Court's recent ruling in *Pennsylvania v. Finley*³¹ that the Constitution did not require appointed counsel in state postconviction proceedings to follow the procedures of *Anders v. California*³² if a client's position lacked merit,³³ since the Constitution did not require states to appoint counsel in such proceedings at all.³⁴ But in the end, the Fourth Circuit decided that because *Finley* was not a case about meaningful access to the courts and did not involve the death penalty,³⁵ it did not apply to "the unique circumstances of post-conviction proceedings involving a challenge to the death penalty."³⁶

Four Supreme Court Justices would have affirmed the en banc ruling of the Fourth Circuit because "Virginia's procedure for collateral review of capital convictions and sentences [does not assure] its indigent death row inmates an adequate opportunity to present their claims fairly."³⁷ But Chief Justice Rehnquist, writing for a plurality consisting of himself and Justices White, O'Connor, and Scalia, concluded that "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases."³⁸ Rather, any need for additional safeguards in capital cases should be met through the Eighth Amendment's rules governing the trial phase of such cases.³⁹

Justice Kennedy concurred in the judgment only and wrote separately that

²⁷ *Giarratano*, 668 F. Supp. at 517.

²⁸ See *Giarratano v. Murray*, 836 F.2d 1421, 1428 (4th Cir.), *rev'd en banc*, 847 F.2d 1118 (4th Cir. 1988), *rev'd*, 492 U.S. 1 (1989).

²⁹ See *Giarratano*, 847 F.2d at 1119.

³⁰ *Id.* at 1120.

³¹ 481 U.S. 551 (1987).

³² 386 U.S. 738 (1967).

³³ See *Finley*, 481 U.S. at 557.

³⁴ See *id.*

³⁵ See *Giarratano*, 847 F.2d at 1122.

³⁶ *Id.*

³⁷ See *Murray v. Giarratano*, 492 U.S. 1, 32 (1989) (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.).

³⁸ *Id.* at 10 (plurality opinion).

³⁹ See *id.*

[t]he requirement of meaningful access can be satisfied in various ways While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief. I am not prepared to say that this scheme violates the Constitution.

On the facts and record of this case, I concur in the judgment of the Court.⁴⁰

Justice O'Connor joined Justice Kennedy's opinion, as well as that of the plurality, writing separately that she did not view the two as inconsistent.⁴¹

Thus, the Court's judgment turned on Justice Kennedy's conclusion that "on the facts and record of this case"⁴² Virginia had met its constitutional duty. To read *Giarratano* as holding that states have no obligation to provide postconviction counsel to death row inmates is to misread it. On the contrary, five, and perhaps six, Justices plainly believed that states do have such an obligation.

II

THE AFTERMATH OF *GIARRATANO*

Giarratano was not received well. The scholarly community condemned it⁴³ and the states responded uneasily. At the time of the decision only eighteen of the thirty-seven states with the death penalty automatically appointed defense counsel in capital postconviction proceedings.⁴⁴ Today, thirty-three of the thirty-seven death penalty states do so.⁴⁵ On the other hand, only fourteen of those thirty-three

⁴⁰ *Id.* at 14–15 (Kennedy, J., concurring).

⁴¹ *Id.* at 13 (O'Connor, J., concurring).

⁴² *Id.* at 15 (Kennedy, J., concurring).

⁴³ See, e.g., Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 606 (1994) (describing the plurality's view as "the short-weighting of fundamental constitutional rights so as to skew the scales of criminal justice and cheapen the value of human life"); Moohr, *supra* note 24 (concluding that the Court erred); Scott Elliott Rogers, Note, *Limiting the Relief Available to Indigent Death Row Inmates Denied Meaningful Access to the Courts: Murray v. Giarratano*, 109 S. Ct. 2765 (1989), 17 FLA. ST. U. L. REV. 399, 399 (1990) (concluding that "the decision is supported by neither precedent nor policy"); see also Michael A. Mello, *Is There A Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065, 1067 (1989) (arguing that the Court should rule in *Giarratano*'s favor).

⁴⁴ *Giarratano*, 492 U.S. at 10 n.5 (plurality opinion).

⁴⁵ See ARIZ. R. CRIM. P. 32.4(c); ARK. CODE ANN. § 16-91-202(a)(1)(A)(i) (2006); CAL. GOV'T CODE § 27706 (West 1988); COLO. REV. STAT. § 16-12-205(1) (2004); CONN. GEN. STAT. ANN. § 51-296 (West 2005); FLA. STAT. ANN. § 27.702 (West Supp. 2006); IDAHO CRIM. R. 44.2; 725 ILL. COMP. STAT. ANN. 5/122-2.1 (LexisNexis 2006); IND. CODE ANN. § 33-40-1-2(a) (LexisNexis 2004); KAN. STAT. ANN. § 22-4506(d)(1)(C)(2) (Supp. 2004); KY. REV. STAT. ANN. § 31.110(2)(c) (West 1999); LA. REV. STAT. ANN. 15:149.1 (2005); MD. CODE

states recognize a state statutory or constitutional right to have the appointed counsel be effective.⁴⁶ Moreover, even when made, declarations of rights that “sound so fair”⁴⁷ often consist of pronouncements “[t]hat palter with us in a double sense; [t]hat keep the word of promise to our ear, [a]nd break it to our hope.”⁴⁸ In actuality, “the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment have re-

ANN. CRIM. PROC. § 7-108(a) (LexisNexis 2001); MISS. CODE ANN. § 99-39-23(9) (West Supp. 2005); MO. R. CRIM. P. 24.036(a); MONT. CODE ANN. § 46-21-201(3)(b)(i) (2005); NEB. REV. STAT. ANN. § 23-3402(1) (LexisNexis 2005); NEV. REV. STAT. ANN. § 3-34.820 (LexisNexis 2005); N.J. STAT. ANN. § 2A:158A-5 (West Supp. 2005); N.M. STAT. ANN. § 31-16-3 (LexisNexis 2004); N.C. GEN. STAT. ANN. 7A-451(c) (LexisNexis 2005); OHIO REV. CODE ANN. § 2953.21(I)(1) (LexisNexis 2003); OKLA. STAT. ANN. tit. 22, § 1355.6 (West 2003); OR. REV. STAT. § 138.590 (2003); PA. R. CRIM. P. 904(G)(1); S.C. CODE ANN. § 17-27-160(B) (West 2003); S.D. CODIFIED LAWS § 21-27-4 (1987); TENN. SUP. CT. R. 13(d)(1)(D); TEX. CODE CRIM. PROC. CODE ANN. art. 11.071(2) (West Supp. 2005); UTAH CODE ANN. § 78-35a-202(2)(a) (LexisNexis 2002); VA. CODE ANN. § 19.2-163.7 (LexisNexis 2004); WASH. R. APP. P. 16.25; WYO. STAT. ANN. § 7-6-104(c)(ii) (LexisNexis 2005).

⁴⁶ See *Grinols v. State*, 74 P.3d 889, 894–95 (Alaska 2003) (holding that the due process clause of Alaska’s constitution requires effective postconviction counsel); *Lozada v. Warden*, 613 A.2d 818, 821–22 (Conn. 1992) (holding that the statutory right to counsel in postconviction proceedings includes the right to effective assistance of counsel); *Hernandez v. State*, 992 P.2d 789, 793 (Idaho Ct. App. 1999) (holding the ineffectiveness of a lawyer representing the defendant in a prior action for postconviction relief to be a sufficient reason to permit the defendant to pursue a second petition for relief); *In re Carmody*, 653 N.E.2d 977, 983 (Ill. App. Ct. 1995) (holding that the statutory right to counsel in postconviction proceedings includes the right to effective assistance of counsel); *Daniels v. State*, 741 N.E.2d 1177, 1189–91 (Ind. 2001) (recognizing a limited right to effective assistance of postconviction counsel); *Dunbar v. State*, 515 N.W.2d 12, 14–15 (Iowa 1994) (reconsidering the right to effective assistance of counsel after the U.S. Supreme Court held that no such federal constitutional right exists, and holding that the statutory right to effective assistance of counsel remains good law because it is not grounded in the Federal Constitution); *Brown v. State*, 101 P.3d 1201, 1203–04 (Kan. 2004) (holding that the statutory right to counsel in postconviction proceedings includes the right to effective assistance of counsel); *Stovall v. State*, 800 A.2d 31, 37 (Md. Ct. Spec. App. 2002) (same); *Jackson v. State*, 98-DR-00708-SCT (¶¶ 11–12), 732 So. 2d 187, 191 (Miss. 1999) (en banc) (holding that the state constitution mandates the assignment of counsel in capital postconviction proceedings, and urging further legislative action to remedy the inability of death row inmates to acquire counsel); *Crump v. Warden*, 934 P.2d 247, 252–53 (Nev. 1997) (holding that a petitioner who had postconviction counsel appointed by statutory mandate was entitled to effective assistance by such counsel); *State v. Velez*, 746 A.2d 1073, 1076–77 (N.J. Super. Ct. App. Div. 2000) (holding that the state’s rule mandating the assignment of counsel for postconviction proceedings creates an entitlement to effective assistance of counsel); *Hale v. State*, 934 P.2d 1100, 1102–03 (Okla. Crim. App. 1997) (inferring a requirement of effectiveness from statutory mandate for appointment); *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999) (holding that the ineffectiveness of postconviction counsel provides a basis for relief because effectiveness is implicit in the enforceable right to postconviction relief); *Jackson v. Weber*, 2001 SD 136 ¶¶ 12–19, 637 N.W.2d 19, 22–24 (holding that the statutory right to counsel in postconviction proceedings includes the right to effective assistance of such counsel).

⁴⁷ WILLIAM SHAKESPEARE, *THE TRAGEDY OF MACBETH* act 1, sc. 3.

⁴⁸ *Id.* act 5, sc. 8.

sulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance.”⁴⁹

One need not look far for evidence of the rampant ineffectiveness of postconviction capital counsel at the state level. Current law provides significant procedural advantages in capital federal habeas corpus proceedings to states that have mechanisms for providing “competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal.”⁵⁰ Many states have sought to gain these benefits. Not one has succeeded.⁵¹

⁴⁹ GUIDELINES, *supra* note 13, at 932 n.47 (internal citations omitted). For an overview of the landscape, see Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 353–80 (2003). See generally Sarah L. Thomas, Comment, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 64 EMORY L.J. 1139, 1167 (2005) (urging state legislatures not to “passively stand by and wait for their state courts or the U.S. Supreme Court to take action . . . [but instead to] utilize their resources to implement a statutory right to counsel for indigent habeas corpus petitioners”).

⁵⁰ 28 U.S.C. § 2261(b) (2000). Any state that creates such a program “opts in” to Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 271 (2006). For a summary of the advantages to states that opt in, see *id.* at 272 and GUIDELINES, *supra* note 13, at 931 n.40.

⁵¹ See *Spears v. Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002) (holding the state’s failure to comply with Arizona’s facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions); *Kreutzer v. Bowersox*, 231 F.3d 460, 462 (8th Cir. 2000) (holding that Missouri does not qualify under Chapter 154); *Baker v. Corcoran*, 220 F.3d 276, 285–87 (4th Cir. 2000) (same, as to Maryland); *Tucker v. Catoe*, 221 F.3d 600, 604–05 (4th Cir. 2000) (holding that South Carolina’s “mere promulgation of a ‘mechanism’ [was] not sufficient to permit [it] to invoke [Chapter 154’s] provisions . . . [T]hose mechanisms and standards must in fact be complied with”); *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000) (holding that California failed to meet the opt-in requirements of Chapter 154); *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997) (same, as to Texas); *Brown v. Puckett*, No. 3:01CV197-D, 2003 WL 21018627, at *2–3 (N.D. Miss. Mar. 12, 2003) (same, as to Mississippi); *Kasi v. Angelone*, 200 F. Supp. 2d 585, 592–93 n.2 (E.D. Va. 2002) (same, as to Virginia); *Smith v. Anderson*, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (same, as to Ohio); *Ward v. French*, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (same, as to North Carolina), *aff’d*, 165 F.3d 22 (4th Cir. 1998); *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (same, as to Louisiana), *aff’d in part, rev’d in part on other grounds*, 125 F.3d 269 (5th Cir. 1997); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (same, as to Tennessee); *Ryan v. Hopkins*, No. 4:CV95-3391, 1996 WL 539220, at *3–4 (D. Neb. 1996) (concluding that Nebraska’s framework for appointing counsel in postconviction capital cases was not in compliance with subsections (b) and (c) of § 2261).

To the extent that the states do bring about competent representation, the need for a judicially enforceable right under the Federal Constitution will diminish, *cf. supra* note 8 (noting increased state protections for homosexual activity prior to *Lawrence*), although the likelihood that courts will acknowledge one will increase, *see infra* note 81.

III
RE-VIEWING *GIARRATANO*

Contrary to much loose talk, *Giarratano* did not decide that there is no right to counsel in state postconviction proceedings in capital cases.⁵² Rather, *Giarratano* only rejected the claim of constitutional entitlement in that particular instance, and implicitly held that other facts would lead to other results.⁵³ As indicated above, the controlling vote belonged to Justice Kennedy, who emphasized that his concurrence was based “[o]n the facts and record of this case,” in which “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief.”⁵⁴

The perverse implication of this statement is that by acting to save Earl Washington’s life, the Paul, Weiss lawyers actually reduced their chances of prevailing in *Giarratano*. If Virginia had in fact executed Mr. Washington—as the assistant attorney general testified would have happened if a petition for postconviction relief had not been filed⁵⁵—perhaps Justice Kennedy would have been satisfied that a Virginia prisoner had actually been denied counsel. But this scenario would have been as unsatisfactory to the criminal justice system as it would have been contrary to professional ethics and basic morality. A state would have executed an innocent person who had falsely confessed long before anyone could establish his innocence—an outcome that would both have been grievously unjust to the individual and have buried the very knowledge necessary to make reforms to the system. Moreover, it is wrong in principle to excuse a state from meeting a constitutional obligation because a private party voluntarily stepped in to fulfill the state’s duty.⁵⁶

Regardless of the merits of Justice Kennedy’s view of the facts of *Giarratano*, some state systems today are considerably worse than that of Virginia in the 1980s. The current leading example is Alabama, which has no system at all for providing prefiling assistance⁵⁷ to capi-

⁵² See *supra* Part I.

⁵³ See *Murray v. Giarratano*, 492 U.S. 1, 14–15 (1989) (Kennedy, J., concurring).

⁵⁴ *Id.*; see *supra* text accompanying note 40.

⁵⁵ See *supra* note 24 and accompanying text.

⁵⁶ See Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1101 n.13 (2003); cf. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) (holding that a state cannot not discharge its duty to provide an integrated law school by sending the plaintiff to one elsewhere).

⁵⁷ As in *Giarratano*, a court, in its discretion, may provide counsel after examining the petition for potential merit. The *Dallas* and *Barbour* cases cited *infra* note 64 are examples of this system at work—and of its inadequacies.

tal prisoners wishing to pursue postconviction actions,⁵⁸ known locally as Rule 32 proceedings.⁵⁹ Accordingly, Alabama prisoners are at the mercy of whatever pro bono assistance they can scrape together and their own pro se efforts.⁶⁰

In today's legal environment the effect of this system is that some prisoners may literally be left to die of neglect. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner must exhaust all state postconviction remedies before seeking federal habeas corpus review.⁶¹ But, except in the rarest of circumstances, a petitioner has only one year after the denial of certiorari on direct appeal to file a federal habeas corpus petition (a period that is tolled while a properly filed postconviction review petition is pending in the state courts).⁶² Thus, if ten months elapse between the denial of certiorari and the filing of a state postconviction petition, the prisoner will have two months after that petition is finally denied to file for federal habeas corpus relief. If, however, thirteen months elapse before the state filing, even if the petition is still timely under state law, after it is denied the inmate will be precluded from any federal court review at all—and some Texas prisoners have been executed under those very circumstances.⁶³

In a number of reported cases, unrepresented Alabama prisoners forfeited their Rule 32 rights, and only last moment intervention by the federal courts prevented the state from executing them with their federal claims unreviewed.⁶⁴ Unless the meaning of Justice Kennedy's

⁵⁸ See GUIDELINES, *supra* note 13, at 932 n.47, 1081 n.333 (singling out Alabama as engaging in "irresponsible behavior" and encouraging defense counsel to argue that the state must comply with *Giarratano*). Georgia presently ranks second on this "dishonor roll." Its thoroughly inadequate system for the appointment of counsel in postconviction capital proceedings was one of the reasons that the ABA, in an exhaustive report, called for a moratorium on executions in that state. See AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT, at iii, 13, 147–52 (2006) (finding that the Georgia capital postconviction system is in "a situation where this critical constitutional safeguard is so undermined as to be ineffective"), available at <http://www.abanet.org/moratorium/assessmentproject/georgia/finalreport.doc>.

⁵⁹ See ALA. R. CRIM. P. 32.

⁶⁰ See Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment and Plaintiffs' Submission of Additional Rule 56(e) Materials at 3–9, *Barbour v. Haley*, 410 F. Supp. 2d 1120 (M.D. Ala. 2006) (Civ. A. No. 01-S-1530-N) (on file with author).

⁶¹ See 28 U.S.C. § 2254(b)(1)(A) (2000); *cf. infra* note 79 (discussing an exception to this requirement).

⁶² See 28 U.S.C. § 2244(d) (2000).

⁶³ See GUIDELINES, *supra* note 13, at 1085 n.347 and accompanying text.

⁶⁴ See *Dallas v. Haley*, 228 F. Supp. 2d 1317 (M.D. Ala. 2002) (staying execution two days before it was to occur for an inmate who had been appointed counsel by the court after he filed a Rule 32 petition but whose appeal from the dismissal of that petition had been dismissed as untimely); *Barbour v. Haley*, 145 F. Supp. 2d 1280 (M.D. Ala. 2001) (staying execution two days before it was to occur for an inmate who had been appointed counsel by the court after filing of a Rule 32 petition but whose counsel withdrew before

controlling opinion really is that one prisoner must be executed before other prisoners can successfully claim that denying them lawyers to prepare capital postconviction petitions is unconstitutional, the Alabama system—which has been aptly described as “legal Russian roulette”⁶⁵—violates the Constitution even under *Giarratano*’s exiguous standard.

Before devising new legal theories, courts and lawyers should take the simple step of reading the case accurately and applying it to the facts presented to them.

IV

RE-VIEWING DUE PROCESS

A. Protecting Liberty

In considering *Giarratano*’s argument that he had a due process right to counsel for postconviction proceedings, the plurality stated the claim as one for a “right of access” to the legal system under *Bounds v. Smith*.⁶⁶ But the plurality’s opinion left two major gaps.

First, it contained no discussion of equal protection doctrine, even though this had been the basis for some of the precedents underlying *Bounds*, including most notably *Douglas v. California*.⁶⁷ Although those underpinnings were of little interest to the Court when it decided *Giarratano*, it has recently reiterated their importance in considering judicial access claims.⁶⁸ In view of the plurality’s neglect of this issue, it would pose no great challenge to construct an argu-

dismissal of that petition with the result that no appeal from that dismissal was ever filed); *Arthur v. Haley*, No. CV-01-N-00983-S (N.D. Ala. Apr. 25, 2001) (order granting a stay of execution two days before the scheduled execution of an inmate who had been unrepresented for more than two years following his direct appeal) (on file with author).

⁶⁵ GUIDELINES, *supra* note 13, at 1081 n.333.

⁶⁶ *Murray v. Giarratano*, 492 U.S. 1, 11 (1989) (plurality opinion) (rejecting *Giarratano*’s argument that his “right of access” to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977), was violated). The dissent rejected this narrow focus:

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

Id. at 16 (Stevens, J., dissenting). In other words, in some proceedings due process may require the provision of a lawyer regardless of any issue of access to the courts. But the dissent did not discuss the various other constitutional theories invoked. *See id.* at 15 n.1. The plurality treated *Giarratano*’s claim of a need for special accuracy in his particular circumstances as arising under the Eighth Amendment. *Id.* at 8–10 (plurality opinion). Accordingly, I will address it under that heading. *See infra* Part V.

⁶⁷ 372 U.S. 353 (1963).

⁶⁸ *See M.L.B. v. S.L.J.*, 519 U.S. 102, 110–13, 120–21 (1996) (holding that the state of Mississippi had to provide a free trial transcript to an indigent mother to enable her to appeal the loss of her parental rights).

ment that its decision was incorrect or, alternatively, that the Court must reach the opposite result today under this newly reinvigorated theory.⁶⁹

Second, the *Giarratano* plurality failed to discuss *Mathews v. Eldridge*.⁷⁰ This gap too is a sufficient reason to characterize *Giarratano* as having been wrongly decided.⁷¹ As the Court recently reiterated in a context presenting “weighty and sensitive governmental interests”⁷² that militated against the procedural safeguards sought by the prisoner, the “ordinary” test for deciding such a claim “is the test we articulated in *Mathews v. Eldridge*.”⁷³

Mathews dictates that the process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute procedural safeguards.”⁷⁴

If the Court had applied the *Mathews* test in *Giarratano*, the death row inmates would have won. On the individual side of the *Mathews* calculus, physical liberty is “the most elemental of liberty interests”

⁶⁹ See Brad Snyder, Note, *Disparate Impact on Death Row: M.L.B. and the Indigent’s Right to Counsel at Capital State Postconviction Proceedings*, 107 YALE L.J. 2211, 2246 (1998) (arguing that in light of *M.L.B.* the “right of access to the criminal process should be used to overrule *Giarratano* on equal protection grounds and to provide counsel for indigent death row inmates at state postconviction proceedings”).

⁷⁰ 424 U.S. 319 (1976); cf. *Giarratano*, 492 U.S. at 29 (Stevens, J., dissenting) (citing *Mathews* without discussion).

⁷¹ Alternatively, this gap, like the failure to discuss the equal protection doctrine, could provide a basis for a later Court to distinguish *Giarratano* away. Were it to rule in this fashion the Court would be employing a well-established technique. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (using the First Amendment to substantially overrule the result in *Gannett v. DePasquale*, 443 U.S. 368 (1979), which had been based on the Sixth Amendment); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (using due process to substantially overrule the result in *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which had been based on equal protection); *Taylor v. Louisiana*, 419 U.S. 522, 533–34 (1975) (using the Sixth Amendment to overrule the result in *Hoyt v. Florida*, 368 U.S. 57 (1961), which had been based on due process and equal protection).

⁷² *Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 531 (2004) (plurality opinion) (deciding what process is due in making the determination that an individual may be detained as an “enemy combatant”). The main opinion was written by Justice O’Connor for a four-member plurality. In a concurring opinion joined by three other Justices, Justice Souter stated that he would have decided the case in favor of the petitioner on other grounds, and, had he reached the due process issue, would have provided more robust procedural rights than the plurality did. See *id.* at 553–54 (Souter, J., concurring). I note that I was a member of Hamdi’s legal team.

⁷³ *Id.* at 528–29.

⁷⁴ *Id.* at 529 (citation omitted).

safeguarded by due process.⁷⁵ Furthermore, protecting against its unjust deprivation through a wrongful execution is not just a private interest of the prisoner. All actors in the criminal justice system—prosecutors, judges, and victims no less than defendants—share an interest in the accuracy of the decision to put a person to death by state authority.⁷⁶

In terms of the governmental burden, requiring the states to provide competent postconviction lawyers in capital cases will certainly impose new costs on them. But those costs already exist. They are just being borne by others: by death row inmates in injustice,⁷⁷ by pro bono counsel in dollars,⁷⁸ and by the federal government, which pays habeas counsel to attempt to clean up the messes that ineffective state postconviction lawyers leave behind.⁷⁹

⁷⁵ *Id.* Accordingly, the Court has recognized the applicability of due process standards in this area without consideration of the extent to which the liberty interest is recognized as such by state law. *See, e.g.,* *Ingraham v. Wright*, 430 U.S. 651, 672–74 (1977) (applying due process analysis to the paddling of schoolchildren).

⁷⁶ *See* Eric M. Freedman, *The Revised ABA Guidelines and the Duties of Lawyers and Judges in Capital Post-Conviction Proceedings*, 5 J. APP. PRAC. & PROCESS 325, 332 (2003) (quoting Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. OF ASS'N OF BAR OF N.Y. 848, 854 (1989)).

⁷⁷ *See* Freedman, *supra* note 56, at 1101.

⁷⁸ *See id.*

⁷⁹ Federal law provides for the appointment of qualified counsel in habeas corpus proceedings challenging state capital convictions. *See* 21 U.S.C. § 848(q)(4)(B) (2000); *McFarland v. Scott*, 512 U.S. 849, 859 (1994) (noting the importance of this entitlement “in promoting fundamental fairness in the imposition of the death penalty”). Of course, one of the key duties of such counsel is to attempt to overcome any procedural blunders committed by state postconviction attorneys. *See* Freedman, *supra* note 76, at 341–42. Hence, notwithstanding 28 U.S.C. § 2254(i) (2000) (“The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”), if appointed federal habeas counsel fails to perform competently a petitioner may be able to assert rights flowing from the statutory mandate for qualified counsel. *See* *Cooley v. Bradshaw*, 216 F.R.D. 408, 415–17 (N.D. Ohio) (granting stay of execution on a claim of ineffective assistance by prior counsel appointed under § 848), *motion to vacate stay denied*, 338 F.3d 615 (6th Cir.), *motion to vacate stay denied*, 539 U.S. 974 (2003).

Moreover, to the extent that state postconviction remedies are “ineffective to protect the rights of the applicant”—for example, because without competent counsel the prisoner cannot effectively use those proceedings to assert his federal rights—such remedies need not be exhausted as a predicate to federal habeas corpus review. 28 U.S.C. § 2254(b)(1)(B)(ii) (2000). This provision, which dates back to 1966, was left unamended by AEDPA and is thus unaffected by its Chapter 154. *See supra* note 50 and accompanying text (describing Chapter 154). In any event, a state postconviction process might be ineffective to protect the rights of the applicant even if it does provide for the appointment of counsel. Such a claim is currently being litigated with respect to Mississippi’s capital postconviction system. *See* Reply to Respondents’ Overall Assertions that Grounds C, D, and E of the Petition for Writ of Habeas Corpus are Unexhausted and Procedurally Defaulted at 5–49, *Grayson v. Epps*, No. 1:04CV708-B (S.D. Miss. Aug. 1, 2005) (on file with author).

Thus, the federal government is bearing significant costs that the states would bear if they were providing competent counsel to capital postconviction petitioners. From a *Mathews* perspective, it is questionable whether requiring the states to do so would impose any

The virtually unanimous decision of the death penalty states to provide lawyers for capital postconviction proceedings⁸⁰ amply testifies to the fact that the assistance of counsel is critical in making those proceedings meaningful.⁸¹ Indeed, the Court may not even be entitled under its own recent precedents to weigh and balance the factors of the *Mathews* calculus. The premise of *Giarratano* was that state postconviction proceedings are collateral attacks on convictions and fall into an entirely different constitutional category than direct appeals.⁸² But the Court's recent jurisprudence draws a different line. It decides whether particular criminal proceedings carry a due process right to the appointment of counsel by distinguishing proceedings that primarily correct error in individual cases from ones that declare legal principles concerning issues of general public importance.⁸³ Since capital postconviction proceedings plainly fall into the former class, they may well carry a mandatory due process right to counsel. And where there

additional costs on the government as a whole. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Perhaps recognizing that effective assistance of postconviction counsel in capital cases is in the interests of the federal government as well as of the states, Congress has recently taken the first steps toward providing funding to bring it about. See 42 U.S.C.A. § 14163 (West 2005). See also Lily Henning, *The White House's Capital Venture*, LEGAL TIMES (Wash., D.C.), Mar. 21, 2005, at 1 (discussing President George W. Bush's support for such funding in his State of the Union Message on Feb. 2, 2005).

Viewing the matter through a slightly different due process lens, Congress could simply act under Section 5 of the Fourteenth Amendment to mandate that the states fulfill their obligations. See Moohr, *supra* note 24, at 809 (making this proposal).

⁸⁰ See *supra* note 45 and accompanying text.

⁸¹ Cf. *Ake v. Oklahoma*, 470 U.S. 68, 78 n.4 (1985) (collecting state statutes that make expert psychiatric assistance available to indigent defendants as support for the holding that due process requires the provision of such assistance).

⁸² See *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). For an early attack on this premise, see Moohr, *supra* note 24, at 791. This explains why the Sixth Amendment is the dog that failed to bark throughout the case. But as subsequently became clear, the effect of this silence was to leave unanswered whether there might be a Sixth Amendment right to effective postconviction counsel when, as is frequently the case, postconviction proceedings are the first opportunity to assert the ineffectiveness of trial counsel. See *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc) (addressing this argument); *id.* at 451–52 (Butzner, J., dissenting) (same). The silence has become louder in the wake of *Massaro v. United States*, 538 U.S. 500, 508–09 (2003) (holding unanimously that federal prisoners do not have to raise claims of ineffective assistance of trial counsel on direct appeal, but rather can wait and raise them during postconviction proceedings). See Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 799–801 (2004) (arguing that *Massaro* “casts serious doubt on” *Giarratano*).

⁸³ See *Halbert v. Michigan*, 545 U.S. ____, ____, ____ (2005); 125 S. Ct. 2582, 2586, 2590 (2005) (holding that a defendant who had pleaded guilty was entitled to the appointment of counsel in preparing leave to appeal because in passing on such applications appeals courts look to the merits of the individual case and because indigent defendants pursuing such review “are generally ill equipped to represent themselves”).

is a due process right to counsel there is the right to effective counsel.⁸⁴

B. Protecting Statutory Entitlements

The same due process conclusion follows if the matter is considered from the viewpoint not of liberty, which states are not free to grant or withhold, but of property in the form of statutory entitlements. Even if states are not required to grant the right to postconviction counsel in the first place, once they do the state-created entitlement may not be arbitrarily denied.⁸⁵ As Professor McConville has amply demonstrated, the Constitution compels states that have created a state statutory right to capital postconviction counsel to provide effective counsel.⁸⁶

V

RE-VIEWING THE EIGHTH AMENDMENT

Even if the Court is unprepared to hold that ordinary principles of due process now require the states to provide counsel in capital postconviction proceedings, it could quite comfortably reach that result under the Eighth Amendment.⁸⁷

⁸⁴ See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 239, 255 (E.D.N.Y. 2002) (applying the *Mathews* factors to hold that a class of mothers facing the termination of their parental rights had a due process right to the appointment of counsel and for such counsel to be effective).

⁸⁵ See, e.g., *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (citing *Vitek v. Jones*, 445 U.S. 480, 488–489 (1980)); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

⁸⁶ See Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 67–68; Letty S. Di Giulio, Note, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Proceedings: State Statutes & Due Process in Capital Cases*, 9 B.U. PUB. INT. L.J. 109, 129–31 (1999) (presenting an initial version of the theory); see also Megan K. Rosichan, Comment, *A Meaningless Ritual? The Due Process Mandate for the Provision of Competent Counsel in Arkansas Capital Post-Conviction Proceedings*, 38 U.S.F. L. REV. 749, 751–52 (2004) (arguing that Arkansas' failure to provide effective assistance of postconviction counsel appointed pursuant to a state statute may create federal and state claims for "deprivation of due process of law in violation of the Fourteenth Amendment").

Indeed, this was precisely the reasoning of the Alaska Supreme Court in *Grinols v. State*, 74 P.3d 889, 894–95 (Alaska 2003). Although the Alaska Supreme Court is not one that has interpreted its state's statutory entitlement to counsel to include an entitlement to effective counsel, see *supra* note 46 (listing those courts), it read the due process clause of its constitution, which it gave the same meaning as *Mathews*, to require that result. See *Grinols*, 74 P.3d at 894–95.

⁸⁷ Cf. *Gregg v. Georgia*, 428 U.S. 153, 195 n.47 (1976) (plurality opinion) (noting that in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Court had invalidated under the Eighth Amendment capital sentencing procedures that it had upheld against a due process challenge in *McGautha v. California*, 402 U.S. 183 (1971)).

The unique imperative of safeguards to ensure accuracy in criminal prosecutions that might eventuate in the prisoner's execution is deeply woven into centuries of jurisprudence in England,⁸⁸ in the states,⁸⁹ and in the Supreme Court of the United States.⁹⁰ In approving the reinstatement of capital punishment in 1976, the Court made clear that because the death penalty is qualitatively different from any other punishment, the Eighth Amendment requires heightened procedural safeguards to ensure accuracy and reliability in its administration.⁹¹ The Court has adhered to that position ever since,⁹² and has relied upon the "acute need for reliability in capital sentencing proceedings" in declining to extend those safeguards to noncapital cases.⁹³

The undeniable reality that litigating death penalty cases is infinitely more complicated than other criminal cases⁹⁴ has only grown more stark as a result of legal developments since *Giarratano*. The fundamental Eighth Amendment mandate of reliability in capital proceedings is simply not achievable unless a defendant has the assistance of counsel in state postconviction proceedings. To the extent that *Giarratano* was based on the contrary premise,⁹⁵ it has become obso-

⁸⁸ See 4 WILLIAM BLACKSTONE, COMMENTARIES *338, *352-57 (describing respects in which, *in favorem vitae*, the laws of England were more favorable to capital than noncapital prisoners and arguing for legislative intervention when they were not).

⁸⁹ See, e.g., *State v. Thompson*, 115 S.E. 326, 335 (S.C. 1922); *Bearden v. State*, 44 Ark. 331, 334 (1884); *Prine v. Commonwealth*, 18 Pa. 103, 104-05 (1851).

⁹⁰ See, e.g., *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Andres v. United States*, 333 U.S. 740, 752 (1948); *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Diaz v. United States*, 223 U.S. 442, 455 (1912).

⁹¹ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

⁹² See, e.g., *Mills v. Maryland*, 486 U.S. 367, 383-84 (1988); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Beck v. Alabama*, 447 U.S. 625, 637-38 & n.13 (1980); *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (plurality opinion).

⁹³ *Monge v. California*, 524 U.S. 721, 732, 733-34 (1998) (holding that the double jeopardy protection detailed in *Bullington v. Missouri*, 451 U.S. 430 (1981), only applies to capital cases).

⁹⁴ See *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994); see also GUIDELINES, *supra* note 13, at 923 (discussing the "uniquely demanding" nature of the responsibilities of defense counsel in capital cases).

⁹⁵ See *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) ("The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed."). Even when first presented, this optimistic view ignored the fact that the Court's approval of the "death qualification" of capital juries in *Lockhart v. McCree*, 476 U.S. 162 (1986), had validated the "jarring injustice" that capital cases "are tried under rules that systematically increase the chances that the innocent will be convicted compared to the trial of the same case where the death penalty is not sought." Eric M. Freedman, *Mend It or End It?: The Revised ABA Capital Defense Representation Guidelines as an Opportunity to Recon-*

lete.⁹⁶ The legal and factual environments are both very different than they were in 1989, and there is ample precedent for the Court to overrule its death penalty decisions in light of evolving realities.⁹⁷

In the years after *Giarratano*, the Court decided a series of cases that precluded petitioners from achieving review of the constitutional merits of their claims through federal habeas corpus.⁹⁸ For example, the Court's decisions made it vanishingly rare for death row inmates to overcome such defenses as procedural default,⁹⁹ abuse of the writ,¹⁰⁰ and nonexhaustion,¹⁰¹ while also creating a nonretroactivity doctrine that radically shrank the universe of claims on which a federal habeas court could grant relief.¹⁰² Even with these obstacles to the recognition and correction of error in place, the realities of the unreliability of the system kept breaching the levees that hid them. The most comprehensive available data shows that 68% of death sentences did not survive postconviction review. Approximately 47% were reversed at the state level (41% on direct appeal and 6% on state collateral attack), and a further 21% on federal habeas corpus re-

sider the Death Penalty, 2 OHIO ST. J. CRIM. L. 663, 667–68 (2005); see GUIDELINES, *supra* note 13, at 1052 & n.261; Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in AMERICA'S EXPERIMENT, *supra* note 11, at 385, 408 (providing a comprehensive review of the social science literature showing that death-qualified jurors "are more conviction-prone, less concerned with due process, and . . . more inclined to believe the prosecution," and as a result of the death-qualification process itself, "often are unwilling or unable to consider mitigation evidence").

⁹⁶ The lower courts should take note of the current legal environment and not follow outdated precedent. *Cf.* *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942) (refusing to follow *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), on the basis that the Court would no longer adhere to it), *aff'd*, 319 U.S. 624 (1943); *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399–400 (Mo. 2003) (en banc) (concluding that the Court would no longer adhere to *Stanford v. Kentucky*, 492 U.S. 361 (1989)), *aff'd*, 543 U.S. 551 (2005).

⁹⁷ See, e.g., *Roper*, 543 U.S. at 578 (holding that the Constitution bars the execution of convicts younger than eighteen at the time of their crimes, thus overruling *Stanford*, 492 U.S. at 378); *Ring v. Arizona*, 536 U.S. 584, 608–09 (2002) (holding that the Constitution ordinarily requires jury determination of factors making the defendant death-eligible, overruling *Walton v. Arizona*, 497 U.S. 639, 649–51 (1990)); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Constitution forbids the execution of mentally retarded individuals, abrogating *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989)). In *Roper* and *Atkins*, the Court relied heavily upon the fact that since its prior ruling there had been steady movement on the state level toward its new position. See *Roper*, 543 U.S. at 559–60 (quoting the Missouri Supreme Court's decision in *Simmons*, 112 S.W.3d at 399); *Atkins*, 536 U.S. at 314–15. There has been an even stronger trend on the state level toward the appointment of capital postconviction counsel than was evident in either of those two cases. See *supra* text accompanying notes 43–45.

⁹⁸ See *Freedman*, *supra* note 11, at 563–68.

⁹⁹ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 750–51 (1991).

¹⁰⁰ See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 488–89 (1991).

¹⁰¹ See, e.g., *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

¹⁰² See *Teague v. Lane*, 489 U.S. 288, 300–10 (1989).

view¹⁰³ (after first running the gauntlet of state postconviction proceedings).

The passage of AEDPA in 1996 then rearranged the legal landscape of capital litigation in such a way as to increase the importance of state postconviction proceedings even further.¹⁰⁴ By limiting federal habeas corpus review of the factual and legal determinations of state courts,¹⁰⁵ AEDPA sought to give state courts the last word on questions of both guilt and sentence—and the last word on the state level is spoken during the postconviction process.¹⁰⁶

The factual and legal implications of these developments are far-reaching¹⁰⁷ and cast a harsh light on the hollowness of *Giarratano*.¹⁰⁸

Factually, the problem of innocent people being condemned to death is far more salient than it was in the 1980s.¹⁰⁹ Moreover, there

¹⁰³ See GUIDELINES, *supra* note 13, at 932 n.46 (citing JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 app. A at 5–7 (2000)). The statistics from this comprehensive empirical study by Professor Liebman and his colleagues have been distilled in James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1847, 1850 & n.37 (2000). For a full discussion, see Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004).

¹⁰⁴ Last term, in *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528 (2005), the Court quite appropriately relaxed the rule of *Rose v. Lundy*, 455 U.S. 509 (1982), in light of its recognition that “[t]he enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions.” *Rhines*, 544 U.S. at ___, 125 S. Ct. at 1533.

¹⁰⁵ See 28 U.S.C. §§ 2254(d)–(e) (1996) (providing that a federal court may not grant the writ unless state proceedings resulted in a decision that “was contrary to, or involved an unreasonable application of, clearly established Federal law” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”).

¹⁰⁶ This might be of less concern if states systematically provided effective assistance of counsel at capital trials, see Freedman, *supra* note 17, at 1106, but states do not, see GUIDELINES, *supra* note 13, at 928–30; Kenneth Williams, *Ensuring the Capital Defendant’s Right to Competent Counsel: It’s Time for Some Standards!*, 51 WAYNE L. REV. 129 (2005). See generally *Nelson v. Washington*, No. 04-35383, 2006 WL 529958, at *1 (9th Cir. Mar. 6, 2006) (unpublished memorandum) (granting a federal habeas petitioner relief for ineffectiveness of trial counsel because, *inter alia*, state court factfinding was flawed by appointment of postconviction lawyer laboring under a conflict of interest); Lawrence C. Marshall, *Gideon’s Paradox*, 73 FORDHAM L. REV. 955, 962 (2004) (arguing that the only way for the Court to ensure effective trial representation is to provide petitioners with effective postconviction counsel to challenge the adequacy of the petitioners’ trial representation).

¹⁰⁷ Indeed, they go beyond the particular issue of postconviction counsel that this Article addresses. The greater the extent to which the final available route for petitioners to vindicate their federal rights is through the state courts, the greater the constitutional obligation of those courts to have in place effectual mechanisms for the enforcement of those rights. See Christopher Flood, *Closing the Circle: Case v. Nebraska and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 663–64 (2002).

¹⁰⁸ See Hammel, *supra* note 49, at 349 (observing that AEDPA and other recent legal changes “place an incalculable premium on competent representation by talented, adequately funded lawyers” in capital postconviction proceedings).

¹⁰⁹ The Web site of the Death Penalty Information Center lists 123 cases of people who have been released from death row on account of evidence of their innocence since 1973. Death Penalty Info. Ctr., *Innocence: List of Those Freed From Death Row*, <http://www.deathpenaltyinfo.org>

is an increasing recognition that for many reasons, including the natural evolution of scientific techniques, exculpatory evidence tends to emerge at a relatively late stage in capital cases.¹¹⁰ In today's legal environment, the last stage at which the emergence of such evidence can realistically do the prisoner any good is during state postconviction proceedings,¹¹¹ since to date there is only dictum from the Court supporting the proposition that an inmate asserts a violation of the Constitution by alleging in a federal habeas corpus petition that a state is about to execute an innocent person.¹¹² Although the embarrassing saga of Paul Gregory House may lead to a more favorable legal rule,¹¹³ even the strongest ruling in House's favor will simply high-

www.deathpenaltyinfo.org/article.php?acid=6&did=110 (last visited Apr. 9, 2006). Only thirty-six of these releases took place before 1989, and the average number of exonerations per year has risen sharply since then. *Id.*

For a comprehensive empirical overview of the problem presented as part of a symposium on innocence in capital cases, see Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent, in AMERICA'S EXPERIMENT*, *supra* note 11, at 325. Significantly, the term "innocent" in the postconviction context has a far more stringent definition than at trial. See Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 403, 411 (2004) (observing that an innocent person seeking postconviction relief "must demonstrate to judges both that his or her constitutional rights were violated in the criminal process and that he or she is really not guilty by a standard that can only be described as the squeaky clean test").

¹¹⁰ See Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (1991). This emerging understanding strongly suggests that the Supreme Court should overrule the suggestion of *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (plurality opinion), that there is no constitutional right to have the jury in a capital trial consider "lingering doubts" about the defendant's guilt as a mitigating factor in sentencing. *Id.*; accord GUIDELINES, *supra* note 13, at 1060 n.275 (listing reasons why there is ample support for doubting the force of this precedent). In its recent decision in *Oregon v. Guzek*, the Court specifically declined to reach the issue. See 546 U.S. ___, ___, 126 S. Ct. 1226, 1232 (2006).

¹¹¹ See GUIDELINES, *supra* note 13, at 932-35 (discussing the importance of state postconviction proceedings in vindicating claims of innocence).

¹¹² See *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (holding that Herrera had not made a strong enough initial showing of his innocence to be entitled to pursue whatever putative constitutional claim might exist); Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121 (2005) (presenting a sharp critique of the case). The gravity of the issue has been highlighted by the subsequent chilling revelation that an innocent defendant was actually executed in Texas in 1993. See Lise Olsen, *Cantu Case: Death and Doubt*, Hous. CHRON., Nov. 21, 2005, at A1.

¹¹³ See *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (en banc), *cert. granted*, 125 S. Ct. 2991 (2005). Eight judges in that case found that although House had presented "a colorable claim of actual innocence," he was entitled to no relief under existing law. *Id.* at 684. One judge concluded that since there was grave doubt as to House's guilt, he should receive a new trial. See *id.* at 709-10 (Gilman, J., dissenting). Six judges ruled that because House had established his actual innocence, see *id.* at 686 (Merritt, J., dissenting), he had met the criteria hypothesized by the dictum in *Herrera* and was entitled to immediate release. See *id.* at 708. With House heading for execution on this 8-7 vote, and the law descending ever deeper into its unsettling habit of hiding factual errors behind a "veil of

light, not diminish, the need for competent counsel in state capital postconviction proceedings, because innocent death row inmates in the future will still have to thread the AEDPA labyrinth.¹¹⁴ Furthermore, as a matter of federalism, habeas corpus ought to provide only a fallback for innocent defendants who have somehow made it to that point, not their primary protection.

Legally, the Court has increasingly come to understand the importance of competent representation at the penalty phase of capital cases. In three death penalty cases since 2000, the only cases of any kind since 1984 in which it has ever found ineffective assistance of counsel,¹¹⁵ the Court ruled that counsel performed incompetently during the sentencing phase by failing to unearth and present mitigating evidence.¹¹⁶ Having been thoroughly persuaded of the importance of effective advocacy at the penalty phase, the Court was willing in those cases to find that the petitioners had made the necessary demonstrations of ineffective assistance of counsel to prevail on federal habeas corpus, notwithstanding state court rulings to the contrary.¹¹⁷ But as a practical and legal matter, in an AEDPA-governed world the primary venue for the adjudication of such claims is likely to be the state courts. Hence, if the right to effective representation at state capital sentencing is to become a reality, it will have to be enforced in state postconviction proceedings by competent lawyers capable of deploying resources to make those proceedings meaningful.¹¹⁸

Because state postconviction review proceedings are of such critical importance to the just administration of the death penalty,¹¹⁹ the Guidelines, which “embody the current consensus about what is required to provide effective defense representation in capital cases,”¹²⁰

procedural rules,” Roger Berkowitz, *Error-Centricity, Habeas Corpus, and The Rule of Law as The Law of Rulings*, 64 LA. L. REV. 477, 514 (2004), the Supreme Court granted certiorari to clarify the doctrine, see *House v. Bell*, 125 S. Ct. 2991. An opinion will presumably be forthcoming during the 2005 Term.

¹¹⁴ See Pub. L. No. 104-132, 110 Stat. 1214 (1996).

¹¹⁵ See Freedman, *supra* note 76, at 332 n.33.

¹¹⁶ See *Rompilla v. Beard*, 545 U.S. ___, ___, 125 S. Ct. 2456, 2464 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523–25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000). For a comprehensive discussion of the importance of a robust application of Sixth Amendment rights beyond the right to effective assistance of counsel at capital sentencing proceedings, see John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005).

¹¹⁷ See *Rompilla*, 545 U.S. at ___, ___, 125 S. Ct. at 2462, 2467; *Wiggins*, 539 U.S. at 518–22, 526–31; *Williams*, 529 U.S. at 397–99.

¹¹⁸ In *Wiggins*, for example, the Court relied heavily on an elaborate social history report presented in state postconviction proceedings by an expert social worker who had collected the powerful mitigation evidence that trial counsel had failed to discover. See 539 U.S. at 516–17.

¹¹⁹ See GUIDELINES, *supra* note 13, at 932–35, 1085–87; Freedman, *supra* note 76, at 328–32.

¹²⁰ GUIDELINES, *supra* note 13, at 920.

mandate that death penalty jurisdictions furnish “high quality legal representation for all persons facing the possible imposition or execution of a death sentence” throughout each and every phase of the case, including on state postconviction review.¹²¹ Tellingly, the Guidelines pointedly advise counsel to test aggressively the boundaries of *Giarratano* by challenging as a federal constitutional violation states’ failure to appoint competent counsel for capital postconviction petitioners.¹²²

The Court should agree with the bar that attempting to retain *Giarratano* as a component of a just contemporary capital punishment system makes as much sense as attempting to retain vacuum tubes as a component of computers.¹²³

VI

TAKING AN INTERNATIONAL VIEWPOINT

In a period when the Supreme Court has become increasingly sensitive to legal trends in the world community,¹²⁴ it seems appropriate to end by discussing how *Giarratano* would be considered abroad.

¹²¹ *Id.* at 919.

¹²² *See id.* at 932 n.47, 1081 n.333.

¹²³ *See Freedman, supra* note 76, at 327 (“There is a right to the effective assistance of counsel beyond direct appeal. The conventional wisdom, that the federal Constitution guarantees no such right and therefore none exists, is flawed on multiple levels. It is a perilous foundation on which to ground any legal conclusion, and an unacceptable one on which to build a just system for adjudicating capital cases.”); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 *LOV. L. REV.* 55, 56 (1999).

¹²⁴ *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (taking note of the world community’s views on the juvenile death penalty in the course of overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989), and determining that executing offenders younger than eighteen violates the Eighth Amendment). For a few summaries of this much discussed trend, see T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 *TEX. L. REV.* 1989, 1989 (2004); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 *YALE L. & POL’Y REV.* 329, 329–30, 335–37 (2004); John K. Setear, *A Forest With No Trees: The Supreme Court and International Law in the 2003 Term*, 91 *VA. L. REV.* 579, 580–84 (2005); David Weissbrodt, *International Human Rights Law Perspective on Grutter and Gratz*, 21 *CONST. COMMENT.* 275, 275–281 (2004); *see also* Joseph Brossart, *Death is Different: An Essay Considering the Propriety of Utilizing Foreign Case Law in Eighth Amendment Jurisprudence*, 29 *U. DAYTON L. REV.* 345 (2004) (discussing how the Court should use international case law in interpreting the Eighth Amendment); Tony Mauro, *U.S. Supreme Court vs. The World*, *U.S.A. TODAY*, June 20, 2005, at 15A (discussing the debate over whether the Court should rely on foreign law in interpreting the Constitution).

In light of my suggestion that *Giarratano* today is like *Bowers v. Hardwick* before *Lawrence v. Texas* overruled it, *supra* text accompanying notes 5–7, it is intriguing that Professor Leonard sees part of the reason for the shift between *Bowers* and *Lawrence* in a greater willingness on the part of the Court to allow itself to be influenced by foreign legal developments, *see* Arthur S. Leonard, *The Impact of International Human Rights Developments on Sexual Minority Rights*, 49 *N.Y.L. SCH. L. REV.* 525 (2005), a view that certainly finds support in the text of *Lawrence*, *see* 539 U.S. 558, 572–73, 576–77 (2003). *See generally* Charlene Smith & James Wilets, *Lessons from the Past and Strategies for the Future: Using Domestic, Interna-*

In recent decades, international law has sharpened its focus on the importance of scrupulous adherence to procedural fairness in capital cases and the significance of the right to counsel in all criminal proceedings, even noncapital ones involving only the discretionary considerations of abstract legal issues.¹²⁵ Of course, capital punishment is a fading phenomenon on the world scene and there is reason to believe that a *jus cogens* norm is developing against it.¹²⁶ But the authorities that recognize its continued existence also recognize that

[c]apital punishment may only be carried out pursuant to a final judgment rendered . . . after legal process which gives all possible safeguards to ensure a fair trial, . . . including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.¹²⁷

Authority supporting the right to counsel in noncapital cases would thus apply a fortiori to capital cases.

Ample authority lies close to hand. The European Court of Human Rights (ECHR), adjudicating cases arising from countries where the death penalty does not exist, has for some years been highly active in enforcing the right to counsel under Article 6(3)(c) of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms.¹²⁸ The ECHR's goal has been to ensure that the contests between governments and individuals take place on a level field; "equality of arms" seems to be the preferred term.¹²⁹ The ECHR has accordingly found governments in violation of the Convention for denying individuals counsel in both legally complicated cases¹³⁰ and simple ones,¹³¹ in situations where the proceedings were in high courts solely concerned with legal rules of general applicability,¹³² and even when a petitioner's attack was on the trial court's exer-

tional and Comparative Law to Overturn Sodomy Laws, 24 SEATTLE U. L. REV. 49 (2000) (discussing how to incorporate international and comparative law into attacks on domestic sodomy laws).

¹²⁵ See *infra* text accompanying notes 130–33.

¹²⁶ See Geoffrey Sawyer, Comment, *The Death Penalty is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency*, 22 PENN. ST. INT'L L. REV. 459 (2004).

¹²⁷ E.S.C. Res. 1984/50, annex, U.N. ESCOR, 1st Sess., Supp. No. I, at 33, U.N. Doc. E/1984/84 (May 25, 1984); see John Quigley, *Exclusion of Death-Scrupled Jurors and International Due Process*, 2 OHIO ST. J. CRIM. L. 261, 280–81 (2004).

¹²⁸ See Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(c), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone charged with a criminal offence has the following minimum rights: . . . if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require . . .").

¹²⁹ See, e.g., *Delcourt Case*, 11 Eur. Ct. H.R. (ser. A) at 15 (1970); *Case of Monnell & Morris*, 115 Eur. Ct. H.R. (ser. A) at 23–24 (1987).

¹³⁰ See *Granger Case*, 174 Eur. Ct. H.R. (ser. A) at 18–19 (1990).

¹³¹ See *Boner v. United Kingdom*, 300 Eur. Ct. H.R. 66, 75 (1994).

¹³² See *Pakelli Case*, 64 Eur. Ct. H.R. (ser. A) at 17–18 (1983).

cise of discretion and therefore unlikely to succeed.¹³³ Intriguingly, the ECHR has rejected as inadequate a system quite similar to that at issue in *Giarratano*, in which the burden was on pro se applicants to show prima facie merit to their appeals before the law required courts to assign lawyers to study the files.¹³⁴

Considering that these cases arose in an environment in which a five-year prison sentence was deemed a situation in which there can be “no question as to the importance of what was at stake in the appeal”¹³⁵ and in light of the scrupulous nature of international due process requirements for imposing the death penalty, as well as the legal complexity and serious consequences of state capital postconviction proceedings,¹³⁶ it seems quite plain that in failing to provide counsel in those proceedings America falls woefully short of the legal standards that other democracies impose upon themselves.

CONCLUSION

Scarecrows may for a time frighten crows into going hungry. But intelligent crows learn from experience to ignore scarecrows, and eventually intelligent farmers conclude that their maintenance is counterproductive. *Giarratano* is a scarecrow, a precedent as hollow as was *Bowers*¹³⁷ long before *Lawrence*¹³⁸ interred its lifeless husk. Intelligent lawyers, judges, and legislators should not allow *Giarratano* to divert them from doing what justice requires, and the Supreme Court should abandon it.

¹³³ See *Boner*, 300 Eur. Ct. H.R. at 75; *id.* at 79–80 (Sir John Freeland, concurring).

¹³⁴ See *Pham Hoang v. France*, 243 Eur. Ct. H.R. (ser. A) at 17–19 (1992).

¹³⁵ *Granger*, 174 Eur. Ct. H.R. at 18.

¹³⁶ See *supra* note 108 and text accompanying notes 94–104.

¹³⁷ 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³⁸ 539 U.S. 558.

