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*Giarratano* is a Scarecrow: The Right to Counsel in State Capital Post-conviction Proceedings

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As described in more detail *infra* note 18, I was peripherally involved as counsel in the *Giarratano* litigation. More recently, I served as Reporter for the American Bar Association's revised death penalty representation guidelines, *see* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA Death Penalty Representation Guidelines]; *see also infra* notes 14-15 and accompanying text, for which reason I feel the need to state specifically that the opinions expressed below are attributable solely to me.

This essay originated as a presentation at the scholarly conference entitled "The Great Writ: Developments in the Law of Habeas Corpus" which took place at Cornell Law School on April 2, 2005. It has benefitted from the insights of my fellow participants, from the data collection efforts of Paul Morrow of the Tennessee Office of the Post-Conviction Defender, 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. It seeks to take account of developments through late 2005.

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## I. Introduction

In the apocryphal Case of the Kettle,<sup>1</sup> one thing is plain: the defendant has no liability for the damage to the plaintiff's pot, although that may be because he never borrowed it in the first place, or because it was cracked when he borrowed it, or because it was sound when he returned it.<sup>2</sup>

*Murray v. Giarratano*<sup>3</sup> has a similarly clear bottom line. Even though courts continue to opine, in direct or indirect reliance upon the decision, that there is no right to counsel in state capital post-conviction proceedings,<sup>4</sup> that proposition is as dead as "some ghoul in a late-night horror movie."<sup>5</sup> Like *Bowers v. Hardwick*<sup>6</sup> before it was overruled by *Lawrence v. Texas*,<sup>7</sup> *Giarratano* is a scarecrow, although that may be because if applied to concrete instances the case

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<sup>1</sup>See ROBERT C. CASAD ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 466 (2d ed. 1989).

<sup>2</sup>See *Rudd v. Dewey*, 96 N.W. 973, 975 (Iowa 1903); *Johnson v. Eversole Lumber Co.*, 60 S.E. 1129, 1130 (N.C. 1908); *Clark v. Clark*, 65 N.C. 655, 663 (1871). The borrowed object has also appeared over the years as a lawn mower, see *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548 (7<sup>th</sup> Cir. 1990) (Easterbrook, J.), a pail, see *Dawson v. Pogue*, 18 Ore. 94, 105 (1889), and a skillet, see *Rogers v. Ratcliff*, 48 N.C. 225, 230 (1855).

<sup>3</sup>492 U.S. 1 (1989) .

<sup>4</sup>See, e.g., *Morris v. Dretke*, 90 Fed. Appx. 62, 71 (5<sup>th</sup> Cir.), cert. denied 125 S.Ct. 33 (2004); *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002).

<sup>5</sup>*Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Indeed, I argue *infra* in the text accompanying note 40 that it was never alive in the first place.

<sup>6</sup>476 U.S. 186 (1986).

<sup>7</sup>539 U.S. 558 (2003).

will support the existence of the claimed right;<sup>8</sup> or because it is irrelevant in today's legal environment;<sup>9</sup> or because it should be overruled, whether on the basis that it was wrong then<sup>10</sup> or

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<sup>8</sup>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 had not been facing actual injury and arguing that Court would have reached opposite result “in a concrete case in which an individual suffered actual injury solely on account of private consensual behavior.”). See also Allan Ides, *Bowers v. Hardwick: The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93, 97-98 (1992) (detailing the abstract posture in which the case reached the Court).

<sup>9</sup>See *infra* Part III; text accompanying notes 85-111. Cf. *Lawrence v. Texas*, 539 U.S. 558, 570, 573 (2003) (Noting that, as a result of legislative changes and state constitutional decisions, the number of states with consensual sodomy statutes in force had fallen from 25 at the time of *Bowers* to 13 at the time of *Lawrence*. “In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances”); Larry Cata Backer, *Inscribing Judicial Preferences into our Fundamental Law: On the European Principle of Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA J. COMP. & INT’L. L. 327, 368-69 (2000) (describing extent of these developments in the years prior to *Bowers*).

<sup>10</sup>Cf. *Lawrence*, 539 U.S. at 578 (holding “*Bowers* was not correct when it was decided”); Ronald J. Krotoszynski, Jr., *Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr.* 109 YALE L.J. 1237, 1247-48 (2000) (predicting that Supreme Court would eventually adopt views of Judge Johnson, who had written Court of Appeals decision in *Hardwick*’s favor); Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1103 (1988) (Assessing *Bowers* and concluding “that the majority’s historical claims were inaccurate. Its attempt to ground its holding in American and Western history must be judged a failure.”)

is wrong now.<sup>11</sup>

But unless judges, lawyers, and legislators recognize that they are dealing with an illusion they will permit themselves to be scared off the path of basic justice,<sup>12</sup> with fatal consequences in

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<sup>11</sup>See *infra* text accompanying notes 72-72 & nn. 72-73. Cf. *Lawrence*, 539 U.S. at 578 (holding *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, 1661 (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 *Bower’s* validation of same-sex sodomy laws survives the Court’s analysis” in *Romer*.)

<sup>12</sup>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, 327 (2003) (“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 build any legal conclusion, and an unacceptable one on which to build a just system for adjudicating capital cases.”); Clive A. Stafford Smith & Remy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55 (1999). Cf. Backer, *supra* note 9, at 362 (“*Bowers* is an excellent example of a pronouncement not in sync with core social reality. It is problematical and likely not to last long in its present form.”)

the real world.<sup>13</sup> The purpose of this essay is to provide assistance in seeing the scarecrow for what it is.

The piece proceeds as follows. Part II reviews the *Giarratano* litigation, noting several of the questions that the Supreme Court left unaddressed. Part III describes the subsequent actions of the states, actions that have considerable legal significance. Today every active death penalty state except Alabama provides for the pre-filing appointment of counsel to assist indigent Death Row inmates in the preparation of post-conviction petitions challenging their convictions and sentences.

The remaining Parts discuss legal theories, relying throughout on the current edition of the ABA Death Penalty Representation Guidelines. Because they represent the mainstream views of

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<sup>13</sup>*See, e.g.,* *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (holding capital petitioner to have forfeited review of federal claims because appellate papers in state post-conviction proceedings filed three days late; attack on effectiveness of counsel rejected because “There is no constitutional right to an attorney in state post-conviction proceedings....Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.”) *Cf.* Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 553, 568 (Acker et al. eds., 2d ed. 2003) (describing result as intellectually and practically untenable and “morally indefensible”). It remains unclear to this day whether Coleman was in fact guilty of the charges for which he was put to death, *see* JOHN C. TUCKER, *MAY GOD HAVE MERCY* (1997); Stuart Taylor, Jr., *Was an Innocent Man Executed?*, *Am. Law.*, Dec. 1997, and the Governor of Virginia is still considering whether to order DNA testing in the case. *See Mr. Warner, Lost In Thought*, *Wash. Post*, Nov. 27, 2005, at B6 (editorial). Plainly whatever results are obtained will come years too late; they should have been made known to the judicial system before rather than after Coleman’s execution.

the legal profession,<sup>14</sup> ABA standards in the criminal justice field have long been extremely influential with the Court<sup>15</sup> and this particular document provides significant empirical support for the arguments that follow.

Part IV posits that *Giarratano* has been much overread. The controlling opinion of Justice Kennedy does recognize that capital post-conviction petitioners have a right to counsel in certain circumstances – and those circumstances exist in today’s world.

Part V focuses on due process issues. Part V (A) notes that the Court should have applied the procedural due process framework of *Mathews v. Eldridge*<sup>16</sup> but did not. Had it done so, or were it to apply its more recent analysis of the due process right to counsel with respect to criminal proceedings (or to revive its older one based on equal protection), the constitutional right would be secure. Moreover, Part V (B) argues, the decision of the states to create statutory entitlements provides an independent source of due process protection against their arbitrary deprivation.

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<sup>14</sup>The Acknowledgments and Introduction to the ABA Death Penalty Representation Guidelines, 31 Hofstra L. Rev. at 914-916, list the numerous experts and institutions that contributed to their formulation. 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*, July 2005, at 49, 51 (noting importance of fact that Guidelines “reflect the current consensus among practitioners committed to quality representation”).

<sup>15</sup>Such “standards [are ones] to which we have long referred as ‘guides to determining what is reasonable’” when considering the performance of defense counsel, *Wiggins v. Smith*, 123 S.Ct. 2527, 2536-37 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). See *Rompilla v. Beard*, 125 S.Ct. 2456, 2465-66 (2005).

<sup>16</sup>424 U.S. 319 (1976).

Part VI 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 respecting capital determinations.

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

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

## II. From Giarratano to *Giarratano*

*Giarratano* began when Joseph M. Giarratano, a Virginia Death Row inmate and remarkable human being,<sup>17</sup> commenced a Section 1983 action in the United States District Court for the Eastern District of Virginia on behalf of himself and his fellow prisoners asserting a constitutional right to the appointment of counsel for collateral challenges to their capital

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<sup>17</sup>See Colman McCarthy, *Prisoner's Life is Radically Different from Time of His '79 Conviction*, *Virginian-Pilot*, Feb. 26, 2004, at B11.

convictions and sentences.<sup>18</sup> Spurred into action by this development, pro bono lawyers who had

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<sup>18</sup>The complaint, *Giarratano v. Sielaff*, No. 85-0655-R, was received in the Clerk's Office on July 3, 1985. It was officially filed on August 6, 1985, when an order was entered permitting it to go forward *in forma pauperis*; requiring the defendant, the Director of the Virginia State Department of Corrections, to respond by August 26; and granting Giarratano 20 days from receipt of the response to reply. Both documents are on file with the Cornell Law Review.

On August 19, 1985, Giarratano wrote to the assigned District Judge, Robert Merighe, Jr., to point out that one of his co-plaintiffs, Earl Washington, Jr. had been transferred to another facility on August 16 in anticipation of an execution on September 5. "Mr. Washington," Giarratano told the judge, "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 counsel to assist him in p[ur]suing 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 very common here of late." On the schedule set by the Court, Giarratano noted, "It seems that my co-plaintiff will be executed before any response by me could be filed; or before any proper state relief could be sought."

On September 5, the Court entered an order deeming this letter to constitute an amendment to the complaint. Both the letter and the order are on file with the Cornell Law Review.

Meanwhile, Giarratano forcefully 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 currently a judge on the North Carolina Court of Appeals) when she visited him for reasons that will appear in the next sentence of text. *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 she raised the matter with me. The result, as described in Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOF. L. REV. 1089, 1099 (2001), was that I began work as part of a legal team representing Washington individually in the drawn-out proceedings that obtained a stay of his execution on August 27, 1985 (nine days before it was to occur), *see* EDDS, *supra*, at 92, 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. *See also* *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) (noting first gubernatorial action). Washington subsequently filed a civil rights suit against Virginia officials for fabricating the case against him, which continues to be litigated, *see, e.g.*, *Washington v. Wilmore*, 407 F.3d 274 (4<sup>th</sup> Cir. 2005); *Va. Dept. State Police v. Washington Post*, 386 F.3d 567 (4<sup>th</sup> Cir. 2004), *cert. denied* 125 S.Ct. 1706 (2005), and in which I represent him along with a number of co-counsel.

Another consequence of these developments was that I consulted frequently with the legal teams representing both the *Giarratano* class and Giarratano personally in connection with his efforts to win relief from his own conviction and death sentence. The latter has been

(continued...)

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 re-configured the original lawsuit accordingly.<sup>19</sup>

The case was tried on July 10-11, 1986 before Judge Mehri. He heard extensive testimony from defense lawyers, capital prisoners, government officials, and institutional attorneys designated to assist Death Row inmates, as well as from Deans and Giarratano. The testimony, which was fleshed out by various affidavits, was essentially undisputed. Post-conviction representation was both critical to the inmates' cases and legally very complex.<sup>20</sup> The government employed private lawyers on a part-time basis to "assist," although not actually represent,<sup>21</sup> Virginia's inmates. These lawyers had in fact never filed a post-conviction petition on behalf of a Death Row inmate though many had been without representation for long periods.<sup>22</sup> Moreover, the lawyers' "jurisdiction" did not extend to the Death House, in which inmates were housed for

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<sup>18</sup>(...continued)  
commuted, *see* B. Drummond Ayres, Jr., *Virginia Governor Blocks an Execution*, N.Y. Times, February 20, 1991, at A16, and I remain a member of the team seeking to secure his release on parole.

<sup>19</sup>*See* *Giarratano v. Murray*, 668 F. Supp. 511, 512 (E.D. Va. 1986); EDDS, *supra* note 18, at 84-87.

<sup>20</sup>*See* Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law, *Watkins v. Baliles*, No. 85-0655-R, at 13-18 (E.D.Va. Aug. 20, 1986) (copy on file with Cornell Law Review).

<sup>21</sup>In other words, the lawyers might sometimes provide inmates with photocopies of specifically-requested cases, *see id.* at 44 ¶ 92, but, as they testified, they could not actually appear as counsel for them, *see id.* at 36-38.

<sup>22</sup>*See* Plaintiffs' Post-trial Memorandum of Law, *Watkins v. Baliles*, No. 85-0655-R, at 9 (E.D.Va. Aug. 20, 1986) (copy on file with Cornell Law Review).

the last 15 days prior to execution.<sup>23</sup> The only way in which counsel might be appointed was if a trial judge on review of a pro se petition for possible merit exercised discretion to appoint one.<sup>24</sup> Thus, the responsible attorney general admitted, if Paul, Weiss had not intervened Earl Washington – who was mentally retarded and could not have filed a pro se petition – would have been executed.<sup>25</sup> In short, the only actual pre-filing representation any Death Row inmate had ever obtained was from volunteer members of the private bar.

Against this background – and considering that Death Row prisoners were incapable of doing for themselves the complex and often-frenzied legal work required to avert an execution,<sup>26</sup> particularly under the stress of their own impending demise – the District Court ruled that Virginia

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<sup>23</sup>See id. at 10 n.7; Plaintiff's Amended Proposed Findings of Fact, *supra* note 20, at 31 ¶ 67.

<sup>24</sup>See id. at 36 ¶ 77, 49 ¶ 102. 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 ¶ 72.

<sup>25</sup>See Edds, *supra* note 18, 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); Plaintiffs' Amended Proposed Findings of Fact, *supra* note 20, at 31 ¶¶ 67-69; Plaintiffs' Post-trial Memorandum of Law, *supra* note 22, at 8 n.5.

<sup>26</sup>See Freedman, *supra* note 18, at 1098 (noting that staying Washington's execution required a team of Paul, Weiss attorneys to spend "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 18, at 89-92.

had failed to provide the meaningful access to the courts required by the Constitution.<sup>27</sup> The state was accordingly ordered to provide for the pre-filing appointment of counsel for indigent Death Row inmates desiring to file state habeas corpus petitions.<sup>28</sup>

This decision was reversed by a divided Fourth Circuit panel<sup>29</sup> and then reinstated by a 6-4 vote of the en banc court.<sup>30</sup> Straightforwardly relying on the record below, the en banc majority had no difficulty in determining that the District Court had been correct when it “concluded that 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 guaranteed by the Constitution,” and that the pre-filing appointment of such an attorney was necessary.<sup>31</sup> The Fourth Circuit’s only real hesitation was a legal one. The Supreme Court had recently ruled in *Pennsylvania v. Finley*<sup>32</sup> that the federal constitution did not require appointed

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<sup>27</sup>See *Giarratano v. Murray*, 668 F. Supp. 511 (E.D. Va. 1986) (relying upon *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 (4<sup>th</sup> Cir. 1990) (en banc).

The Supreme Court plurality later denigrated the considerations relied upon by the District Court as unworthy of the dignity of factual findings, see *Giarratano*, 492 U.S. at 11-12. In light of the extensive evidentiary record below, this was disingenuous at best, as the dissent noted, *id.* at 27-28 & n.19. But, the plurality opined, if the rule were otherwise “a different constitutional rule [might] apply in a different State if the district judge hearing that claim reached different conclusions,” *id.* at 12. What might be anomalous about ruling that one state was meeting its access obligations while another was not went unexplained.

<sup>28</sup>*Giarratano*, 668 F. Supp. at 517.

<sup>29</sup>See *Giarratano v. Murray*, 836 F.2d 1421 (4<sup>th</sup> Cir. 1988).

<sup>30</sup>See *Giarratano v. Murray*, 847 F.2d 1118 (4<sup>th</sup> Cir. 1990) (en banc).

<sup>31</sup>*Id.* at 1120-21.

<sup>32</sup>481 U.S. 551 (1987).

counsel in state post-conviction proceedings who determined that the client’s position lacked merit to follow the procedures of *Anders v. California*,<sup>33</sup> since the federal constitution did not require the state to appoint counsel in such proceedings at all.<sup>34</sup> But, the Fourth Circuit reasoned, *Finley* was not a case about meaningful access to the courts and did not involve the death penalty.<sup>35</sup> Hence it stood as no barrier to requiring the appointment of counsel “under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty.”<sup>36</sup>

In the Supreme Court, four Justices would have affirmed 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.”<sup>37</sup> Chief Justice Rehnquist, 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,” with any need for additional safeguards for the former class being met through the Eighth Amendment rules governing the trial phase of those cases.<sup>38</sup>

Justice Kennedy concurred in the judgment only and wrote separately. “The requirement of meaningful access,” he said, “can be satisfied in various ways. . . . While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those

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<sup>33</sup>366 U.S. 738 (1967).

<sup>34</sup>*See Finley*, 481 U.S. at 557.

<sup>35</sup>*See Giarratano*, 847 F.2d at 1122.

<sup>36</sup>*Id.*

<sup>37</sup>*See Giarratano*, 492 U.S. at 32 (Stevens, J., dissenting, joined by Brennan, Marshall and Blackmun, JJ.).

<sup>38</sup>*Id.* at 10.

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 records of this case, I concur in the judgment of the Court."<sup>39</sup>

Intriguingly, Justice O'Connor joined this opinion, as well as that of the plurality, writing that she did not view the two as inconsistent.<sup>40</sup>

Whatever may be gleaned from all this, one fact is clear enough. The judgment of the Court turned on the conclusion of Justice Kennedy that "on the facts and records of this case" Virginia had met its constitutional obligation. *Giarratano* did not rule that no constitutional obligation existed. On the contrary five, and perhaps six, Justices believed that one did.

### III. The Aftermath of *Giarratano*

The decision in *Giarratano* led to the proverbial interesting times.<sup>41</sup>

At the time the case was decided only 18 of 37 states with the death penalty automatically

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<sup>39</sup>*Id.* at 14-15 (Kennedy, J., concurring).

<sup>40</sup>*Id.* at 13 (O'Connor, J., concurring).

<sup>41</sup>These largely followed upon the negative scholarly commentary that greeted the ruling. See, e.g., Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 607 (1994) (describing 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"); Scott Elliott Rogers, Note, *Limiting the Relief Available to Indigent Death Row Inmates Denied Meaningful Access to the Courts*, 17 FL. ST. U. L. REV. 399 (1990) ("concluding that the decision is supported by neither precedent nor policy"); Moohr, *supra* note 25 (concluding "that the Court erred"). See also Michael A. Mello, *Is There A Federal Constitutional Right to Counsel in Capital Post-Conviction Proceedings?*, 79 J. CRIM. L. & CRIMINOLOGY 1065 (1989) (arguing that Court should rule in *Giarratano*'s favor).

appointed counsel in capital post conviction proceedings;<sup>42</sup> currently, 33 of the 37 death penalty states do.<sup>43</sup> Moreover, 13 of those states have read either the state's statute or its constitution to

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<sup>42</sup>*Giarratano*, 492 U.S. at 10 n.5.

<sup>43</sup>*See* Ariz. R. Crim. P. 32.5; Ark. Code 16-91-202 (a)(1)(A)(i); Cal. Gov't Code § 27706; Colo Rev. Stat. 16-12-205(1); Conn. Gen. Stat. Ann. § 51- 296; Fla. Stat. Ann. § 27.7001; Idaho Crim. R. 44.2; 725 Ill. Comp. Stat. Ann. 5/122-2.1; Ind. Code Ann. § 33-40-1-2(a); Kan. Crim. Proc. Code Ann. § 22-4506(d)(1)(C)(2); Ky. Rev. Stat. Ann. § 31.110; La. Rev. Stat. 15:149-1; Md. R. Crim. Proc. Ann. Art. 7-108(a); Miss. R. App. Proc. 22(c)(1); Mo. R. Crim. Proc. 24.036(a); Mont. Code Ann. § 46-21-201(3)(b)(i); Neb. Rev. Stat. Ann. § 23-3402(1); Nev. Rev. Stat. Ann. § 3-34.820; N.J. Stat. Ann. § 2a:158A-5; N.M. Stat. Ann. §31-16-3; N.C. Gen. Stat. 7A-451(c); Ohio Rev. Code Ann. § 2953.21(I)(1); Okla. Stat. tit. 22, § 1355.6; Or. Rev. Stat. § 138.590; Pa. R. Crim. P. 1500; S.C. Code Ann. § 17-27-160 (B); S.D. Codified Laws §21-27-4; Tenn. Code Ann. § 40-30-306; Tex. Crim. P. Code Ann. § 11.071(2); Utah Code Ann. § 78-35a-202(2)(a); Va. Code Ann. § 19.2-163.7; Wash. Rev. Code § 10.73.150(4); and Wy. Stat. §7-6-104(c)(ii).

create a legal right that such counsel be effective.<sup>44</sup>

But the remainder have not. Even in those that have, the declarations of rights that “sound so fair”<sup>45</sup> have often proved to consist of pronouncements “that palter with us in a double sense;

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<sup>44</sup>*See* Grinols v. State, 74 P.3d 889 (Alaska 2003) (holding that due process clause of the Alaska’s constitution requires effective post-conviction counsel); Lozado v. Warden, State Prison, 613 A.2d 818 (Conn. 1992) (holding that statutory right to counsel in post conviction proceedings includes the right to effective assistance of counsel); Hernandez v. State, 992 P.2d 789, 793 (Idaho App. 1999) (holding incompetence of lawyer who represented defendant in prior action for post conviction relief to be sufficient reason to allow defendant to pursue second petition for relief); In the Matter of Carmody, 653 N.E.2d 977, 983 (Ill.App. 1995) (holding that the statutory right to counsel in post conviction proceedings includes the right to effective assistance of counsel); Daniels v. State, 741 N.E. 2d 1177, 1190 (Indiana 2001) (recognizing limited right to effective assistance of post-conviction counsel); Dunbar v. State, 515 N.W.2d 12, 14-15 (Iowa 1994) (reconsidering the right to effective assistance of counsel after the United States Supreme Court held that there is no federal constitutional right to the effective assistance of counsel, and holding that the statutory right to the effective assistance of counsel remains good law because it is not grounded in the federal constitution); Brown v. State, 101 P.3d 1201 (Kan. 2004) (holding that the statutory right to counsel in post conviction proceedings includes the right to effective assistance of counsel); Stovall v. State, 144 Md. App. 711, 715-16 (2002) (holding that the statutory right to counsel in post conviction proceedings includes the right to effective assistance of counsel); Jackson v. State, 732 So.2d 187, 191-92 (Miss. 1999) (holding state constitution mandated assignment of counsel in capital post-conviction proceedings; state later created statutory mechanism, *see* ABA Death Penalty Representation Guidelines, 31 HOFSTRA L. REV. at 942 n.77; *see also* Grayson v. Epps, 338 F.Supp.2d 699, 703-04 (S.D. Miss. 2004) (noting absence of evidence that either mandate had resulted in provision of effective counsel); *infra* note 68 (reporting further litigation developments)); State v. Velez, 746 A.2d 1073 (N.J.Super. 2000) (holding that New Jersey’s state rule mandating assignment of counsel for post conviction proceedings creates entitlement to effective assistance); Crump v. Warden, 934 P.2d 247 (Nev. 1992) (holding that inmate who had post-conviction counsel appointed by statutory mandate was entitled to effective assistance of counsel); Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999) (holding that the enforceable right to post-conviction counsel under state law means ineffectiveness of such counsel provides a basis for relief); Jackson v. Weber, 637 N.W.2d 19 (S.D. 2001) (holding that the statutory right to counsel in post-conviction proceedings includes the right to effective assistance of counsel).

<sup>45</sup>WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH act 1, sc. 3.

that keep the word of promise to our ear, and break it to our hope.”<sup>46</sup> In the sublunary world, “the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment . . . have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance.”<sup>47</sup>

One need not look far for proof of this statement. Current law provides significant procedural advantages in capital federal habeas corpus proceedings to states that have mechanisms for the provision of “competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions have been upheld on direct appeal.”<sup>48</sup> A number of states have

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<sup>46</sup>Id. act 5, sc. 8.

<sup>47</sup>ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 HOFSTRA L. REV. at 932 n.47. 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 that state legislatures “not passively stand by and wait for their state courts or the U.S. Supreme Court to take action [but rather] utilize their resources” to address problem).

<sup>48</sup>28 U.S.C. § 2261 (b) (2000). A state which does this is says to have “opted-in” under Chapter 154 of the statute. For a summary of the advantages to the states of opting-in, see ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 HOFSTRA L. REV. at 931 n.40.

sought to gain these benefits. Not one has succeeded.<sup>49</sup>

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<sup>49</sup>*See* *Spears v. Stewart*, 283 F.3d 992, 1019 (9th Cir. 2002) (holding state’s failure to comply with Arizona’s facially sufficient Chapter 154 mechanism prevented it from benefiting from the opt-in provisions in instant case); *Kreutzer v. Bowersox*, 231 F.3d 460, 462-63 (8th Cir. 2000) (stating Missouri does not qualify under Chapter 154); *Tucker v. Catoe*, 221 F.3d 600, 604-05 (4th Cir. 2000) (holding South Carolina’s “mere promulgation of a ‘mechanism’ [was] not sufficient to permit [it] to invoke [Chapter 154’s] provisions[;] . . . those mechanisms and standards must in fact be complied with”); *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000) (California does not qualify under Chapter 154); *Baker v. Corcoran*, 220 F.3d 276, 285-87 (4th Cir. 2000) (Maryland does not qualify under Chapter 154), *cert. denied*, 531 U.S. 1193 (2001); *Green v. Johnson*, 116 F.3d 1115, 1120 (5th Cir. 1997) (Texas does not qualify under Chapter 154); *Brown v. Puckett*, No. 3:01CV197-D, 2003 WL 21018627, at \*2-3 (N.D. Miss. Mar. 12, 2003) (Mississippi does not qualify under Chapter 154); *Kasi v. Angelone*, 200 F. Supp. 2d 585, 592-93 n.2 (E.D. Va. 2002) (determining that “Virginia does not meet the [opt-in provisions]”); *Smith v. Anderson*, 104 F. Supp. 2d 773, 786 (S.D. Ohio 2000) (Ohio does not qualify under Chapter 154); *Ward v. French*, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (North Carolina does not qualify under Chapter 154), *aff’d*, 165 F.3d 22 (4th Cir. 1998); *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (Louisiana does not qualify under Chapter 154); *Austin v. Bell*, 927 F. Supp. 1058, 1062 (M.D. Tenn. 1996) (finding “Tennessee law [providing] for the appointment of counsel to habeas petitioners did not satisfy prerequisites of § 2261(b)”); *Ryan v. Hopkins*, No. 4:CV95-3391, 1996 WL 539220, \*3-4 (D. Neb. July 31, 1996) (ruling “Nebraska’s framework for appointing counsel in post-conviction capital cases [is not] in compliance with subsections (b) and (c) of section 2261”).

Perhaps recognizing that effective assistance of post-conviction counsel in capital cases is in the interests of the federal government as well as of the states, *see infra* note 68 and accompanying text, Congress has recently taken the first steps towards providing funding to bring it about. *See* 42 U.S.C. § 14163 (2004). *See also* Lily Henning, *The White House’s Capital Venture*, *Legal Times*, March 21, 2005, at 1 (discussing President Bush’s support for such funding in his State of the Union Message on Feb. 2, 2005).

Of course to the extent that the states and the federal government do bring about competent representation the need for a judicially enforceable right under the federal Constitution will diminish, *cf. supra* note 9 (noting increased state protections for homosexual activity prior to *Bowers*) – although the likelihood of one being recognized will increase, *see infra* note 71. Correlatively, to the extent that a federal constitutional requirement exists Congress could simply act under Section 5 of the Fourteenth Amendment to mandate that the states implement it. *See* *Moohr, supra* note 25, at 809 (making this proposal).

#### IV. Re-Viewing *Giarratano*

Contrary to much loose talk to the effect that *Giarratano* held that there is no right to counsel in post-conviction proceedings in capital cases,<sup>50</sup> all it actually did was to reject the claim of constitutional entitlement in the case before it, leaving open the possibility that other facts might lead to other results. As indicated, the controlling vote belonged to Justice Kennedy, who emphasized that his concurrence was based “on the facts and records of this case,” in which “no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia’s prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief.”<sup>51</sup>

Whatever the merits of this view as applied to the facts of *Giarratano* itself,<sup>52</sup> there are state systems now that are worse than Virginia’s was then. The current leading example is

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<sup>50</sup>*See supra* note 4 and accompanying text.

<sup>51</sup>*Giarratano*, 492 U.S. at 14-15. *See supra* text accompanying note 40.

<sup>52</sup>The perverse implication of the statement is that by acting to save Earl Washington’s life, *see supra* note 18, the Paul, Weiss lawyers reduced their chances of prevailing in the *Giarratano* class action. If Mr. Washington had in fact been executed – as the responsible assistant attorney general testified would have happened if a petition not been filed, *see supra* note 25 and accompanying text – perhaps Justice Kennedy would have been satisfied that a Virginia prisoner had actually been denied counsel. But this scenario would have been as unsatisfactory from the viewpoint of the criminal justice system as from those of professional ethics or basic morality. An innocent person who had confessed falsely would have been executed long before his innocence could have been established, thus burying the very knowledge necessary to make reforms. *Cf. infra* note 102 (discussing role of state post-conviction proceedings in vindicating innocence). In any event, as a pure matter of legal doctrine, to excuse a state from meeting a constitutional obligation on the grounds that a private party voluntarily stepped in to fulfill it is “wrong in principle.” Eric M. Freedman, *Add Resources and Apply Them Systemically: Governments’ Responsibilities Under the Revised ABA Capital Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1101 n.13 (2003).

Alabama. That state has no system at all for providing pre-filing assistance<sup>53</sup> to capital prisoners desiring to<sup>54</sup> pursue post-conviction actions<sup>55</sup> (known locally as Rule 32 proceedings) and such prisoners have therefore been at the mercy of whatever pro bono assistance could be scraped up for them or of their own pro se efforts.<sup>56</sup>

In a number of reported cases unrepresented prisoners have forfeited their Rule 32 rights and only last-moment intervention by the federal courts has prevented them from being executed

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<sup>53</sup> As in *Giarratano*, a court may in its discretion provide counsel after examining the petition for potential merit. The *Dallas* and *Barbour* cases cited *infra* note 57 are examples of this happening – and also examples of why such a system is inadequate.

<sup>54</sup>“Desiring to” understates the urgency of the case. Under the Anti-terrorism and Effective Death Penalty Act of 1996 [AEDPA hereinafter], whose Chapter 153 made various amendments to 28 U.S.C. §§2244, 2253, 2254, and 2255, and whose Chapter 154 added 28 U.S.C. §§ 2261-66, “needing to” is far more accurate. It is a predicate to federal habeas corpus review that a petitioner exhaust state remedies. *See* 28 U.S.C. § 2254 (b) (1) (A) (2000). *Cf. infra* note 68 (discussing an exception to this requirement). But, except in the rarest of circumstances, a petitioner has a one- year period after the denial of certiorari on direct appeal to file a federal habeas corpus petition (a period that is tolled while a post-conviction review petition is pending in state court). *See* 28 U.S.C. §§ 2244 (d) (1), (2) (2000). Thus if 10 months elapse between the denial of certiorari and the filing of a state post-conviction petition the prisoner will have two months after the final denial of that petition to file for federal habeas corpus. But if 13 months elapse then even if the petition is timely under state law the prisoner is precluded from any federal court review at all – and Texas prisoners have in fact been executed under just such circumstances. *See* ABA Death Penalty Representation Guidelines, 31 HOFSTRA L. REV. at 1085 n.347 and accompanying text.

<sup>55</sup>*See* ABA Death Penalty Representation Guidelines, 31 Hofstra L. Rev. at 932 n.47, 1081 n.333 (singling out Alabama as engaging in “irresponsible behavior” and encouraging counsel to litigate its compliance with *Giarratano*).

<sup>56</sup> *See* Plaintiffs’ Brief in Opposition to Defendants’ Motion for Summary Judgment and Plaintiffs’ Submission of Additional Rule 56(e) Materials, *Barbour v. Campbell*, No. 01-S-1530-N, at 3-9 (M.D. Ala. Aug. 29, 2003) (copy on file with Cornell Law Review).

with their federal claims unexamined.<sup>57</sup> Unless the meaning of Justice Kennedy’s controlling opinion really is that one prisoner must be executed before later ones can successfully claim that denying them lawyers to prepare capital post-conviction petitions is unconstitutional, the Alabama system – which has been aptly described as “legal Russian roulette”<sup>58</sup> – violates the Constitution even under the exiguous standard of *Giarratano* itself.

The case simply did not hold that there is no constitutional right to counsel in capital post-conviction proceedings; indeed, it strongly indicated that there is such a right under appropriate circumstances. Before progressing to any additional legal theories, courts and lawyers should take the simple step of reading the case accurately and applying it to the facts before them.

## V. Re-Viewing Due Process

### A. Protecting Liberty

In considering *Giarratano*’s argument that he had a due process right to counsel for post-

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<sup>57</sup>*See* *Arthur v. Haley*, 248 F.3d 1302 (11<sup>th</sup> Cir. 2001) (affirming grant of stay on day before scheduled execution to inmate who had been unrepresented for more than two years following direct appeal); *Dallas v. Haley*, 228 F.Supp. 2d 1317 (M.D. Ala. 2002) (staying execution two days before it was to occur for inmate who had been appointed counsel by court after filing of 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 inmate who had been appointed counsel by court after filing of Rule 32 petition but whose counsel withdrew before dismissal of petition with result that no appeal from that dismissal was ever filed).

<sup>58</sup>ABA Death Penalty Representation Guidelines, 31 Hofstra L. Rev. at 1081 n.333.

conviction proceedings, the plurality stated the claim as one for access to the legal system<sup>59</sup> and notably failed to discuss *Mathews v. Eldridge*.<sup>60</sup> This gap alone is sufficient reason to characterize *Giarratano* as having been wrongly decided.<sup>61</sup>

As the Court recently re-iterated in a context presenting “weighty and sensitive

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<sup>59</sup>*Id.*, 492 U.S. at 11 (denying *Giarratano*’s claim of a right of access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977)). 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 government 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, and I accordingly discuss it under that heading, *see infra* Part VI.

*Giarratano* contained no discussion of equal protection doctrine, even though this had been the basis for some of the precedents underlying *Bounds*, notably *Douglas v. California*, 372 U.S. 353 (1963). By building on the revival of this underpinning of the right of access to the courts in *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-13, 120-21 (1996) (holding that state had to provide free transcript to indigent mother to enable her to appeal loss of parental rights), it would be straightforward to construct an argument that *Giarratano* had been incorrectly decided or, alternatively, that an opposite result must be reached today under this newly reinvigorated theory. *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”).

<sup>60</sup>424 U.S. 319 (1976). *Cf. Giarratano*, 492 U.S. at 29 (Stevens, J., dissenting) (citing *Mathews* without discussion).

<sup>61</sup>Alternatively, it might provide a basis in addition to the one noted in the last paragraph of *supra* note 59 for a later Court to distinguish the precedent away. Examples of the use of this technique that come readily to mind include *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (using First Amendment to substantially overrule result in *Gannett v. DePasquale*, 443 U.S. 368 (1979), which had been based on Sixth Amendment) and *Moore v. City of East Cleveland*, 413 U.S. 494 (1977) (using due process to substantially overrule result in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which had been based on equal protection).

governmental interests”<sup>62</sup> militating towards denying the procedural safeguards sought by the prisoner, its “ordinary” test for deciding such a claim “is the test we articulated in *Mathews v. Eldridge*.”<sup>63</sup>

*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. 424 U.S., at 335, 96 S.Ct. 893. 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 safeguards.” *Ibid.*<sup>64</sup>

Physical liberty is “the most elemental of liberty interests” safeguarded by due process.<sup>65</sup> 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 and judges no less than defendants – share an interest in the accuracy of the decision to put a

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<sup>62</sup>*Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004) (deciding what process 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. Justice Souter’s concurrence on behalf of three other Justices would have decided the case favorably to the petitioner on other grounds and, had it reached the due process issue, provided more robust procedural rights than the plurality did. *Id.* at 2660 (Souter, J., concurring). I note that I was a member of Hamdi’s legal team.

<sup>63</sup>*Hamdi*, 124 S.Ct. at 2646.

<sup>64</sup>*Id.*

<sup>65</sup>*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. 652, 672-74 (1977) (applying due process analysis to paddling of schoolchildren).

person to death by state authority.<sup>66</sup> While, to be sure, it will cost money for the states to provide competent post-conviction lawyers in capital cases,<sup>67</sup> those costs already exist; they are just being borne at present by others: by pro bono counsel and the federal government (which pays for habeas counsel to clean up, or attempt to clean up, the mess ineffective

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<sup>66</sup>See Freedman, *supra* note 12, at 332.

<sup>67</sup>*Id.* at 345.

state post-conviction lawyers have left behind)<sup>68</sup> in dollars and by Death Row inmates in injustice.<sup>69</sup> The virtually unanimous decision of the death penalty states to provide lawyers for capital post-conviction proceedings<sup>70</sup> is itself ample testament to the fact that the

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<sup>68</sup>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 importance of this entitlement “in promoting fundamental fairness in the imposition of the death penalty”), and of course one of the key duties of such counsel is to attempt to overcome any procedural blunders committed by state post-conviction attorneys. *See* Freedman, *supra* note 12, at 342-43. Hence, notwithstanding 28 U.S.C. § 2254 (i) (“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 Cooney v. Bradshaw*, 216 F.R.D. 408 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under § 848), *motion to vacate stay denied*, No. 03-4001 (6th Cir. July 24, 2003), *motion to vacate stay denied*, No. 03-5472 (U.S. July 24, 2003).

Moreover, to the extent that state post-conviction remedies are “ineffective to protect the rights of the applicant” – for example, because without competent counsel the prisoner cannot effectively utilize those proceedings to assert his federal rights – such remedies need not be exhausted as a predicate to federal habeas corpus review. *See* 28 U.S.C. § 2254(b)(1)(b)(ii) (2000). This provision, which dates in its present form to 1966, was left unamended by AEDPA and is thus unaffected by its Chapter 154. *See supra* note 48 and accompanying text (describing Chapter 154). In any event, a state post-conviction process might be “ineffective to protect the rights of the applicant” even it does provide for the appointment of counsel. Such a claim is currently being litigated with respect to Mississippi’s capital post-conviction 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. 1:04CV708B (S.D. Miss. Aug. 1, 2005) (copy on file with Cornell Law Review).

Thus the federal government is bearing significant costs that the states would be bearing if they were providing competent counsel to capital post-conviction petitioners. From a *Mathews* perspective, it is questionable whether requiring the states to make such provision would be imposing any additional costs at all on the government as a whole.

<sup>69</sup>*See* Freedman, *supra* note 52, at 1101.

<sup>70</sup>*See supra* text accompanying note 43.

assistance of counsel is critical to making those proceedings meaningful.<sup>71</sup>

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 post-conviction proceedings are collateral attacks on convictions and fall into an entirely different constitutional category than direct appeals.<sup>72</sup> But the Court's recent jurisprudence in classifying criminal proceedings into ones in which due process does or does not require the appointment of counsel rests upon a different distinction – one between legal processes that are primarily designed to correct error in individual cases and ones (like certiorari review) whose major purpose is to declare legal principles concerning issues of general public importance.<sup>73</sup> Since capital post-conviction proceedings plainly fall into the former

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<sup>71</sup>*Cf.* *Ake v. Oklahoma*, 470 U.S. 68, 78 n. 4 (1985) (collecting state statutes making expert psychiatric assistance available to indigent defendants as support for holding that due process requires provision of such assistance). As indicated in the second paragraph *supra* note 49, in our case the federal government agrees with the states.

<sup>72</sup>*See Giarratano*, 492 U.S. at 10. For an early attack on this premise, see Moohr, *supra* note 25, at 791. This explains why the Sixth Amendment is a dog that fails 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 post-conviction counsel where, as is frequently the case, post-conviction proceedings are the first opportunity to assert the ineffectiveness of trial counsel. *See Mackall v. Angelone*, 131 F.3d 442, 449, 451-52 (4<sup>th</sup> Cir. 1997) (en banc) (addressing this argument). The silence has become louder in the wake of *Massaro v. United States*, 538 U.S. 500 (2003) (unanimous) (holding that federal prisoner should raise ineffective assistance of trial counsel on post-conviction, not direct appeal). *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*).

<sup>73</sup>*See Halbert v. Michigan*, 125 S.Ct. 2582, 2586, 2590 (2005) (holding defendant who had pleaded guilty entitled to appointment of counsel in preparing leave to appeal because in passing on such applications appeals courts looks to merits of individual case and because indigent defendants pursuing such review “are generally ill-equipped to represent themselves”).

class, they may well carry a mandatory due process right to counsel.

And if there is a due process right to counsel, whether under *Mathews* or otherwise, then there is a right to effective counsel.<sup>74</sup>

#### B. Protecting Statutory Entitlements

The same due process conclusion follows if the matter be considered from the viewpoint not of liberty – which states are not free to grant or withhold – but from that of property in the form of statutory entitlements. Even if the states need never have granted the right to post-conviction counsel in the first place, a state-created right may not be arbitrarily denied.<sup>75</sup> As Professor McConville has amply demonstrated, in the present context this means that once a jurisdiction creates a statutory right to capital post-conviction counsel the Constitution requires that such counsel be effective.<sup>76</sup>

#### VI. Re-viewing the Eighth Amendment

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<sup>74</sup> See, e.g., *Nicholson v. Williams*, 203 F.Supp.2d 239, 255 (E.D.N.Y. 2002) (Weinstein, J.) (applying *Mathews* factors to hold that class of mothers facing termination of parental rights had due process right to appointment of counsel and to having such counsel be effective).

<sup>75</sup> See *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (collecting cases).

<sup>76</sup> See Celestine Richards McConville *The Right to the Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WISC. L. REV. 31; 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 initial version of the theory). See also Megan K. Rosichan, Note, *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 (2004) (making this argument with respect to Arkansas).

Indeed, that was precisely the reasoning of the Alaska Supreme Court in *Grinols v. State*, 74 P.3d 889 (Alaska 2003) (described *supra* note 44). Although it was not among the courts that had interpreted the state's statutory entitlement to counsel to mean effective counsel, *cf. supra* note 44 (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, supra*, at 894-95.

Even if the Court were unprepared to hold that ordinary principles of due process now require the States to provide counsel in capital post-conviction proceedings, it could quite comfortably reach that result under the Eighth Amendment.<sup>77</sup>

The unique imperative of safeguards to insure accuracy in criminal prosecutions that might eventuate in the prisoner's execution is deeply woven deeply into centuries of law in England,<sup>78</sup> in the States,<sup>79</sup> and in the United States Supreme Court.<sup>80</sup> 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

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<sup>77</sup>For example, the Court held in *Furman v. Georgia*, 428 U.S. 195 n.47 (1976) that the Eighth Amendment invalidated capital sentencing procedures that it had upheld against a due process challenge in *McGautha v. California*, 402 U.S. 183 (1971).

<sup>78</sup>*See* WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 332, 346-50 (1769) (describing respects in which, in *favorem vitae*, the laws of England were more favorable to capital than non-capital prisoners and arguing for legislative intervention where they were not).

<sup>79</sup>*See, e.g.*, *State v. Thompson*, 115 S.E. 326, 335 (S.C. 1922); *Bearden v. State*, 44 Ark. 331 (1884); *Prine v. Commonwealth*, 18 Pa. 103 (1851).

<sup>80</sup>*See, e.g.* *Diaz v. United States*, 223 U.S. 442, 455 (1912); *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Andres v. United States*, 333 U.S. 740, 752 (1948); *Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

administration.<sup>81</sup> It has adhered to that position ever since,<sup>82</sup> and has relied upon the “acute need for reliability in capital sentencing proceedings” in declining to extend to the non-capital context safeguards it has required in capital cases.<sup>83</sup>

The undeniable reality that litigating death penalty cases is infinitely more complicated than other criminal cases<sup>84</sup> has only grown more stark as a result of legal developments since *Giarratano*. In today’s circumstances the fundamental Eighth Amendment mandate of reliability in capital proceedings is simply not achievable unless a

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<sup>81</sup>*Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“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.”).

<sup>82</sup>*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).

<sup>83</sup>*See, e.g., Monge v. California*, 524 U.S. 721, 732 (1998) (holding that *Bullington v. Missouri*, 451 U.S. 430 (1981) applies only to capital cases).

<sup>84</sup>*See McFarland v. Scott*, 512 U.S. 849, 856 (1994). *See also* ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1., 31 Hofstra L. Rev. at 923.

The situation is greatly worsened because by approving the “death qualification” of capital juries in *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court 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 Reconsider the Death Penalty*, 2 OHIO ST. J. CRIM. L. 663, 667-68 (2005). *See* Marla Sandys & Scott McClelland, *Stacking the Death for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in AMERICA’S EXPERIMENT, *supra* note 13, at 385, 408 (comprehensively reviewing 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”); ABA Death Penalty Representation Guidelines, Commentary to Guideline 10.10.2, 31 HOFSTRA L. REV. at 1052 & n.261.

capital defendant has the assistance of counsel in state post-conviction proceedings.

To the extent *Giarratano* was based on the contrary premise<sup>85</sup> it has become obsolete.<sup>86</sup> The legal and factual environments are both very different than they were in 1989, and there is ample precedent for the Court overruling its death penalty decisions in light of evolving realities.<sup>87</sup>

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 on federal habeas corpus.<sup>88</sup> To take just a few examples, the Court's decisions made it vanishingly rare as a practical matter for Death Row inmates to be able to overcome such procedural

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<sup>85</sup>*See Giarratano*, 492 U.S. at 10 (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.”)

<sup>86</sup>The lower courts should take due note. *See* *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251 (1943) (refusing to follow *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) on the grounds that the Supreme Court would no longer adhere to it), *affirmed*, 319 U.S. 624 (1943); *State v. Simmons*, 112 S.W.3d 397 (Mo. 2003) (concluding that Court would no longer adhere to *Stanford v. Kentucky*, 492 U.S. 261 (1982)), *affirmed*, 125 S.Ct. 1183 (2005).

<sup>87</sup>*See, e.g., Roper v. Simmons*, 125 S.Ct. 1183 (2005) (holding Constitution bars execution of those younger than 18 at time of crime), *overruling* *Stanford v. Kentucky*, 492 U.S. 361 (1982); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding Constitution forbids execution of mentally retarded individuals), *overruling* *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989); *Ring v. Arizona*, 536 U.S. 584, 608 (2002) (holding Constitution ordinarily requires jury determination of factors making defendant death-eligible), *overruling* *Walton v. Arizona*, 497 U.S. 639, 649-51 (1990); *see also* *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) (stating that *Walton* remained good law). In the first two of these cases, the Court relied heavily upon the fact that since its prior ruling there had been steady movement on the state level towards its new position. *See Roper*, 125 S.Ct. at 1190; *Atkins*, 536 U.S. at 315. The same is true in our situation. *See supra* text accompanying notes 43-44.

<sup>88</sup> There is a more detailed discussion of these developments in Freedman, *supra* note 13, at 563-68.

defenses as procedural default,<sup>89</sup> “abuse of the writ”<sup>90</sup> and non-exhaustion,<sup>91</sup> while creating a non-retroactivity doctrine that radically shrank the universe of federal claims on which relief could be granted.<sup>92</sup> Even with these obstacles to the recognition and correction of error in place, the realities of the unreliability of the system kept overtopping the levees hiding them. The most comprehensive available data shows that of every hundred death sentences imposed through 1995 sixty-eight percent did not survive post-conviction review; forty-seven percent were reversed at the state level (roughly forty-one percent on direct appeal and six percent on state collateral attack), and a further twenty-one percent on federal habeas corpus<sup>93</sup> (which of course required that they have run the gauntlet of state post-conviction proceedings first).

Then, in 1996, AEDPA was enacted, a development whose re-arrangement of the legal landscape increased the importance of state capital post-conviction proceedings yet

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<sup>89</sup>See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991).

<sup>90</sup>See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991).

<sup>91</sup>See, e.g., *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

<sup>92</sup>See *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>93</sup>See ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 HOFSTRA L. REV. at 932 n.46 (citing James S. Liebman, Jeffrey A. Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, pt. I, app. A, at 5-6 (2000)). The statistics from the comprehensive empirical study by Professor Liebman and his colleagues have been distilled at James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases*, 78 TEX. L. REV. 1839 (2000). A fuller discussion is contained in Andrew Gelman, James S. Liebman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL STUDIES 209 (2004).

further.<sup>94</sup> Because a federal habeas corpus court was now limited in its review of the factual and legal determinations of the state courts,<sup>95</sup> those courts would increasingly have the last word on questions of both guilt and sentence. And the last word on the state level is spoken in state post-conviction proceedings.<sup>96</sup>

The implications of these developments are far reaching<sup>97</sup> and cast a harsh light on the hollowness of *Giarratano*.<sup>98</sup> Consider just two examples.

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<sup>94</sup>Last Term in *Rhines v. Weber*, 125 S.Ct. 1528 (2005), the Court quite appropriately relaxed the rule of *Rose v. Lundy*, 455 U.S. 509 (1982) (requiring dismissal of federal habeas corpus petitions containing claims that had not been exhausted in state court) in light of its recognition that, “The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions,” *Rhines*, 125 S.Ct. at 1533.

<sup>95</sup>*See* 28 U.S. C. § 2254 (d)-(e) (providing that writ may not be granted 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”).

<sup>96</sup>This might be of less concern if the states systematically provided effective assistance of counsel at capital trials. *See* Freedman, *supra* note 18, at 1106. But they do not. *See* ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 HOFSTRA L. REV. at 928-30. *See generally* Lawrence Marshall, *Gideon’s Paradox*, 73 FORDHAM L. REV. 935, 962 (2004) (urging Court to recognize importance of effective post-conviction representation in assuring effective trial representation).

<sup>97</sup>Indeed, they go beyond the particular issue of counsel that this essay addresses. The more the final available route by which petitioners may vindicate federal rights is through the state courts, the greater is 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. LAW & SOC. CHANGE 633 (2001-02).

<sup>98</sup>*See* Hammel, *supra* note 47, at 349 (observing that AEDPA and other recent legal changes “place an incalculable premium on competent representation by talented, adequately funded lawyers” in capital post-conviction proceedings).

Factually, the problem of innocence far more salient than it was in the 1980's.<sup>99</sup>

There is, moreover, an increasing recognition of the reality that for many reasons (including but not limited to the natural evolution of scientific techniques) there is a general tendency in capital cases for “evidence of innocence to emerge only at a relatively late stage.”<sup>100</sup> If under AEDPA the last stage at which the emergence of such evidence will do the prisoner

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<sup>99</sup>The website of the Death Penalty Information Center, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited November 23, 2005), lists 122 cases of people who have been released from death row with evidence of their innocence since 1973. Only 35 of these instances had taken place by 1989, and the average number of exonerations per year has been risen sharply since then. 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); see also Michael L. Radelet & Hugo Adam Bedau, “The Execution of the Innocent,” in *AMERICA’S EXPERIMENT*, *supra* note 13, at 325. Significantly, “innocent” in the post-conviction context has a far more stringent definition than at trial. See Anthony G. Amsterdam, *Remarks*, 33 HOFSTRA L. REV. 403, 411 (2004) (showing that an actually innocent person seeking post-conviction 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”).

<sup>100</sup>Eric M. Freedman, *Innocence, Federalism, and the Capital Jury*, 18 N.Y.U. REV. LAW & SOC. CHANGE 315, 316 (1990-91).

This emerging understanding strongly suggests that the Supreme Court should in the near future re-visit and overrule the suggestion of *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) that there is no constitutional right to have the sentencing jury in a capital trial consider evidence of lingering doubt. See ABA Death Penalty Representation Guidelines, Commentary to Guideline 10.11, 31 Hofstra L.Rev. at 1060 n. 275 (collecting reasons why “there is ample reason to doubt the force of this precedent”). Indeed, it may well do so in *Oregon v. Guzek*, 125 S.Ct. 1929 (2005) (granting certiorari to review *State v. Guzek*, 336 Ore. 424 (2004)).

any good is to be state post-conviction proceedings,<sup>101</sup> the need for the effective assistance of counsel at that stage is re-doubled.<sup>102</sup>

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

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<sup>101</sup>Only dictum in *Herrera v. Collins*, 506 U.S. 390 (1993) supports the proposition that a prisoner asserts a violation of the Constitution by alleging that a state is about to execute him for a crime of which he is innocent. The holding of the case was that Herrera had not made a strong enough initial showing to be able to pursue on federal habeas corpus whatever putative claim might exist. See Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121 (2005) (presenting sharp critique of case).

The resulting disjunction between a judicial theory built on a model of well-functioning state justice systems and an empirical reality stained by near-executions of the innocent was epitomized by *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (en banc). Eight judges in that case found that although House had “presented a colorable claim of actual innocence,” *id.* at 684, he was entitled to no relief under existing law; one judge concluded that since there was “grave doubt” as to House’s guilt he should receive a new trial, *id.* at 709–10; and six judges ruled that, because House had “established his actual innocence,” *id.* at 686, he had met the criteria hypothesized by the dictum in *Herrera* and was entitled to his immediate release, *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 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 (2005). An opinion will presumably be forthcoming during the 2005 Term.

The gravity of the issue is highlighted by the subsequent chilling revelation of the actual execution of an innocent defendant in Texas in 1993. See Lise Olsen, *Cantu Case: Death and Doubt*, Houston Chronicle, Nov. 21, 2005, at A1.

In a system of redundant safety features, though, federal habeas corpus should be providing only a fail-safe for innocent defendants who have somehow made it to that point, not their primary protection. Even the strongest Supreme Court ruling in House’s favor will simply highlight, not diminish, the significance of competent counsel in state capital post-conviction proceedings.

<sup>102</sup>See ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 Hofstra L.Rev. at 932-35 (discussing importance of state post-conviction proceedings in vindicating claims of innocence).

assistance of counsel<sup>103</sup>— the Court has ruled that counsel performed incompetently at sentencing by failing to unearth and present mitigating evidence.<sup>104</sup>

Because the Court has been so persuaded of the importance of effective advocacy at the penalty phase it 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 the contrary rulings of the state courts.<sup>105</sup> But, as a practical and legal matter the primary venue for the adjudication of such claims in an AEDPA-governed world is likely to be the state courts. Hence, if the right to effective representation at state capital sentencings is to become a reality it will have to be enforced in state post-conviction proceedings by competent lawyers who can deploy appropriate resources to make those proceedings meaningful.<sup>106</sup>

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<sup>103</sup>See Freedman, *supra* note 12, at 332 n.33.

<sup>104</sup>See *Rompilla v. Beard*, 125 S.Ct. 2456, 2464 (2005); *Wiggins v. Smith*, 123 S.Ct. 2527, 2536-37 (2003); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). For a comprehensive recent discussion of the importance of a robust application of Sixth Amendment rights beyond those 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).

<sup>105</sup>See *Rompilla*, 125 S.Ct. at 2462, 2467; *Wiggins*, 123 S.Ct. at 2534-35, 2538-39; *Williams*, 529 U.S. 397-98.

<sup>106</sup>In *Wiggins*, for example, the Court relied heavily on “an elaborate social history report” presented in state post-conviction proceedings by an expert social worker collecting the powerful mitigation evidence that trial counsel should have discovered but did not. See *Wiggins*, 123 S.Ct. at 2532-33.

Because state post-conviction review proceedings are of such critical importance to the just administration of the death penalty overall,<sup>107</sup> the ABA Death Penalty Representation Guidelines, which “embody the current consensus about what is required to provide effective defense representation in capital cases,”<sup>108</sup> 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 case, including on state post-conviction review.<sup>109</sup> Tellingly, the Guidelines also pointedly advise counsel to aggressively test the boundaries of *Giarratano* by challenging as a federal constitutional violation states’ failures to appoint counsel for capital post-conviction petitioners.<sup>110</sup>

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

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<sup>107</sup>See ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 Hofstra L. Rev. at 932-35; id., Commentary to Guideline 10.15.1, 31 Hofstra L. Rev. at 1085-87; Freedman, *supra* note 12, at 328-32.

<sup>108</sup>ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 Hofstra L. Rev. at 920.

<sup>109</sup>ABA Death Penalty Representation Guidelines, Guideline 1.1.

<sup>110</sup>See ABA Death Penalty Representation Guidelines, Commentary to Guideline 1.1, 31 Hofstra L. Rev. at 932 n.47; id., Commentary to Guideline 10.15.1, 31 Hofstra L. Rev. at 1081 n.333.

## VII. Taking an International Viewpoint

In a period when the Supreme Court has become increasingly sensitive to legal trends in the world community,<sup>111</sup> it seems appropriate to end the legal re-view by discussing how *Giarratano* would be considered abroad.

In recent decades international law has sharpened its focus on (a) the importance of scrupulous adherence to procedural fairness in capital cases, and (b) the significance of the right to counsel in all criminal proceedings, even non-capital ones involving only the discretionary consideration of abstract legal issues.

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<sup>111</sup>*See, e.g.*, *Roper v. Simmons*, 125 S.Ct. 1183, 1198-1200 (2005) (noting views of the world community in the course of overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989) as obsolete and determining that execution of offenders younger than 18 violates Eighth Amendment).

For a few summaries of this much-discussed trend, see 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); 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); David Weissbrodt, 21 CONST. COMMENT., *International Human Rights Law Perspective on Grutter and Gratz*, 275, 275-281 (2004). *See also* Tony Mauro, *U.S. Supreme Court vs. The World*, U.S.A. Today, June 20, 2005, at 15A; Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. Times, April 2, 2005, at A 10; Linda Greenhouse, *Supreme Court, 5-4, Forbids Execution in Juvenile Crime*, N.Y. TIMES, March 1, 2005, at A 1. *See generally* 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).

In light of my suggestion *supra* text accompanying notes 6-7 that *Giarratano* today is like *Bowers v. Hardwick* before *Lawrence v. Texas*, it is intriguing that Professor Leonard sees part of the reason for that shift in the greater willingness of the Court 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 (2004-05), a view that certainly finds support in the text of *Lawrence*, *see id.* 539 U.S. at 572-73, 576-77. *See generally* Charlene Smith & James Wilets, *Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, 24 SEATTLE U. L. REV. 49 (2000).

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.<sup>112</sup> But the authorities that recognize its continued existence also recognize that it “may only be carried out pursuant to a final judgment entered ... after a legal process which gives all possible safeguards to insure 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.”<sup>113</sup> Authority supportive of the right to counsel in non-capital cases would thus apply *a fortiori* to capital cases.

The European Court of Human Rights, 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<sup>114</sup> so as to insure that the contest between the government and the individual takes place on a level field (“equality of arms” seems to be the preferred term). Governments have been found to deny individuals the

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<sup>112</sup>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).

<sup>113</sup>U.N. ESCOR, 1984 Sess., Supp. No. 1, at 33, Annex art. 5, U.N. Doc. E/1084/50 (1984) (“Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty”). See John B. Quigley, *Exclusion of Death-Scrupled Jurors and International Due Process*, 2 OHIO ST. J. CRIM. L. 261, 280-81 (2004).

<sup>114</sup>“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.”

right to counsel both in legally complicated cases<sup>115</sup> and simple ones,<sup>116</sup> as well as in situations where the proceedings were in high courts solely concerned with legal rules of general applicability,<sup>117</sup> even when the attack was on the trial court's exercise of discretion and deemed by counsel most unlikely to succeed.<sup>118</sup> Intriguingly, the Court has pointedly rejected as inadequate a system quite similar to that at issue in *Giarratano*, in which the burden was on the pro se applicant to show prima facie merit to his appeal before the court would assign a lawyer to conduct a study of the file.<sup>119</sup>

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”;<sup>120</sup> in light of the scrupulous international due process requirements for imposition of the death penalty; and in view of the legal complexity and serious consequences of state post-conviction proceedings;<sup>121</sup> it seems quite plain that the failure to provide appointed counsel in such proceedings falls woefully short of the legal standards that other democracies have imposed upon themselves.

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<sup>115</sup>See *Granger v. United Kingdom*, No. 2/1989/162/218, at Para. 47.

<sup>116</sup>See *Boner v. United Kingdom*, No. 30/1993/425/504, at Para. 41.

<sup>117</sup>See *Pakelli v. Federal Republic of Germany*, No. 8398 of March 23, 1983, at Paras. 37-38.

<sup>118</sup>See *Boner*, *supra* note 116, at Paras. 41 & Para. 3 of concurring opinion of Sir John Freeland.

<sup>119</sup>*Phaom Hoang v. France*, No. 66/1991/318/390, Para. 24.

<sup>120</sup>*Granger*, *supra* note 115, at Para. 47.

<sup>121</sup>See *supra* text accompanying notes 88-92, 94-96, 107 & n.107.

### VIII. Conclusion

Scarecrows sometimes have effects in the real world. They can scare off crows that would otherwise achieve their goals. But intelligent crows learn from experience to ignore scarecrows, and eventually intelligent farmers conclude that their maintenance is counterproductive.

*Giarratano* is a scarecrow. Intelligent lawyers, judges, and legislators should not allow it to divert them from doing what justice requires, and the Supreme Court should abandon it.