ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-2099

TITLE PENNSYLVANIA, Petitioner V. DOROTHY FINLEY

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA, :

Petitioner, :

v. : No. 85-2099

DOROTHY FINLEY :

Washington, D.C.

Monday, March 2, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

MRS. GAELE M. BARTHOLD, ESQ., Deputy District Attorney, Philadelphia, Pennsylvania; on behalf of the Petitioner.

MS. CATHERINE M. HARPER, ESQ., Lansdale, Pennsylvania; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-2099, Pennsylvania against Finley.

Mrs. Barthold, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. GAELE M. BARTHOLD, ESQ.,
ON BEHALF OF THE PETITIONER

MRS. BARTHOLD: Mr. Chief Justice, and may it please the Court:

Twenty years ago this Court imposed strict and unique briefing requirements on appointed attorneys seeking to withdraw because they concluded that a client's first appeal was frivolous.

In addition, reviewing courts, charged with hearing such appeals, were charged with the responsibility of conducting an independent review of the record to determine whether the appeal was in fact frivolous.

This issue presented by this case is whether those procedures, those prophylactic rules as articulated by this Court in Anders v. California, should be held applicable on collateral review.

It is our position that they should not be held applicable, and that in the collateral review

context, a no merit letter, with notice to the client and an opportunity to proceed pro se, is a constitutionally acceptable alternative.

Now before detailing our reasons in support of that conclusion, I would like rather briefly to address the respondent's claim that this Court is without jurisdiction to decide that issue because the opinion below rests on an adequate and independent state basis.

The opinion is, of course, a Pennsylvania Superior Court opinion; although that is an intermediate appellate court, it is the highest court in which the decision could be had in this case.

The respondent is a state prisoner having been convicted in 1975 of second degree felony murder and related offenses.

She was represented by appointed counsel during his trial, and during her unsuccessful direct appeal to the Pennsylvania Supreme Court.

She next sought collateral review under the State Post Conviction Hearing Act statute, and counsel was not appointed for her because the claims that she raised were finally litigated under Pennsylvania law.

The Pennsylvania Supreme Court, however, held that under its supervisory rules, its rules of criminal procedure, that any defendant is entitled to counsel on

a first PCHA petition, or on a subsequent petition raising new issues.

When counsel was appointed for Mrs. Finley, he reviewed the record and concluded that he had no arguable issues to raise.

He, as a result, after consulting with his client, filed a no merit letter with the Post Conviction Hearing Act court, and detailed in that letter the additional claims which Mrs. Finley wanted raised on her behalf.

Based on that letter and his own independent review of the record, the Post Conviction Hearing Act judge dismissed the petition and allowed counsel to withdraw.

QUESTION: Have you any knowledge as to exactly what his review of the record consisted of? Was he looking at the notes of testimony or what?

MRS. BARTHOLD: We know from his letter tha he looked at the notes of testimony.

QUESTION: Is that enough?

MRS. BARTHOLD: Judge Blake indicated in his opinion that he looked at the entire record. We also know that he consulted with his client. So I think we are reasonably certain that he did the kind of conscientious review that he should have done, and which

this Court, of course, in Strickland, has said that counsel is presumed to do their job and to be competent.

Now when the Pennsylvania Supreme Court reversed because Anders' prophylactic requirements on direct appeal had not been complied with, they said, among other things, since Anders has been applied in similar circumstances, we hold, quote unquote, Anders is applicable here.

And in addition, they noted that the Pennsylvania law with respect to the withdrawal of counsel is dervied from -- and those were their exact words -- Anders v. California.

I think those two statements by the Superior Court make it very clear that there is not an independent state basis for this opinion.

That conclusion is underscored by the fact that there is no clear statement in the opinion saying we used the Federal authority only for purposes of guidance. And of course in this Court's opinion, Michigan v. Long, you made clear to state courts that if they wanted to make such a statement, they could.

So I think there's no question but that this Court has jurisdiction to consider the very significant issue which is presented here.

Now, I think the starting point for that

consideration is twofold. First, it must be recalled that collateral review is in fact a procedure which is three, if not four, steps removed from the trial court process.

By that point in the proceedings, a defendant has had the opportunity to raise matters in post trial motions. A defendant has had a direct first appeal. A defendant, in a majority of jurisdictions, has had the opportunity to either have or to seek discretionary review.

Collateral review is three or four steps removed, and it's a procedure which is intended to identify those rare cases in which there is error that has not been previously identified.

Secondly, it is of course very important that there is no general constitutional right to counsel on collateral review.

Nonetheless, the respondent claims that since counsel was given, although only under a supervisory rule, not under a constitutional basis, and so far as we can determine, there is no state in the country that gives counsel on collateral review based on a state constitutional basis, the respondent contends that since the right to counsel is there, all of the procedures that are given with respect to the right to counsel on a

first appeal should be given; in other words, that Anders should be applied even though we are only talking about a supervisory right to counsel.

And I think respondent has really three misconceptions. First, respondent assumes that an Anders brief is in fact an advocate's brief.

And of course, an Anders brief is not that. What it is is a device to determine, to monitor, whether counsel has in fact conducted the sort of conscientious and thorough review of the case to be certain that the appeal is in fact -- or the petition is in fact -- frivolous.

I think counsel does not take account of the fact that when you get to collateral review, you are getting to a procedure that is so far removed that there simply are cases without arguable issues by the time you get to collateral review.

And I think finally the respondent assumes that Anders is the only way of being sure that attorneys do their job. And I think that is just not so.

Attorneys do their job. Attorneys are presumed to be competent. Attorneys have an obligation not to clog the courts with frivolous arguments.

And I think that you need not apply the precise procedures of Anders on collateral review to see

that counsel do what they're charged to do, which is to do their job.

Now, the important considerations are: fundamental fairness; meaningful access; and the fact that there are not the invidious discrimination, the fact that arbitrary obstacles not be put in a defendant's way so that --

QUESTION: May I just interrupt for a second? Is it correct in your view that if Pennsylvania -- the Pennsylvania courts decided they would like to apply Anders as a matter of state law, you would agree they would have the power to do that?

MRS. BARTHOLD: Oh, absolutely, Justice Stevens.

QUESTION: But your view is that when they refer to the Pennsylvania law in this area, it is derived from Anders, that they thought they were compelled by Anders to apply the Anders rule in collateral proceedings?

MRS. BARTHOLD: That is our position.

QUESTION: Has any other state so read Anders, as far as you know?

MRS. BARTHOLD: Yes, the District of Columbia has so read Anders; has applied Anders on collateral review. Iowa has. I believe it's Arkansas has, and

Texas has.

Illinois has not.

QUESTION: In Iowa, Arkansas, and Texas, do you understand they did it because they thought Anders compelled them to do it?

MRS. BARTHOLD: Yes, I believe so.

QUESTION: I see.

MRS. BARTHOLD: I could be in error, but I believe so. And we have about three other states that have found Anders inapplicable on collateral review: Illinois, Arizona, and I believe Utah.

And only three circuits have spoken on this point. The Second and Fifth Circuits have found Anders applicable, and I believe the Seventh Circuit has not.

QUESTION: (Inaudible) prohibited from going further than Anders, is it?

MRS. BARTHOLD: Oh, absolutely not, Justice Marshall. Absolutely not.

So it's our point that --

QUESTION: Mrs. Barthold, while you're interrupted, may I inquire whether the record reflects whether the respondent was sent a copy of the attorney's no merit letter?

MRS. BARTHOLD: The no merit letter indicates a carbon copy to the respondent. There has been no

evidence to rebut the fact that it was received.

The respondent speaks in terms of, quote unquote, apparent lack of notice. But that notice has not been rebutted, and there are, I think, a number of arguments to be made, which perhaps I'll reserve, which would demonstrate that even if you want to assume for the sake of argument that the notice was not received, that there was no prejudice to this particular defendant because of the peculiarities of both this case and of Pennsylvania practice.

So if you take the fundamental fairness, the meaningful access, and the no invidious discrimination concepts, and I think apply the balancing test which this Court has articulated in Matthews v. Eldridge, and then applied in Ake v. Oklahoma, what we should look at is the individual interest, which is, here, the accuracy of the criminal proceeding itself; the governmental interest, which would be the cost to the criminal justice system of applying Anders; and finally, what value is to be derived from applying the procedure here sought, Anders, whether it is more likely than not that cases would be identified that would otherwise be lost in the shuffle, so to speak.

And I would submit that when you apply that balancing test, the line should be drawn to say that

Anders is not applicable on collateral review.

The chances of it resulting in the identification of cases on collateral review that truly have even arguable issues, I think, is just not likely.

I think that the Court should look at the strains on the criminal justice system, if you conclude that Anders should be applied on collateral review. Because we are talking about post conviction hearing remedies and petitions which are burgeoning out of all proportions, at least in the states, and I would assume in the federal system too.

We are talking about a complete change in the role of the courts, who are not sitting as courts, but are required to conduct this independent review of records, which puts a great strain on one of our scarcest resources at this time, which is the time of our judges.

QUESTION: Mrs. Barthold, what do you think the Federal Constitution requires, at a minimum, through its due process clause, when the state has granted an avenue for state post conviction review?

MRS. BARTHOLD: I think --

QUESTION: Must the state afford counsel at all to indigent defendants in that situation?

MRS. BARTHOLD: I think, Justice O'Connor,

that they need not afford counsel except in those rare cases where, as a matter of due process, counsel is necessary, which is a statistically insignificant number of cases, I believe, even in the federal system.

I think a no merit letter with -- which states that counsel has conducted a meaningful and thorough review, with notice to the client and an opportunity for the client to proceed pro se, so that the client is in substantially the same position as they would have been had counsel not been appointed.

QUESTION: Well, you say the facts of this case are at least enough to meet it. But at bottom, what must the state provide?

MRS. BARTHOLD: The state must provide access to the courts. The -- if they have collateral review, as do all states, they must allow counsel -- or indigent defendants to file their petitions; to not have fees which would keep them out of court; to give them, if they are incarcerated, the benefit of law libraries, under Bounds v. Smith; the use of their jailhouse lawyers, if necessary, under Johnson v. Avery --

QUESTION: And in some cases, it must provide counsel?

MRS. BARTHOLD: I think that would be a very rare case where it would be an idiosyncratic case where

a court with prescreening would discover that there was something that would make it only possible for counsel to handle this matter.

I know the rule in the Federal courts usually is if there is an evidentiary hearing on Federal habeas, they give counsel. We have at least --

QUESTION: Well, in Pennsylvania, it is the practice to provide counsel uniformly for indigent defendants, I take it, in post -- state post conviction review proceedings?

MRS. BARTHOLD: On any first petition. Any first post conviction hearing at petition, or any subsequent petition that raises new issues.

QUESTION: And given that as a factor, then what do you think due process requires, above and beyond that?

MRS. BARTHOLD: I think due process requires that the attorney conduct a conscientious and meaningful review of the case and the record. So that having given that indigent an attorney, they have the benefit of that attorney's best review of the record.

If the attorney then determines that there is nothing even arguable to raise, I submit that it is appropriate for him to be allowed to withdraw from the case.

I mean, we are talking about at least 23 states, as nearly as we can determine, that have very liberal policies with respect to the appointment of counse; far more liberal than the federal system.

And the strain of requiring all 23 of these states to superimpose Anders on top of what they're giving, above and beyond what they must, will, I submit, put a very great strain on the criminal justice system.

QUESTION: Of course, Pennsylvania has control of that in its own hands. It can simply stop affording counsel.

MRS. BARTHOLD: Yes, and I believe that that is something that might well occur, if not in Pennsylvania, in some of the other 23 states, if it is held by this Court that Anders must be applied on collateral review.

And I would submit, Mr. Chief Justice, that it would be unfortunate if that should happen. Because these states have determined, for either -- for one reason or another to give indigents counsel when it's not necessary for them to do so constitutionally.

And I think we should encourage that, but not superimpose other procedures which will make that burdensome on the states.

Now turning to this defendant's, this

respondent's case, she undoubtedly will argue to you that there was no notice, therefore, she must necessarily win the case; and secondly, that her appointed PCHA attorney was ineffective because he did not raise certain arguably meritorious issues.

We have addressed both of those in our reply brief. With respect to the so-called issues, I have dealt with them in a footnote, and I truly believe that they are in fact frivolous issues.

With respect to the notice matter, even if we want to assume for the sake of argument that Dorothy Finley did not receive the no merit letter -- and as I indicated, it shows a carbon copy to her -- she still had the benefit, in this particular case, of having the time consuming independent review of the record, which was conducted by the Post Conviction Hearing Act judge.

And he concluded, independently, that there was nothing there.

And finally, under the peculiarities of Pennsylvania practice, she is not barred from filing yet another Post Conviction Hearing Act petition, and raising whatever issues she would want to.

So I would in conclusion, Your Honors, urge you to hold that Anders does not apply on collateral review. And I would urge you to reverse the

Pennsylvania Superior Court decision.

CHIEF JUSTICE REHNQUIST: Thank you, Mrs. Barthold.

We'll now hear from you, Ms. Harper.

ORAL ARGUMENT OF MS. CATHERINE M. HARPER, ESQ.,

ON BEHALF OF THE RESPONDENTK

MS. HARPER: Thank you, Mr. Chief Justice Rehnquist, and may it please the Court.

First, let me address Ms. Barthold -- some of the issues that she had raised, before getting into my argument.

In response to Justice O'Connor's question, in this case my client told me that she never received that letter. Since we didn't get the hearing that the Superior Court had awarded to us, that's a question of evidence that is still open.

I would argue that she didn't receive the notice that was required under Anders in this case.

Secondly, the district attorney repeatedly characterized collateral review as three or four steps removed from the actual trial. That's not exactly accurate.

In Pennsylvania, as I would imagine in most jurisdictions, the only issues which can be raised in the higher courts are those which were raised in post

trial motions. Therefore, we're actually one step removed, if you consider that there was -- if there was an issue that was not raised in post trial motions, neither the Superior Court nor the Pennsylvania Supreme Court had that issue before it when they were deciding the direct appeal.

Thirdly, I'd like to note that the district attorney points to this case as a case of fundamental fairness. I agree with that. I think that what happened --

QUESTION: May I ask you on that question, a matter that was not raised on direct appeal of course wouldn't have gone to the Supreme Court of Pennsylvania.

Does Pennsylvania have a rule in its collateral proceedings that issues which could have been raised on direct appeal but were not raised are barred from collateral review?

MS. HARPER: I don't believe it's a matter of what could have been raised. I think the PCHA says that matters that were already litigated to a final determination are barred.

QUESTION: That means it was litigated in the trial court and no --

MS. HARPER: And on appeal.

QUESTION: And on appeal?

MS. HARPER: The distinction I'm drawing, Justice, is not -- is between issues that were raised and which could have been raised.

I believe Pennsylvania --

QUESTION: On appeal, or in the direct proceeding? I mean, say it was raised in the trial. For example, there's a motion to suppress evidence, but no appeal was taken from the adverse ruling.

In Pennsylvania practice, could that be raised in collateral proceeding?

MS. HARPER: Only through the back door. You'd have to argue, Your Honor, that --

QUESTION: Ineffective assistance of counsel?

MS. HARPER: Exactly. You'd have to argue that the counsel on appeal was ineffective for failing to raise that earlier. And then you could get to it.

Yes, Justice Marshall?

QUESTION: (Inaudible) that should have been raised?

MS. HARPER: Well, Justice Marshall, I believe in my brief, at footnote 7, I've listed several issues of arguable merit.

But I don't believe that Anders requires me to show prejudice at this stage. And I would ask this Court not to put that burden on me.

QUESTION: But the judge went through the record.

MS. HARPER: The PCHA court says that they -- yes, the court went through the record.

QUESTION: No, no. He did go through the record.

MS. HARPER: Yes, Your Honor. My problem is, Your Honor, that on collateral review, court appointed counsel should look beyond the record; should not only scour the record to determine whether there are issues that should have been raised, but should also consult with the petitioner, and should perhaps even look into investigation beyond that based on whatever the petitioner tells him is there.

QUESTION: If there's nothing there?

MS. HARPER: If there's nothing there, which is not this case, Your Honor, he should follow Anders.

QUESTION: Would you make the same argument if there were 86 eyewitnesses?

MS. HARPER: Your Honor, that's a tough question.

QUESTION: Would you?

MS. HARPER: I guess you're asking me whether there is a case where there are no arguable --

QUESTION: Would you make the same argument,

if there were 86 eyewitnesses who testified that this person committed the crime?

MS. HARPER: I would make the argument that Anders applies. I would not have the liberty or good grace to be able to say that there are issues.

QUESTION: I see.

MS. HARPER: But I would make the argument that Anders applies, and one should file an Anders brief.

QUESTION: (Inaudible.)

MS. HARPER: And in this case --

QUESTION: Can you leave me off at 85?

MS. HARPER: Yes, I will, Your Honor.

The argument of the respondent basically is that since Pennsylvania does provide a post conviction hearing act procedure, and it does provide counsel, and it explicitly provides effective counsel, that when counsel seeks to withdraw from a PCHA petition, then due process considerations come into play.

And the Fourteenth Amendment says you can't arbitrarily deprive a petitioner of counsel without following due process.

When counsel seeks to withdraw, due process means the Anders procedure.

QUESTION: Well, what do you think the constitutional basis of the Anders case is, Ms. Harper?

MS. HARPER: I believe that Anders does rest on the fact that there was a constitutional right to counsel in that case; but I don't think it was necessary for the holding.

I think that this Court obviously handed down that case, knowing that there was a constitutional right to counsel. But that's not really discussed in the opinion, and I can only assume --

QUESTION: I just read the opinion and I had a hard time figuring out what the basis for the right was.

MS. HARPER: Well, I didn't see it discussed there explicitly either, Your Honor. I think the Court simply assumed that it was a right. Now, the question is, what do we do when the counsel wants to withdraw, assuming the right exists.

Which is the same in this case. I'm not arguing that there is a constitutional right to an attorney on collateral review, because I don't have to. There is a very clear Pennsylvania right to a lawyer, and to an effective lawyer.

Conversely, the no merit letter that --

QUESTION: Well, wait, it's just a Pennsylvania right we're talking about. Why couldn't Pennsylvania -- suppose the Pennsylvania statute had been very clear and had said, the only right we're

giving here is the right to have a member of the bar, in good standing, look over this case, and in his or her judgment, decide whether there's anything worth arguing.

Suppose that's how it read. Would there be anything wrong with that? Would that be unconstitutional?

MS. HARPER: I guess Pennsylvania could give that limited right, and the question would be whether that limited right is entitled to due process; am I understanding you correct?

QUESTION: (Inaudible) there. I mean, so long as you give it to a lawyer whose in good standing, you've complied with the Pennsylvania statute and treated everyone alike.

MS. HARPER: This would be a different case if that were the Pennsylvania practice. But this is not -- that's not Pennsylvania practice.

QUESTION: Why is this Pennsylvania statute different?

MS. HARPER: First of all, the Pennsylvania statute explicitly calls for counsel. Secondly, there's a criminal rule for civil -- a rule of criminal procedure that calls for counsel, and there's case law that says, the right to counsel means the right to the effective assistance of counsel, not only to make

arguments, but also to marshall the facts and go through th record and see what else might be there.

For that reason, even petitioners who raise -- who draft their own petitions and name things that have already been litigated on a first PCHA are entitled to counsel, the reasoning being not only that they're entitled to an advocate, but also because an attorney can better explore the issues.

QUESTION: So you're saying although Pennsylvania need not provide for effective assistance of counsel, it could just provide to have some lawyer look over your case, if it does provide for effective assistance of counsel, whether the assistance is in fact effective is a federal constitutional question?

MS. HARPER: That's correct. I think that you cannot withdraw the effective assistance of counsel without due process.

So I think that that would contemplate that there might be a constitutional issue raised if counsel were very ineffective.

It's not necessary to get to that, though, because Pennsylvania's own collateral review procedure provides for ineffective assistance of counsel questions to be raised right in our Commonwealth courts, and to be taken care of there.

For that reason I'd also take issue with the idea that applying Anders in collateral review cases would clog the courts.

I think, on the contrary, applying Anders in these cases would make sure that the court more readily reached the merits of the case, and if it is frivolous, got rid of it. Rather than -- of have a no merit letter, which I think would encourage the petitioner to go to the federal courts with a habeas petition saying that they weren't dealt with fairly.

QUESTION: Ms. Harper, may I interrupt again? Because one of your responses to Justice Scalia puzzled me.

Do you think that the holding of the Pennsylvania Supreme Court in this case is based on its view that this procedure in Pennsylvania is mandated by the federal Constitution?

MS. HARPER: No, I do not. I think that -- my argument in the alternative is that it rests on independent and adequate state grounds.

I think that the Pennsylvania Court did not feel compelled to apply Anders, but merely applied Anders because it's a very sane, fair, humane approach to this problem, and because Pennsylvania has had 20 years experience with Anders; because very shortly after

this Court handed down Anders, it was applied in Pennsylvania in direct appeal cases.

So the Pennsylvania courts are familiar with it; had 20 years practice with it; and the opinion indicates that Pennsylvania law is derived from Anders, but it doesn't say it's constitutionally compelled by it.

QUESTION: It doesn't say, modelled after; it says derived from. I think that that's normal language to indicate that you feel that one case requires a legal rule in this case.

MS. HARPER: I respectfully disagree, Justice Scalia. And I point out that it also relies --

QUESTION: You wouldn't say it's at least ambiguous?

MS. HARPER: No, I would not. I think it's very clear. I perhaps would wish for a better scrivener of the opinion. But I think it's better clear that "derived from" is different from "is constitutionally compelled by".

I don't think this opinion indicates that it -- that the Court felt compelled by the federal courts to do this.

QUESTION: You don't think if I said this rule is derived from Marbury v. Madison, that it couldn't be read to mean that I think Marbury v. Madison requires

this rule in the present case?

Maybe not, must, but could.

MS. HARPER: No, Your Honor, I think that this -- I think this opinion's clear.

QUESTION: But your point is that they said, this Pennsylvania rule was derived from Marbury v. Madison.

MS. HARPER: This is a Pennsylvania law, is dervied from, is what it says. Thank you.

But it also points to crimninal rules of procedure in its opinion --

QUESTION: But, counsel, haven't we said, in Michigan v. Long, that when the court doesn't make that clear, we're going to assume that they mean it's required by federal law, when the opinion cites federal authority and doesn't make it clear.k

MS. HARPER: That is what Michigan -- that is what Michigan v. Long says. Apparently Justice Scalia and I have a disagreement on whether or not it's clear.

I think the opinion is clear that it relies on Pennsylvania law. I kept trying to say that --

QUESTION: Well, suppose that we disagree with you. And we have to face up to what we do here.

MS. HARPER: Well, then, if you disagree with me, it's not necessary to find that this rests on

adequate and independent state grounds.

Then I go back to my due process argument. If a state grants an important right, the state can't willy-nilly take it away without providing due process.

Anders is the measure of due process for withdrawing attorneys. So it's not necessary to find that this rests on adequate and independent state grounds.

QUESTION: No, Ms. Harper, I didn't see any reference to due process in the Anders opinion. There's certainly reference to the Sixth Amendment, to equal protection.

But the Anders opinion itself isn't grounded on the view that you can't withdraw an attorney because of due process considerations, is it?

MS. HARPER: It wasn't necessary in Anders, because it rested -- arguably rested on a constitutional right. It wasn't necessary to tlk about the Goldberg and Kelly type of cases where the state does grant a right, even if it's not granted constitutionally.

I think there's a clear line of cases with the Griffin/Douglas line of cases that would provide support for that. And Evitts v. Lucey is very close to this case, and rests on due process grounds.

Although of course I'm also arguing equal

protection, because I have an indigent who is, with a court appointed attorney, forced to take whatever the state gives her.

Pennsylvania law gives no right to the indigent to complain about which attorney she gets. And the indigent has to take whichever attorney it is and can't request them.

I think for equal protection reasons, it would probably be reasonable for the Court to more closely scrutinize court appointed counsel's conduct in this regard, and to make sure that the poor defendant, petitioner, gets the same justice that the wealthier one can afford to get.

So my argument rests both on due process and on equal protection.

The no merit letter, by contrast, does violence to both due process and equal protction. The district attorney has suggested that there may be other ways to deal with this problem. I can conceive that there may be other ways. I don't think the district attorney has suggested anyway that we can deal with it, but there may be other ways.

The no merit letter is not the way to deal with it. This Court specifically disapproved of the no merit letter in the Anders case. I see no reason to

distinguish between direct appeal and collateral review when talking about the sufficiency of the no merit letter.

It has the terrible handicap that it forces the court appointed counsel to argue against his own client, and it puts the petitioner in the position of having the state give her a lawyer who thereafter briefs the case for the prosecution.

I think the no merit letter is affirmatively bad in that respect, and is not a substitute for Anders.

It may be that there's another state in the union that has come up with a better way to deal with this problem, but the district attorney hasn't suggested one, and the no merit letter is not that case.

As I also stated --

QUESTION: What would you do with another lawyer?

MS. HARPER: In this case?

QUESTION: Uh-huh.

MS. HARPER: I think what should have been done is apply Anders, so that --

QUESTION: So that -- go ahead.

MS. HARPER: So that the court could get to the merits of the case with the benefit of an advocate's marshalling of the facts and evidence.

And the court would not be compelled to do it on its own.

QUESTION: I see.

MS. HARPER: So I think Anders would be the proper solution here, and that's what the Pennsylvania courts decided was the proper solution.

QUESTION: And what do you think Anders says? That the lawyer has to file a brief?

MS. HARPER: Yes, I think Anders requires a brief.

QUESTION: And he has to say more than he said in that letter?

MS. HARPER: He has to say not only more than he said in that letter, but he has to avoid making an argument against it.

I think Anders calls for citations to the record and to legal authority. It doesn't -- and I think that it affirmatively disapproves of the idea that you can write out what the petitioner wants raised, and then say, but it's a terrible argument, or it won't fly, or don't pay any attention to this, court.

Because that places in the lawyer the job that belongs to the court. In the adversary system it's a spirit of give and take --

QUESTION: What would you do --

MS. HARPER: Pardon?

QUESTION: What would you do if the client said that my ground for appeal was that I was sentenced on count two before I was sentenced on count one; and that's the only grounds that I have for appeal?

MS. HARPER: And counsel had conducted a careful review?

QUESTION: And I warn you in advance that there's an actual case that that happened.

MS. HARPER: I can conceive of that case. I guess what --

QUESTION: And what would you do in that case?

MS. HARPER: I guess what counsel should do in that event is simply set out that she was sentenced on count two before count one; point the court to the appropriate sentencing rules and whatever cases construe them in their fairness; and point to whatever position there is in the record that might support the argument on behalf of the advocate; and let the court decide.

And if it gets thrown out, then that's the way the adversary system works.

QUESTION: Well, what's the difference between that and this letter here, except that it doesn't have all the detail in it?

MS. HARPER: Well, that's a big difference,

because -- there's a couple of differences. First of all --

QUESTION: Well, in this case, is it --

MS. HARPER: -- I was able to find arguable issues that don't appear in that letter.

QUESTION: Is it true that her only defense was an alibi?

MS. HARPER: It is true that her defense was an alibi. But --

QUESTION: That's what you say.

MS. HARPER: It is true -- no, it is true that her defense was an alibi. But you have to remember that the most important witness at her trial was a prosecution witness who received two years' probation for his part in this.

And after the trial, Dorothy Finley asked to speak to the court. After she was convicted -- it was a bench trial -- she asked to speak to the court, and the court permits her, and she begins to tell why the prosecution witness would have other reasons to be biased against her, and would be unfairly disposed, for his own reasons, to give testimony that would benefit the prosecution.

None of that's in this case, because that wasn't raised by the PCHA counsel.

QUESTION: But you did raise that her defense was an alibi. You put that in footnote 7.

MS. HARPER: That is correct. That is a portion --

QUESTION: And we are bound by that, aren't we?

MS. HARPER: That is the course chosen. I wouldn't take footnote 7 to be a statement of all the reasons that could be raised in this case.

You have to remember, first of all, that when I got this case, I was in the Superior Court. I had no right to raise evidentiary issues.

I merely raised them for illustrative purposes, and the court let me do that.

You also have to remember that I only had the record that was available in the court -- which by the way didn't include the suppression motions and other pieces of paper that I think counsel should look at before they make a determination on collateral review.

So I would not -- I would ask this Court not to take footnote 7 as anything other than illustrative of the issues that could have been raised and should have been raised by counsel.

I'd like to state in summary, then, that where the state grants a valuable right to its citizens, in this case, the right to the effective assistance of

counsel in collateral review, that right cannot be taken away without giving the affected citizens due process.

The Anders procedure is the due process that is required in this case.

Because this is a case involving a court appointment, I would also ask Your Honors to consider that there are equal protection considerations as well; and that is because she cannot choose her own attorney, she has to take what the state gives her.

And also, because the court wants to ensure that the indigent prisoners get the same equal protection and due process as wealthier individuals.

I'd also ask the Court to consider that the alternative in this case -- and what we are really talking about here is a procedure, the no merit letter -- is not sufficient under due process or equal protection guidelines for the reasons ably stated in Anders.

And in the alternative, I'd argue that this decision of the Superior Court rests on adequate and independent state grounds, and that this Court can decline to accept jurisdiction and let the Pennsylvania's court choice to deal with this difficult problem stand.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Harper.

Ms. Barthold, you have 12 minutes remaining.

MRS. BARTHOLD: If there are no questions, I see no reason to use my 12 minutes.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Barthold. The case is submitted.

(Whereupon, at 11:42 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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BY Paul A. Richardson

(REPORTER)