ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners V. JOSEPH M. GIARRATANO, ET AL.

CASE NO: 88-411

PLACE: WASHINGTON, D.C.

DATE: March 22, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners, v. JOSEPH M. GIARRATANO, ET AL : No. 88-411

Washington, D.C.

Wednesday, March 22, 1989

The above entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 o'clock a.m.

APPEARANCES:

ROBERT Q. HARRIS, ESQ., Assistant Attorney General of Virginia, Richmond, Virginia; on behalf of the petitioners.

GERALD T. ZERKIN, ESQ., Richmond, Virginia; on behalf of the respondents.

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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 argument next in No. 85-411, Edward W. Murray versus Joseph M. Giarratano.

ORAL ARGUMENT OF ROBERT Q. HARRIS, ESQ.

ON BEHALF OF THE PETITIONERS

Mr. Harris, you may proceed whenever you are ready.

MR. HARRIS: Thank you, Mr. Chief Justice, and may it please the Court, two years ago in the case of Pennsylvania versus Finley, this Court said that there is no Constitutional obligation on the States to provide counsel for State prisoners in State collateral attacks on State court judgments.

Since 1983, in Barefoot v. Estelle, this Court has repeatedly held that the rules for collateral review of presumptively valid final judgments do not change depending on the nature of the sentence.

The decision of the court below, the Fourth Circuit, is flatly inconsistent with these decisions of this Court. The issue before this Court is whether to affirm the judgement of the Fourth Circuit and in the process undermine or overrule prior decisions of this Court.

I will briefly address some of the facts in this case, and then explain why we ask this Court to reverse the decision below. The plaintiffs in this case are inmates under sentence of death. They have been tried and convicted of capital crimes in the State courts. Their convictions have been upheld on a mandatory appeal to the Virginia Supreme Court, a mandatory appeal that also includes a statutory requirement of sentence review.

They of course had counsel for trial, and on their mandatory appeal. The focus here --

QUESTION: You are not thereby suggesting that Virginia is particularly gracious toward prisoners of this kind? It is one of the tougher States in the Union, don't you think?

MR. HARRIS: Your Honor, I am pointing out that Virginia meets the Constitutional requirements of counsel for the trials and direct appeals to the Virginia Supreme Court.

QUESTION: That is your basic argument, that you are just within the Constitutional prerequisites?

MR. HARRIS: No, sir, it is not that argument at all.

We think that we exceed many of the Constitutional requirements in the process of the trial

and the direct appeal, particularly in the sense that in a Virginia direct appeal, the Supreme Court is obligated to conduct that separate inquiry on the proportionality of the sentence, and the excessiveness of the sentence, to decide whether that sentence is appropriate even on direct appeal.

QUESTION: I am really suggesting that the Old Dominion is one of the tougher States in the Union.

MR. HARRIS: We try to be in some respects, Your Honor.

QUESTION: Mr. Harris, in that direct review, does the State Supreme Court review the entire record in every case?

MR. HARRIS: The Virginia Supreme Court reviews the record on the errors of trial that are raised. The Virginia Supreme Court conducts review of the entire record on the independent inquiry on the propriety of the sentence.

QUESTION: But not on the merits of the original case?

MR. HARRIS: It will review the errors that are raised by counsel.

QUESTION: It does not necessarily review the entire record on the appeal on the merits of the conviction, does it?

MR. HARRIS: That is correct, Your Honor.

But the focus in this case is not on the trial --

QUESTION: And is that not rather unusual among the States of this country?

MR. HARRIS: As I understand it, practically every State has a rule isolating review to those claims that are raised by the parties.

Virginia has a rule that requires counsel to object at trial and to assign his errors on appeal, and those are the claims that the court will address on direct appeal.

QUESTION: And of course, your rights of direct appeal are rather limited in the Old Dominion.

MR. HARRIS: Not in a capital case, at all. It is a mandatory, direct appeal as a matter of right.

QUESTION: But generally, they are.

MR. HARRIS: In other cases, there is an appeal to an intermediary court.

QUESTION: Whom they recently installed, I might say.

MR. HARRIS: Yes, Your Honor, within the last few years.

But again, the focus here is not on the direct appeals, and those procedures are not at issue in this

case.

We are looking at post-conviction proceedings. We are talking about proceedings that can only occur after a trial and after a complete appeal to the Virginia Supreme Court.

For those proceedings in Virginia, every one of Virginia's Death Row inmates has in fact had counsel to prepare, file, and present his petition to the State courts.

No Virginia inmate has filed a pro se petition for writ of habeas corpus in the State courts.

Now, Virginia does not automatically grant them a right to counsel for their State habeas corpus actions. The State courts have the discretion to appoint counsel upon request for these inmates who wish to pursue collateral remedies. Virginia provides, by State law, a petition for writ of habeas corpus to raise claims of Constitutional deprivation associated with the trial.

We do not require the automatic appointment of counsel from the beginning, but in any habeas case in Virginia where a petition is presented that raises a non-frivolous claim with a factual issue, Virginia law is that the court must at that point appoint counsel to represent that inmate in a habeas corpus proceeding.

QUESTION: Are you talking just about capital cases, or about all collateral review?

MR. HARRIS: In all habeas cases. If you raise a non-frivolous claim that would require hearing, the Virginia Supreme Court has required for over 20 years that the trial court must appoint counsel at that point.

But the trial courts always have the discretion to appoint counsel at any stage of the habeas proceeding.

QUESTION: And who determines whether it is or is not frivolous?

MR. HARRIS: The trial court, and it is very similar to the summary judgement inquiry in the Federal courts. We are talking about a claim that would say the legal claim for relief, and looking at whether or not the facts in support of that claim are in dispute.

Again, the record in this case will show that that discretion of Virginia's trial courts has been exercised on behalf of Death Row inmates. Death Row inmates have, by some means, communicated to a trial court their desire to file a petition for a writ of habeas corpus. And Virginia trial courts have agreed to appoint counsel and in fact have issued orders appointing counsel to prepare and present a petition for

writ of habeas corpus in Virginia.

Few inmates, very few inmates, have asked. The inmates in Virginia have relied on a privately set up system of volunteer attorneys. Since 1983, there has been an organization that has been set up to recruit volunteer attorneys to represent these inmates in their habeas corpus actions.

They have been successful, but they became fearful that that system was in danger of collapsing, and as a result, they turned to the District court to compel Virginia to perpetuate their preferred system of getting legal assistance.

The District court ordered Virginia to do this, and premised this right to counsel on the right of access to the courts. Our position is the right of access to the court in post-conviction proceedings does not include a right to counsel. It is an entirely separate matter, and we know that from this Court's prior decisions.

This Court has never suggested --

QUESTION: May I interrupt just a second, Mr. Harris?

You rely -- you mention the background. There is this independent volunteer organization that has, in fact, provided counsel, and that trial judges have in

fact gone out of the way to get lawyers for the inmates in these death cases.

But your legal position would be exactly the same if none of that had happened, as I understand your brief. If there were no private organization, if trial judge says well, it is just too bad, we are not going to appoint counsel -- that would be Constitutional, I think, under your view.

MR. HARRIS: I am sorry, I do not think that I understand the question.

QUESTION: Well, you have just described two ways in which prisoners in death cases have in fact gotten representation in collateral proceedings, one by the volunteer organization, and two by the judges on occasion appointing counsel. And I am suggesting that under your view of the Constitution, that was not at all necessary. The Judge, if there were no volunteer organization, and if the judges never appointed counsel, you would say, that is just too bad.

I think that is your position.

MR. HARRIS: I would say that it would not make any difference for this issue.

QUESTION: Right.

MR. HARRIS: Because we say there is no Constitutional right to counsel.

QUESTION: And it would be perfectly consistent with the Constitution to have all collateral proceedings by prisoners in Virginia handled by the prisoner himself.

MR. HARRIS: Consistent with the requirements that the Constitution does impose, of giving them some means of legal assistance to present their claims.

QUESTION: And anything beyond that is simply a matter of grace, in your view?

MR. HARRIS: Yes, Your Honor.

QUESTION: Yes.

MR. HARRIS: And in the matter of what this Court has required as some form of legal assistance, that comes under the right of access to the courts.

This Court has said that the States are obligated to provide some form of legal assistance to inmates so that they can have an opportunity to present their claims, to get into court with their claims, and to get their claims before a court.

In Virginia, if it is a colorable claim, a claim of some substance, they will have counsel to present it. There is no possibility of an inmate litigating a claim himself in Virginia. It will not happen.

As far as having legal assistance to get his

claims together, to put them in that package and present it to the appropriate court, Virginia provides a wide variety of resources. Bounds talks in terms of a law library or a form of legal assistance to get into court. Virginia gives these inmates law libraries at the institutions. Virginia gives these inmates a system of legal assistance in the institutions.

Lawyer assistance -- lawyers are appointed for each of the institutions where these inmates could possibly be, to counsel and assist, to help them under the instructions that they have had now since --

QUESTION: But do you think those lawyers are Constitutionally required, or is this again just something that Virginia does as a matter of generosity?

MR. HARRIS: Virginia has chosen to give these inmates more than what the law requires.

QUESTION: My question is, do you think Virginia could have chosen otherwise?

MR. HARRIS: If Bounds means what Bounds says, yes.

We have chosen to go beyond. We have chosen to give them law libraries, we have chosen to give them legal assistance. There is a method to have court-appointed counsel for individual representation for each one of these inmates. Often --

QUESTION: Because you have to do something.

MR. HARRIS: Yes, Your Honor.

QUESTION: You have to have either a law library or some kind of legal assistance.

MR. HARRIS: That is correct. And we give them both. We give them beyond that a real opportunity to have independent counsel appointed to represent them.

Now, nothing in Bounds, nothing in the cases before Bounds, Johnson v. Avery, Ross v. Moffitt, ever suggests that there was a right to counsel and a right of access.

Two years ago, in the Pennsylvania v. Finley case, this Court made it perfectly clear that the Constitution does not require States in their own proceedings, collateral proceedings to their criminal cases, to provide counsel for the inmates in those proceedings.

The distinction here --

QUESTION: That was not a capital case.

MR. HARRIS: It was not, Your Honor.

The distinction here is not the sentence, the distinction here is the nature of the proceedings. They are collateral.

QUESTION: Do you really believe that? Hasn't this Court said many times that death is different?

MR. HARRIS: This Court has refused to create special rules in post-conviction proceedings.

I think I agree, this Court has on many occasions said death is different, and each time, this Court was looking at the trial, and the sentencing process at the time of trial.

As far as --

QUESTION: Why do you think that a majority of the States with capital punishment have, by statute, created a right to have counsel in matters of this kind?

MR. HARRIS: I do not think that is correct.

I will point out that in the --

QUESTION: I think there are 19.

MR. HARRIS: In the plaintiffs' briefs submitted to this Court, it is indicated that, I believe, 18 States have a method of providing automatic appointment of counsel in all habeas cases. We are not talking about capital cases, but in all habeas cases.

In many of those, at least six of those, it is after something has been filed that counsel is automatically appointed.

QUESTION: The point was just that they do not always provide counsel to help people prepare a habeas petition.

MR. HARRIS: That is correct.

Several of them require the prior filing of a petition, and then there will be automatic appointment of counsel.

In many respects, that is what we have already available in Virginia. With the legal assistance available to the inmate at the institution, he can file a petition raising some colorable claim. He is never locked into that petition.

Virginia has a policy of liberal amendment of its petitions to allow inmates, if they have the initial petition with a colorable claim, if the court appoints counsel to represent them -- they can do further inquiry and at that time develop their claims further.

They are not frozen in time to that initial document that they present to the State courts.

The courts below attempted to distinguish Finley because it was a death case. It was not a death case. But I think the issue is closed, that the Constitution does not -- this Court has made it clear -- the Constitution does not require a separate set of procedural standards or procedural review for capital cases.

This choice has made the decision to focus on the trial, to focus on the sentencing. That is where the determination is made that these inmates are going

to be convicted. That is where the decisions are made of guilt and innocence. That is where the decision of sentence is made.

This Court has focused on that forum. That is the forum our legal system has created for deciding these issues. This Court has not decided to require additional proceedings to constantly review these matters.

The courts below ignored the rulings of this Court, and created a new Constitutional right. The procedures that are in place in Virginia are severely underutilized. They have never been used by these inmates. They have instead preferred to rely on an alternative way of getting counsel.

The District court has created a new right to counsel to solve a problem that has not been shown to exist. These inmates have all had counsel. No inmate has filed a pro se petition.

But there is a problem if a Constitutional right is created. The difficulty that we see with a Constitutional right in habeas corpus proceedings is that we are inviting another complete round of litigation challenging final judgments, presumptively final judgments, presumptively valid final judgments, of the State courts.

We are inviting inquiries into the competence of habeas counsel. We are inviting another separate proceeding on an issue that is wholly collateral to the sentence itself.

Rather than discard this prior Court's decisions, and rather than seek to create a new right to counsel, we would ask this Court to reaffirm its prior decisions. We would ask this Court to reaffirm the principles of comity, of recognizing the interests of the States in its own proceedings, and the interest of finality in recognizing that presumptively valid judgments are entitled to that respect.

And we would ask this Court to reaffirm those prior principles and reverse the decision of the court below.

QUESTION: May I ask just one other question on this notion of finality? No matter what you do, it seems in these death cases that sooner or later somebody does file a collateral proceeding, and even -- it has happened in almost every death case that I am familiar with, anyway. It is very rare that you do not have these proceedings.

I am just wondering if you did have a procedure whereby you automatically appointed counsel promptly. Do you not think that might tend to

accelerate the disposition of these proceedings, rather than waiting until the inmate can put together the kind of papers that they generally institute these proceedings with?

MR. HARRIS: There may be some incidental shortening of the time at that very initial stage if the inmate were to make a request for counsel.

The problem is, the inmate has no incentive, other than the fact that we might set an execution date if he does not file.

QUESTION: Well, that is quite an incentive.

MR. HARRIS: It is quite an incentive, and it is one that we prefer not to do hastily.

In the past, when a volunteer attorney has been contacted, or when we talk to any attorney who has indicated that he was representing these attorneys, all we have done is to find out, do you intend to file promptly?

And if he says he does, we do not rush out and set an execution date. If he files promptly, it will be handled in the usual --

QUESTION: Well, I was thinking a little bit ahead. The papers suggest that the volunteer system is on the verge of breaking down. I do not know. I understand there are quite a few Virginia lawyers who

work very hard in some of these cases, and there is not an inexhaustible supply of counsel who will take the cases without being paid.

I was just thinking, if this system does break down, you may actually find yourselves creating a system that might have more delay built into it than if you had prompt and automatic appointment.

MR. HARRIS: Well, again, we think we may in fact have a system that allows for prompt and automatic appointment, if the inmate simply asks the circuit court to appoint counsel. The circuit court has the discretion.

We have represented in the record in this case, we are willing -- the Office of the Attorney General is willing -- to join in such requests.

QUESTION: That is not going to help much. The real problem is having help to get the petition filed in the first place.

MR. HARRIS: All I am talking about is filing a motion for appointment of counsel, a one-page document that says, "Get me a lawyer."

QUESTION: How do you file a motion -- you mean, even before anything else is filed?

MR. HARRIS: We have said, the trial court has the discretion to do that very thing.

And we have lawyers in the institutions who are certainly capable of drafting a motion for appointment of counsel to get these inmates into court.

QUESTION: But the trial court has discretion to grant or deny such a petition, I take it?

MR. HARRIS: There is no guarantee that the trial court will do it in every instance. I would suggest that it is --

QUESTION: If we ruled in your favor, would it be acceptable or recommended that we relax the requirements of for cause showing on Federal habeas, so that if it is a pro se litigant we are less strict about procedural bar in Federal proceedings?

MR. HARRIS: I do not know the Court needs to look at that issue for one particular reason. The evidence in the record in this case was that the plaintiff's expert was unaware of any inmate who had ever litigated a habeas corpus petition pro se in a death case. There is not this nationwide crisis of pro se inmates litigating death sentences. The expert testimony in this case was that everyone had had a lawyer, and we note from the record in this case that everyone in Virginia --

QUESTION: Well, but you are asking us to adopt a rule that you do not require a lawyer. That is

what you are asking us to do.

MR. HARRIS: That is correct, Your Honor.

The existing rule is that there is no right to counsel, so I would ask that that rule be retained.

QUESTION: Mr. Harris, I do not understand what you have been telling us about all you have to do is file a paper with the District Judge in Virginia, saying I want counsel. And then it is within his discretion to grant counsel or not?

MR. HARRIS: That is one of the means of obtaining it.

QUESTION: When that paper is filed, he does not know anything?

MR. HARRIS: That is correct.

QUESTION: On what basis does he exercise his discretion? I like the fellow's name, I do not like the fellow's name? What does your office do when it goes in to urge that the motion for counsel be granted or not granted?

All he knows is the person's name, and that he is on Death Row, I suppose.

MR. HARRIS: The motion would be filed, in all instances, with the judge who is the presiding judge at trial.

We are talking about a judge who has heard of

this inmate before, in other words.

QUESTION: I see, the judge who conducted the trial.

MR. HARRIS: It would be the very same judge who tried the case.

What we have said is that if that inmate makes it known to the trial court that he is interested in pursuing habeas corpus relief, and that he would like to have the appointment of counsel to represent him and to help him file his petition for writ of habeas corpus, that we have, for our own reasons, as you have indicated, expediting this matter in some way, we will join in that motion, and get the matter going.

QUESTION: To have counsel appointed?

MR. HARRIS: Yes, Your Honor.

QUESTION: So long as he files?

MR. HARRIS: It is more convenient for us to deal with a lawyer representing an inmate in a death case than it is a pro se inmate. And it is certainly going to be more convenient for the court considering the case.

And it is for those reasons we expect that the trial courts will in fact grant these motions. I agree, it is discretionary. We cannot guarantee the courts could do it in every case. But we can guarantee that

that inmate will have available to him, at the institution, assistance to get into court and ask. And we can also guarantee that if that Court should, for whatever reason, decline to grant him that discretionary appointment of counsel, that he still has available to him back at that institution legal assistance in excess of what Bounds requires to file a petition raising claims.

Presumably, if he has a valid claim -- we cannot guarantee he is going to have a valid Constitutional claim -- our system is geared to make certain that he does not. But if he has a valid claim, it will be heard. If he has a claim that would require any kind of hearing, he will have counsel.

QUESTION: May I ask you, on these appointments by the trial judges, pursuant to this discretionary authority, are counsel compensated in the same way as they are in the original trial itself?

MR. HARRIS: There is no cap on their compensation. They are compensated in the amount deemed reasonable by the trial court.

QUESTION: But it is the same procedure, basically, as it is for the trial itself?

MR. HARRIS: That is my understanding.

From the testimony in this case, ordinarily

vouchers would be submitted indicating the time that they spent, and then the Court would allow a fee for that time.

QUESTION: But the fact of the matter is that most of the inmates have instead used the volunteer organization, have they not?

MR. HARRIS: We only have evidence in this record of three instances where inmates have ever even sought appointment of counsel before a petition was filed.

In two of those instances, the trial courts appointed counsel.

QUESTION: And what happened in the third?

MR. HARRIS: In the third, the trial court did not.

QUESTION: I see.

MR. HARRIS: The record in this case contains the order from the trial court in that case. We had defended in the lower courts on the basis that he had counsel at the time that motion was made.

There are some questions to be concerned about that case, but still, there is nothing in the record to indicate that that inmate ever made any use of the resources available to him at the institution.

QUESTION: Is this group of lawyers different

from the group that tried the cases?

MR. HARRIS: Yes, Your Honor, in every case. It is not the same as the trial attorney.

QUESTION: I was wondering about that. They say the lawyer was inefficient because I was convicted. You do not have that problem?

MR. HARRIS: Inmates often do raise that very claim, yes, Your Honor.

QUESTION: But it is -- it is still this rumor or possibility of a shortage that does not exist as of now. As of now, everybody gets a lawyer who wants one?

MR. HARRIS: As of now, every inmate has had a lawyer.

QUESTION: Right.

MR. HARRIS: As of now, we think there are systems in place that will make certain that any inmate who makes a request will get a lawyer. It is not guaranteed.

It is possible that he may have to rely on the resources available to him at the institution. But we would say, that institution is much more than is necessary for him to get his claims in front of the Court.

In any case in Virginia, whether it is a death case or any other case, if the inmate makes some

colorable showing of a claim, counsel will be appointed.

QUESTION: Mr. Harris, you may save the rest of your time for rebuttal.

Mr. Zerkin?

MR. HARRIS: Thank you.

ORAL ARGUMENT OF GERALD T. ZERKIN, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. ZERKIN: Mr. Chief Justice, and may it please the Court, in their effort to conjure up the specter of additional rounds of litigation in death penalty cases, the Petitioners have misrepresented the nature of the Constitutional right recognized by the District court, and exaggerated the scope of the relief granted by it.

In fact, the courts below did not rely upon or create a right to counsel. Rather, the courts simply applied the rule in Bounds and its progeny to the particular circumstances of Virginia's Death Row and of capital post-conviction litigation, and ordered only a small --

QUESTION: Which gave each of them a right to counsel?

MR. ZERKIN: Which gave each of them attorneys to assist in the preparation and investigation of their claim and the preparation of their petitions.

QUESTION: What is the difference between that and a right to counsel?

MR. ZERKIN: Well, it is different in terms of right to counsel being a term of art that has certain implications under the Constitution. That is what they have attempted to do in this case.

This Court recognized --

QUESTION: What is the difference between saying that you do not have a right to counsel, or in saying that you do not have a right to the kind of attorney that is to be appointed for you in this case? What is the difference?

MR. ZERKIN: The difference has to do with the fact that we do not have the Court creating a right which is somehow enforceable in a collateral proceeding on a new habeas corpus, which is the specter which the State is attempting to create here.

QUESTION: How do you know it is not enforceable in the new habeas proceeding?

MR. ZERKIN: Well, theoretically -- I mean, it is not as a conceptual matter.

The performance of the habeas attorney, even assuming that he does a poor job, does not go to the validity of the original sentence and conviction. Therefore, it is not even a subject of a new habeas

corpus action, because you are -- when you are challenging the effectiveness of habeas counsel, you are not challenging the validity of the original sentence and conviction.

So, you cannot bring a new habeas action. Indeed, the Fourth Circuit specifically dealt with this issue in the Whitley case.

Mr. Whitley raised -- brought a second challenge in which he claimed the ineffectiveness of his habeas counsel. In that second Whitley case -- it was a successor petition -- the Fourth Circuit said you cannot do that, and Mr. Whitley was in fact executed on schedule.

So, the Fourth Circuit jousted with this and resolved it already.

Now, what is different here is --

QUESTION: So, in your view, the right which you are claiming, or the relief that you are claiming, would be satisfied by the courts appointing incompetent counsel?

MR. ZERKIN: No, sir, we do not say that.

The Court -- we believe that the level of assistance that can be provided, that is being provided in any Bounds case can go so low that meaningful access is not being provided.

If I might give an example, in the McCall cases to which this Court ordered an inquiry, a response by the State as to the right to counsel in preparing a habeas petition, the institutional attorney at Mecklenburg, who was in fact partly the subject of this litigation, filed a habeas petition that included a non-Federal claim.

Now, I would suggest to the Court that that is not meaningful and effective assistance of counsel. So --

QUESTION: So part of the relief you are requesting is a Constitutional rule that capable, competent counsel be appointed to give rights of access to the court.

MR. ZERKIN: Yes, in death penalty cases on Virginia's Death Row. That is correct.

QUESTION: If some other district court in North Carolina were to reach different conclusions, Death Row inmates in North Carolina would not have any right to counsel.

MR. ZERKIN: The question is whether or not --

QUESTION: Well, can you answer my question?

MR. ZERKIN: The result would -- it depends on the facts of the case. We have a two day trial here.

QUESTION: Well, look. I asked you a question

that I think is capable of being answered by yes or no. Please try to answer it that way.

MR. ZERKIN: I will try.

QUESTION: If a district court hearing evidence in North Carolina had reached a different conclusion than the district court in the Eastern District of Virginia, and said no, there is not any right to counsel of the sort that Judge Merhige found, then the rule in North Carolina would be different than the rule in Virginia.

MR. ZERKIN: No, sir, my answer to that is no.

The reason is because the issue first of all was an issue of access, and if a system existed in North Carolina, which in fact it does, as a result of the Bounds litigation itself and the Fourth Circuit's most recent affirmance of the district court's action in Bounds which provided attorneys, then in fact if that access is being provided, then the violation of the right would never occur in the first place.

QUESTION: Well, supposing the district court in North Carolina said we think it is enough that there are law libraries like Bounds required at the institutions -- even in the case of death penalty inmates -- so we do not think there is any necessity for having appointed counsel.

MR. ZERKIN: If that decision was supported by the factual record in the case, then it could reach that conclusion.

The problem here is --

QUESTION: So you would have a right to counsel in Virginia, but not in North Carolina?

MR. ZERKIN: I disagree with the premise that we are dealing with a right to counsel. That is my difficulty in asking the question directly.

We are dealing with access, and the question would be whether or not the fact -- the district court's findings in North Carolina -- that there was access, and therefore no violation of the right to access under Bounds was supported by the evidentiary record in that case.

That is the very confusion that they create, and that is created by defining this as a separate right, that is, the right to counsel.

What has happened here is that the court looked at Bounds, looked at the specific circumstances, determined that there was a violation of Bounds under the facts, and then using its discretion as a court of equity, fashioned a remedy.

In fact, what the district court did was, it did not even order the nature of the system that the

State had to give. All it said was, the only adjustment we want you to make is, appoint counsel pre-petition. How you go about arranging that system is up to you.

It did not dictate any of that to the State. The State, in fact, did not respond except by providing a memo to circuit court judges that said, "If you get a request, appoint counsel."

Now, the petitioners -- one of the problems here, and we see it so far in the argument, is that they have attempted to ignore the factual record in the case.

The Petitioners have insisted throughout this litigation that institutional attorneys are available to prepare and file habeas petitions, and thus they were meeting their affirmative obligations under Bounds to provide meaningful access.

In fact, at the penitentiary where death-sentenced inmates are housed entirely separated from the rest of the prison population during at least the last 15 days -- the critical last 15 days before their execution -- the institutional attorneys at the penitentiary did not even appear at that --

QUESTION: Excuse me, why are the last 15 days critical? I mean, I would assume that if there has been a mistake in your conviction, you want to get that before the courts as soon as possible.

MR. ZERKIN: Yes, I would agree, Your Honor.

The reason that it is critical --

QUESTION: I mean, I am sure that every day is more important as it gets closer and closer, but I do not see why, legally, it is more critical.

MR. ZERKIN: Well, the reason that I just said it is from what Your Honor just suggested, which is that if a petition has not been filed, then obviously that last period of time is the most critical, because time is running out.

QUESTION: But it should have been filed. I mean, the critical time is the time before that 15 days.

MR. ZERKIN: I agree, and unfortunately the access is not being provided at the earlier stage to ensure that, either.

QUESTION: Just because they are housed in a separate part of the facility during the 15 days before the date of execution?

MR. ZERKIN: No, sir, that does not -- in itself --

QUESTION: What is the average space between the date of conviction and the date of execution? Do you have any idea what the average is?

MR. ZERKIN: No, but typically what happens is --

QUESTION: Six months?

MR. ZERKIN: No, less. Less.

Typically what happens is that by statute it has to -- the date must be 30 days after the date is imposed. You have to give 30 day leeway.

Typically what happens is that after affirmance on direct appeal, sometimes prior to denial of cert by this Court, if cert has been requested, sometimes after the inmate is brought back before the circuit court judge, and a date is set.

I would suggest that it is more like 90 days than it is to 180. But the difficulty is that the access is not being provided at Mecklenburg on Death Row itself before that time.

And the facts in the case amply demonstrate that. The --

QUESTION: Mr. Zerkin, before I lose the thread of your thought, you never did tell us what happens in this last 15 days.

MR. ZERKIN: What happens in the last 15 days is, he is in the death house, isolated from the rest of the population at the penitentiary. There are -- there was a period of three months where the institutional attorneys assigned to that facility did not even appear at the institution.

He has no access to a law library at all. So, at that point, no access is being provided in any fashion. In addition, at Mecklenburg, prior to that --and what the Petitioners in this case ignore is the fact that the institutional attorneys had informed the inmates that they did not do death cases.

In fact, the record shows that Mr. Giarratano filed a grievance concerning the lack of assistance for Mr. Boggs and for Mr. Watkins, and that that grievance was ignored.

In fact, neither of those inmates even had a complete trial transcript, and the institutional attorney did not even attempt to obtain Mr. Boggs' transcript during the pendency of this action.

Equally important, the district court found as a factual matter that even assuming that institutional attorneys are available, given the nature of death penalty litigation, these inmates need more than the sporadic assistance of talking law books to ensure meaningful access.

QUESTION: Well, if Virginia is not living up to its duty under Bounds to provide access to these Death Row people, I would suppose that it is also failing its duty under Bounds to non-capital inmates.

Certainly I would say a fortiori that they are

not.

MR. ZERKIN: Not necessarily, Justice White, and the reason is that -- and they may be. They have something like eight attorneys for 2,000 inmates.

But the reason that it does not necessarily apply is because the institutional attorneys, as to Death Row, have told the inmates that they do not handle capital cases. They have not told that to the population at large, but the evidence establishes that they did tell that to the Death Row inmates.

We also know that as to Death Row, Mr. Giarratano filed a grievance about the lack of help from institutional attorneys, and that that request was denied.

QUESTION: Well, what about the library?

MR. ZERKIN: The -- at Mecklenburg, the problem with the library is that the access is limited to two and a half hours twice a week. Now, in a normal -- and this is what is critically different about death penalty litigation -- in a normal case where an inmate has a term of years to prepare his habeas petition, two and a half hours twice a week may give him enough time to prepare a petition over the course of a year. This inmate is going to be dead in 90 days.

He does not have -- he cannot take that two

and a half hours twice a week and stretch it out for however long it takes for him to prepare a petition. If we are dealing with a population in particular which has a lower intelligence level than the general population to begin with, what we end up with -- and even without that, but particularly with that -- it is absurd to think that that inmate, given the complexity of capital litigation, can possibly prepare a meaningful habeas petition during that 90 day period when on top of everything else, he has the threat of execution hanging over his head.

It is difficult enough for us to sit down in a law library that is nice and quiet and figure out capital litigation. You are asking this man with the clock ticking, who has no education, to prepare a habeas petition within 90 days.

QUESTION: Counsel, do we have a situation where a Death Row prisoner has asked the institutional attorney for help and been refused?

MR. ZERKIN: Yes, Justice O'Connor, we do. In fact, we have --

QUESTION: Is that this case?

MR. ZERKIN: Yes, we do.

In fact, we have more than that in this case. And Mr. Washington's case is perhaps the best example.

Mr. Washington, in fact, did everything that they suggest and he came up empty. He not only -- he did not write to the court, he appeared in court, in front of the sentencing judge on the date his execution was being set, and he said, through his attorney, who stated to the judge that he was not going to represent him on habeas -- in fact, he was not going to represent him on habeas because the Assistant Attorney General had told him he could not, because he had been trial counsel.

He made the motion at that time for appointment of counsel, and the circuit court judge denied the motion on the very specific grounds that it is not available. The appointment of counsel for habeas is not available in Virginia until an evidentiary hearing is granted.

So, in fact, when counsel suggests that this does not happen, in fact it has happened. Mr. Washington's situation is actually even worse than that, because his situation was -- Mr. Giarratano filed this case pro se, this case, prior to the Washington situation reaching that crisis.

Mr. Giarratano wrote to the district court judge about Mr. Washington's situation, and that was treated as an amendment to the pleadings. The AG's office at that point was served with it. They knew that

Mr. Washington wanted counsel, that he had been denied counsel, and that he was receiving no assistance -- and yet no assistance was provided.

In fact, Mr. Washington was then transferred, and here we get to the critical 15 days, because time --he still did not have access. He goes to the penitentiary, and he continues to tell the Attorney General's office, who is supervising the death house, that he wants counsel -- he wants to proceed.

QUESTION: Of course, we have never said that he had to be given counsel, have we? We said that he had to be given access.

MR. ZERKIN: But he has no -- he does not even have the assistance at that point of an institutional attorney to assist him in preparing.

Remember this -- part of their position is that the system, what system exists, they say all you have to do is --

QUESTION: We will resume there at one o'clock.

[Recess]

QUESTION: Mr. Zerkin, you may resume.

MR. ZERKIN: Thank you, Chief Justice Rehnquist.

I believe I was attempting to respond to Justice O'Connor's inquiry concerning the facts of a

request for assistance from the institutional attorneys, and what has come of all of that.

As part of that, I wanted to point out, and again in the record, and emphasize that this was tried on the facts, and there is an ample factual record in this case.

Of course, we have been through Mr. Washington's requests for counsel when he appeared in front of the trial judge, and it should also be noted that Mr. Washington has an I.Q. of 69.

In addition, it should be noted that contrary to counsel's suggestions this morning, the Attorney General did not join in the motion in front of the circuit court judge when Mr. Washington made the request for counsel. In fact, the attorney who was present was silent through that, and sat silently while Mr. Washington was denied that appointment.

Although in the original trial record we were dependent upon the order that is part of the Appendix, just the other day the State lodged with this court the actual trial transcript of the hearing in which Mr. Washington was denied counsel. And the Court will see that in fact our scenario of what happened there is very accurate.

In addition, however, Mr. Giarratano had

talked to the institutional attorney specifically about helping Mr. Washington. The institutional attorney did nothing to assist him.

Subsequently, of course, Mr. Washington was transferred to the State penitentiary, and the general rule for the institutional attorneys at the State penitentiary is that these, the assistance they are to provide, is not intended to be very complex. Indeed, the general rule is that they are only supposed to devote one hour to an inmate.

In fact, while Mr. Washington was there, the institutional attorneys did not visit the institution and did not know -- did not know -- that Mr. Washington was present, despite the fact that he continued to indicate, and the Attorney General knew, that Mr. Washington wanted to proceed with habeas corpus.

In addition, Mr. Kulp, the senior Attorney General in charge of capital litigation, testified at trial that they would indeed have executed Mr. Washington even though no papers were filed on his behalf, and even though no volunteer attorney was forthcoming, and clearly even though no institutional attorney was brought down to assist him, and even though clearly he had no access to a law library.

Mr. Giarratano also filed a grievance

concerning Mr. Watkins and Mr. Boggs, the intervenor plaintiffs in this case. And Mr. Boggs and Mr. Watkins remained without any assistance from the institutional attorney for a year, even during the pendency of this lawsuit --so even while they knew that this was at issue, for a year they remained without any assistance, and indeed the institutional attorney visited them at their cell, obtained part of the record, and did nothing more.

As I indicated before, in the case of one of them, he did not even attempt to get the completed transcript. At trial, Judge Merhige asked him about that, and he said, well, at some point I am going to have to do that.

Now, the only reason that this dragged on for this year was because this case was pending at the trial level, and so no one proceeded to set execution dates for Mr. Boggs and Mr. Watkins while they were receiving none of this assistance, because of the pendency of this case.

However, it is clear from prior practice, and it is clear from the experience of Mr. Washington that had this case not been pending, and even though they were receiving no assistance, that the State would have proceeded to set execution dates and would have

proceeded in fact to execute them.

In addition, we have the instance of Mr. Evans, Wilbur Evans, who proceeded Mr. Washington on Death Row. Mr. Evans got as far as three days before being executed. He, too, was in the Death House of the penitentiary, and a volunteer lawyer appeared and filed papers on Mr. Evans' behalf.

What is significant about that is that subsequently, as part of Mr. Evans' habeas petition, the State confessed error. His sentence was reversed not merely because he won through litigation. The State actually confessed error in Mr. Evans' case, and yet they were prepared to execute him at that point, even though he had no assistance.

Mr. Giarratano, in addition, while he was in isolation asked for the assistance of the institutional attorney, and also asked for access to the law library. He was refused as to both of those.

He received neither the assistance of the institutional attorney, nor was he allowed access to the library.

QUESTION: What was the error that was confessed? That was Evans' case?

MR. ZERKIN: Yes, Your Honor.

The error --

QUESTION: The merits error, or what?

MR. ZERKIN: As to -- they had relied upon convictions from the State of North Carolina that were invalid.

QUESTION: Oh, so it went to the sentencing?

MR. ZERKIN: Yes, sir, and he received new sentencing. That is correct.

There is another particular factor that supports the district court's decision that makes death penalty litigation completely different from other litigation, and that is the procedural need to obtain stays in order to litigate your claim.

I mean, you cannot have meaningful access if you do not obtain a stay in the meantime. And Justice Scalia has questioned the relevance of this last 15 day period when he was at Mecklenburg before that. I would suggest two responses to that. The first one is, of course, that they were not receiving access while they were at Mecklenburg.

But the other is that it may well be that once -- even if he has received some assistance prior that it is necessary to obtain a stay, and it may very well be within that last 15 days. Now, something critical happens here. The attorney who is providing the advice at Mecklenburg, and is allegedly helping to prepare

these papers, even though in fact we know they do not -- he gives up jurisdiction over this inmate when this inmate is transferred to the penitentiary.

So even assuming that he is beginning to work on this case, he throws up his hands as soon as the inmate leaves and is sent to the penitentiary, and now, 15 days prior, an institutional attorney who is supposed to devote one hour to a case, who has no prior knowledge of this inmate, now must pick up the ball, presumably, somehow, even though there is no explanation for this, get the work product of the institutional attorney at Mecklenburg, if there is any, and proceed to obtain this stay and get this habeas petition filed if it has not been filed already.

It is also significant to this kind --

QUESTION: Let me ask you -- I meant to ask you earlier, when somebody on the other side made the objection that you will have a challenge to whether the counsel you had was adequate.

What is your response to that -- to an endless series of yes, you gave me access, but with counsel that was not really good enough counsel, and therefore I did not have access, and therefore I am entitled to do it all over again?

MR. ZERKIN: Well, as I indicated to Chief

Justice Rehnquist, that does not result in a new habeas petition, because theoretically that is not a basis for habeas corpus.

What --

QUESTION: What does it result in, then?

MR. ZERKIN: What it could result in would be what would exist even at the present time, which would be a claim that he had been denied access under Bounds. It could be done in the context of 1983.

Now, what is interesting about that is --

QUESTION: Yes, except that the basis for that Bounds claim would then be the inadequacy of his counsel, right?

MR. ZERKIN: No, I disagree with that.

I think that the basis of that would be within -- under the standard of meaningful access, which I think is very different from a standard of effective assistance of counsel -- that could be raised. But even --

QUESTION: Well, I do not understand that. Wait a minute. You --

MR. ZERKIN: The standard --

QUESTION: Could you give him ineffective counsel, and you think that would be adequate?

MR. ZERKIN: I think that the Constitutional

standard of ineffective assistance of counsel, and the standard for providing meaningful access, are not necessarily the same. I think, in fact, that they are different.

I think that there is a lower standard as to the performance of providing access.

QUESTION: Maybe you do not need counsel at all, then.

MR. ZERKIN: Well, we think clearly that you do need counsel, and there are a number of reasons for that.

QUESTION: But not necessarily competent counsel?

MR. ZERKIN: Well, we would like to have competent counsel.

QUESTION: But it is enough if he is incompetent?

MR. ZERKIN: No, we would not say he is incompetent.

QUESTION: But incompetent counsel does not have to be counsel. You can have competent non-counsel who is incompetent counsel.

MR. ZERKIN: Your Honor is drawing a line distinction that says attorneys are either one or the other, and I suggest to the court that within the

concept of meaningful access, there are certain things which that attorney must do in order to provide meaningful access in a capital case.

He must review the record. He must examine the briefs. He must interview the inmate. He must talk to the trial counsel, so that he can develop claims of ineffective assistance.

That is particularly important in Virginia, where the Virginia Supreme Court does not review the entire record for error. Therefore, as this Court noted in Kimmelman, it is only an attorney who is likely to be able to see claims of ineffective assistance of the trial counsel.

We believe that the system that should be set up -- and again, Virginia has not --

QUESTION: But nonetheless, after the habeas proceeding is completed --

MR. ZERKIN: Yes.

QUESTION: With counsel that has been provided somehow, there would still be a claim remaining that that proceeding was itself inadequate because you would not call it ineffectiveness of counsel, you would call it --

MR. ZERKIN: Lack of access.

QUESTION: Lack of access.

MR. ZERKIN: Yes, there would.

And what is interesting then is how that --

QUESTION: But you would not need counsel for that last proceeding? That would really be the last one. Or would you need counsel for that one, too?

MR. ZERKIN: No, sir. What is interesting about that is that that would then fall within the class action order that is part of this case, and so the issue of whether or not that inmate had received access would be defined in terms of whether or not the Petitioners in this case were complying with the order of the district court that required them to provide access.

So, actually, the advantage of it is that rather than simply having any inmate who even now has the ability to bring a 1983 action claiming that he has been denied access -- that in fact, the results of that, that all of those on Death Row would be consolidated within the scope of this action, and it would -- the question would be whether or not the order of this district court was being violated.

So, in that sense, I think that in fact it consolidates them, rather than creating additional problems.

QUESTION: If you found that the order was being violated, then I suppose all capital sentences

would be stayed?

MR. ZERKIN: No, Your Honor, only as to -- only as to an inmate who was immediately facing execution, and as to --

QUESTION: How would you define "immediately facing execution"?

MR. ZERKIN: Well, I think within the standard definitions of what one is allowed to -- the basis of a temporary restraining order or a preliminary injunction.

If we determined that as to a particular inmate, he was not receiving access, then indeed it would be our obligation as class counsel to file an appropriate motion with the district court to indicate that this inmate was not receiving that counsel.

Nothing can prevent anyone from filing a claim. I think the legitimate concern -- the legitimate concern is whether or not the ability of the inmate to make a claim that he is not receiving access will result in additional proceedings and a delay of the execution. That is what this court has repeatedly indicated it has a problem with.

The question is not whether he can file it. The question is whether or not he can stave off the execution by doing it. We know, in fact, from Mr. Whitley's case that he failed. He was executed on

schedule. That would seem to be the concern.

Now, the problem here is that what is being raised are problems which the State has within its power to prevent -- that is, rather than simply doing what they did, which was in response to the judge's order, which was issuing this memorandum to State circuit court judges and then throwing up their hands as to any further responsibility -- if they set up a system which indeed assured that these institutional attorneys would assist, that had some monitoring aspect of it, then indeed they could avoid the very problems that the Court is concerned with.

The reason that those problems potentially exist is that Virginia has been totally non-responsive to the district court's order. In fact, what is interesting in this case from the papers filed that are part of the Appendix, that were filed in the Fourth Circuit in connection with the motion to stay the mandate is that even in response to the district court's order, what it required was that I had to repeatedly write letters to the circuit court judges reminding them of Judge Merhige's order, and asking them to appoint counsel.

They did absolutely nothing to effectuate the

order of the district court. So, these theoretical problems are within the power of the State to prevent.

The mention -- one of the problems that we have here is that death penalty litigation does not necessarily proceed on the orderly course on which other litigation proceeds, and this Court is well aware of that.

One of the problems is that if a stay is denied by a State circuit court judge, it is necessary to proceed at a higher level State court, or in Federal court, in order to obtain a stay in order to litigate those claims.

If you do not have an attorney monitoring that, bringing the motion for a stay to the attention of the judge -- indeed, in Virginia, circuit court judges still circuit-ride. We have under the code circuits that have 10 separate counties and two judges.

There is no automatic provision for any of these filings to be brought to the attention of the circuit court judge. Indeed, if the order is entered, the inmate has no way to even know that it has been entered. He has no basis for knowing at what point it is necessary for him to prepare and file papers either in the Virginia Supreme Court or in the United States District Court.

None of this can be done without an attorney, and it is applicable only to death penalty cases. Now --

QUESTION: Well, did the district court order cover help, legal help, in filing Federal post-conviction writs?

MR. ZERKIN: No, Your Honor. That problem has been solved by virtue of the passage of the anti-drug bill, in which the Federal Courts now, under that statute, will appoint counsel in Federal habeas upon request in any death case, State or Federal.

So, the district court denied that. The district court envisioned that that State habeas attorney would in fact file the petition in Federal court and the Federal court would then appoint and the Federal Government would pay for that. But that problem has been taken care of now.

QUESTION: I suppose then that the inmates in Virginia could go right into Federal habeas if they do not get any help?

MR. ZERKIN: Well, it creates an interesting dilemma, and it is somewhat responsive to what Justice Kennedy asked before. That is, imagine the chaos of this, that not having any access into State court. The inmate writes a letter to the district court and says appoint me counsel so I can proceed on Federal habeas.

They appoint counsel. This attorney, who has now been appointed under the Federal statute for Federal court now has this host of unexhausted claims. Is that attorney now supposed to proceed either under payment by the Federal Government or pro bono, or is he supposed to simply say, "That is too bad. You have these legitimate claims, but you have not exhausted them, and therefore I cannot help you in Federal Court."

QUESTION: Thank you, Mr. Zerkin.

Mr. Harris, you have seven minutes remaining.

REBUTTAL ARGUMENT OF ROBERT Q. HARRIS, ESQ.

ON BEHALF OF THE PETITIONERS

MR. HARRIS: Thank you, Mr. Chief Justice.

The first point that I would like to correct is the suggestion that was made here this morning that there was somewhere in the line of 90 to 180 days between the time of sentencing and the time of execution.

The average time in Virgin between the imposition of sentence and execution is roughly seven years. The average time for getting a conviction affirmed in the Virgin Supreme Court is eight months.

This is not a rush to judgement in these cases.

On the matter of Mr. Washington's motion for appointment of counsel in the circuit court, the record does show that seven weeks after this court denied cert

on his direct appeal, he appeared in the circuit court for purposes of setting an execution date. He appeared with counsel. His attorney asked the court to appoint counsel to represent him, telling the court that he knew his client was not entitled to it.

He also represented to the court that a volunteer group, the ACLU, was looking to find an attorney to represent Mr. Washington, and he represented to the court that there was going to be an attorney out there -- a volunteer attorney out there -- to file a subsequent habeas corpus action.

The trial court denied the motion at that time, and indicated that he was leaving the matter open, because he anticipated there was going to be future activity to request a stay, or some other matters.

This is not a matter of the trial court saying there is no availability of counsel. This is simply a matter of the trial court denying a motion on the understanding that was given to him that volunteer counsel was going to appear.

QUESTION: Mr. Harris, can I ask you, this problem of delay troubles everyone interested in this area. You say that the average time in Virginia is eight months for a direct review to be completed, and then there is apparently another additional six years

that takes place between the completion of direct review and the actual execution?

MR. HARRIS: That is a rough average, and --

QUESTION: What, in your judgement, causes that delay? Do those two or three years go by before the first State collateral proceeding starts?

MR. HARRIS: No, usually the first State habeas corpus petition would be filed rather promptly after the denial of cert.

I think that the longest time there has ever been between a certiori denial and filing would be maybe six months at the longest.

QUESTION: So then it is about seven or so years between the filing of the first State collateral proceeding and the conclusion of both that proceeding and whatever Federal proceedings there are?

MR. HARRIS: I cannot explain any one item.

QUESTION: Is one part of the proceeding more slow, more difficult to conclude than another, do you know?

MR. HARRIS: I do not see any one area as being particularly difficult. There are some --

QUESTION: In some States, it is the direct review that is very slow. In some States you could wait several years before the conviction is confirmed.

But in Virginia, it is just eight months. That is very interesting.

MR. HARRIS: It is an expedited process in Virginia. It is given priority on the Virginia Supreme Court's docket. It is set for immediate briefing, and it is set at the earliest argument date. And the Virginia Supreme Court has a practice of deciding cases heard in one term by the next time they sit. That is the practice of the Court.

QUESTION: They start the first proceeding promptly, and it still takes six years?

MR. HARRIS: Well, I will give you an example -- Mr. Giarratano's case in this. He is the named plaintiff in this action.

He was convicted in 1979. He filed his State habeas proceedings, I believe, in 1980. They were completed by 1983, which includes both a hearing in the State circuit court on allegations of ineffective assistance of counsel and a review on the denial of habeas corpus relief to the Virginia Supreme Court.

I believe in March of 1983, he filed his habeas corpus action in the Federal district court. That was dismissed last December, finally, and it is now pending in the Fourth Circuit.

QUESTION: It pended in the district court for

five years?

MR. HARRIS: That habeas action pended, was interrupted on several occasions -- the last occasion that it was interrupted was, Mr. Giarratano added another claim which made a mixed petition, and he was allowed to go back to State court to file a second State petition while the district court kept the Federal action open.

These cases take time. They do not need to. They certainly do not need to take this long.

We certainly, though, do not want to add another layer of litigation. I do not agree with Mr. Zerkin's statement that there is not going to be any additional delay in these matters. There may not be a habeas corpus petition challenging the conviction, because of ineffective assistance of habeas counsel, but there will certainly be a habeas petition challenging the habeas action.

It is a cost to the State from this new right to counsel that we have to relitigate every State habeas corpus action, because each time the petitioner insists another right to counsel to litigate the next State habeas corpus action. We will be doing this on and on and on, and I do not think this Court should be sending the message out there that these prisoners have a right

to litigate indefinitely, particularly in these matters. And we are talking about litigation that has nothing to do with the trial, nothing to do with the determination of guilt.

QUESTION: I suppose we have to look at the experience in other States -- a lot of States do provide counsel in this proceeding -- and see if they have in fact been slowed up by the process you described.

MR. HARRIS: Well, again, we are talking about a system in Virgin where the delay is not caused by an absence of counsel. They have all had counsel, and there is still delay. That is not the cause of the delay.

But if we add counsel, we are guaranteeing more delay.

QUESTION: I do not understand that. You say that they have had counsel -- but why will you get more delay if you just have different counsel? That is really all you are talking about.

MR. HARRIS: If we are creating a new Constitutional right to counsel, presumably there will be some right to seek redress in some court if you have a claim against that counsel, even under --

QUESTION: Well, all I am saying is that is true in a lot of other States right now. It is maybe

not Constitutionally compelled, but these other States, like Florida, and some of the others, do provide counsel for collateral review.

And you are suggesting that those States are --statistics will show that those States are a lot slower than Virginia, because they have this extra right?

MR. HARRIS: No, I am talking about an extra right to an additional collateral review of collateral counsel.

QUESTION: Well, they have that -- why do they not have that in Florida?

MR. HARRIS: Florida has made that decision. They have created this right to counsel for their prisoners under State law. They are not --

QUESTION: But I am just saying, under your argument, it must be true that Florida has a lot more delay than Virginia does, because they have this extra right. It is a State-created right.

MR. HARRIS: But they have not given them that State-created remedy of attacking collateral counsel.

QUESTION: I do not know why it is not a State-created remedy there, any more than it would be here. I do not understand your argument, I guess.

QUESTION: I gather that you are saying that Florida gives you a right to counsel, but if you do not

get that right, you cannot complain about it?

MR. HARRIS: Florida gives them a representative for their actions, but it has specifically said, we did not mean to create another layer of litigation by doing that.

QUESTION: Yes.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Harris.

The case is submitted.

(Whereupon, at 1:20 o'clock p.m, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-411 - EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners V. JOSEPH M. GIARRATANO, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)