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Effective Assistance of Counsel on Appeal: Due Process Prevails in Evitts v. Lucey

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NOTES

EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL: DUE PROCESS PREVAILS IN *EVITTS v. LUCEY*

The right to effective assistance of counsel is a cornerstone of the American criminal justice system. A criminal defendant's counsel can help maintain the due process and other functions of the court through zealous advocacy of the defendant's cause. State and federal courts have established rules of evidence and procedure to insure that criminal verdicts are based on relevant and reliable evidence, to prevent unfair surprise, to provide uniformity of judgments, and to foster efficiency. To effect the policies underlying these rules, however, an accused must be assisted by competent counsel.[1] Representation by incompetent counsel inflicts damage not only to an individual accused's cause, but also to the courts themselves. The long term danger of incompetent representation is that the public will lose confidence in a system of justice that it already perceives to be dependent more upon gamesmanship than equity.[2]

To protect against improper convictions, the due process clause requires that state and federal courts provide criminal defendants with effective assistance of counsel at trial.[3] The evolution of the criminal appellant's right

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1. Commenting on the quality of counsel, Chief Justice Warren E. Burger stated: "Many judges in general jurisdiction trial courts have stated to me that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227, 234 (1973).

In 1977, the Federal Judicial Center sent questionaires to all 476 federal district judges asking: "Do you believe that there is, overall, a serious problem of inadequate trial advocacy by lawyers with cases in your court?" Out of 366 responses, 41 % answered "yes" and 51 % answered "no". Additionally, judges rated 8.6 % of the lawyers covered by the survey as less than adequate. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role,* 93 HARV. L. REV. 633, 634 n.7 (1980) (citing A. PARTRIDGE & G. BERMANT, THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS 30-43 (1978)).

In a survey conducted by the American Bar Foundation in 1975, 1422 state and federal judges who responded found that 13% of the individual trial performances rated less than minimally competent. Schwarzer, *supra,* at 634 n.7 (citing Maddi, *Trial Advocacy Competence: The Judicial Perspective,* AM. B. FOUND. RESEARCH J. 105, 118 (1978)).

2. Chief Justice Burger has repeatedly lamented the "low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice." Burger, *supra* note 1, at 230.

3. The standard of effective assistance of counsel was defined by one court as that level of performance "which meets a minimum standard of professional representation." United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975). *But see* United States v. Weston, 708 F.2d 302, 306 (7th Cir. 1983) ("a 'minimum standard of professional representation'

to counsel on appeal, by contrast, does not clearly derive from the due process clause. Because the due process clause does not require states to provide criminal appeals,[4] the United States Supreme Court has developed a right to counsel on appeal based on both the equal protection and due process clauses. Until recently, however, the Court never explicitly based the right to appeal on either clause.[5] To eliminate this long-standing ambiguity, the Supreme Court determined in *Evitts v. Lucey*[6] that the due process clause of the fourteenth amendment alone supports a criminal appellant's right to effective assistance of counsel on a first appeal of right.[7] This Note briefly surveys the historical development of the right to counsel, analyzes the Court's opinion in *Lucey*, and discusses the implications of the *Lucey* decision for future adjudication.

HISTORICAL BACKGROUND

In colonial England, a defendant charged with a felony was denied any assistance of counsel.[8] The inclusion of an "assistance of counsel" provision in the sixth amendment[9] of the United States Constitution evidences the framer's rejection of the English tradition.[10] In the first one hundred and fifty

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guarantees the defendant reasonably effective counsel, not errorless counsel"). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

4. In McKane v. Durston, 153 U.S. 684 (1894), the Supreme Court held that a state need not provide a system of appellate review. *McKane* has never been overruled. *See also* Case Comment, 28 RUTGERS L. REV. 751, 756 (1975) (Court in Douglas v. California, 372 U.S. 353 (1956) may have relied on equal protection, because due process had not been held to command criminal appellate review).

5. *See infra* notes 26-38 and accompanying text.

6. 105 S. Ct. 830 (1985).

7. *Id.* at 836-37.

8. F. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 109 (1969). England permitted a prisoner to be represented by counsel only in misdemeaner and treason cases. *Id.* Not until 1836 did England permit a charged felon the assistance of counsel. Powell v. Alabama, 287 U.S. 45, 60 (1932).

9. U.S. CONST. amend. VI. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

10. F. HELLER, *supra* note 8, at 109-10. The rejection of the English rule that prohibited felons from receiving representation by counsel grew out of existing differences in the procedural law of England and the Colonies. In England, criminal defendants were confronted by the person injured or by some other interested party. In contrast, the Colonies employed full time criminal prosecutors. Application of the English rule in the Colonies, therefore, was more inequitable than in England. *Id. See also* United States v. Ash, 413 U.S. 300, 306 (1973) (sixth amendment right to counsel ratified to reject English common law rule); Powell v. Alabama,

years after the adoption of the Bill of Rights, however, it was believed that the sixth amendment did not require the government to provide counsel for indigent criminal defendants.[11] Courts treated the assistance of counsel provision as a declaration of the accused's right to have counsel, and not as a duty on the part of the United States to provide it.[12]

As applied to state courts, the trial level right to counsel emanates from the due process clause of the fourteenth amendment. In *Powell v. Alabama,*[13] a 1932 case, the Supreme Court determined that criminal defendants have a right to the effective assistance of counsel. The *Powell* Court held that defendants in a capital case were denied due process when a state refused them the aid of counsel at trial.[14] The Court also concluded that, in some cases, defendants had a right to appointed counsel to protect their right to a fair hearing. The Court stated that the states' duty to provide counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[15]

After *Powell,* the right to the effective assistance of counsel at the state trial level became embroiled in the fourteenth amendment incorporation controversy.[16] The Supreme Court found that the sixth amendment right to counsel was a fundamental due process right under the fourteenth amendment.[17] On the other hand, the Court adopted a case-by-case approach in right to counsel cases and reversed convictions only when the absence of

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287 U.S. 45, 64-65 (1932) (in all but one of the colonies, English common law rule that barred accused felons from receiving assistance of counsel had been rejected).

11. After the adoption of the Bill of Rights, Congress passed the Federal Crimes Act of 1790, which required that counsel be appointed to defendants in capital cases where defendants could not afford to retain their own. The Federal Crimes Act would not have been necessary if the sixth amendment had already guaranteed such a right. F. HELLER, *supra* note 8, at 110.

12. *See, e.g.,* Nabb v. United States, 1 Ct. Cl. 173 (1864) (government not liable for fees of counsel assigned by United States to defend criminal defendant).

13. 287 U.S. 45 (1932).

14. *Id.* at 71.

15. *Id.*

16. For a discussion of the incorporation controversy, see generally G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 476-88 (10th ed. 1980). The incorporation controversy focuses on the extent to which the first eight amendments of the Bill of Rights are made applicable to the individual states through the due process clause of the fourteenth amendment. The debate in the Court from the 1930's to the 1960's was between advocates of the total and selective incorporation theories. *Id.* Total incorporationists claimed that the original purpose of the fourteenth amendment was to make the first eight amendments of the Bill of Rights applicable to the states. Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting). Proponents of the selective incorporation theory believe that only those Bill of Rights provisions fundamental to liberty or justice are applicable to the states through the due process clause. Palko v. Connecticut, 302 U.S. 319, 324-26 (1937).

17. *See* Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936) (Powell Court concluded that certain fundamental rights, safeguarded by first eight amendments against federal action, also applied against states); *see also* Avery v. Alabama, 308 U.S. 444, 445 (1940) (in a capital case, *Powell* required state to provide counsel).

counsel actually deprived a criminal defendant of a fair trial.[18] Meanwhile, in a 1938 case, *Johnson v. Zerbst,*[19] the Court held that in federal court, "the Sixth Amendment withholds . . . in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[20]

The controversy over the meaning of *Powell* was resolved in *Gideon v. Wainwright.*[21] In *Gideon,* the Supreme Court held that the trial level right to counsel requires that states provide counsel in all cases in which accused felons cannot afford to retain attorneys to represent them.[22] In *Gideon,* a Florida state court denied an indigent criminal defendant who was charged with a noncapital felony the assistance of counsel at trial, because Florida law required the appointment of counsel only in capital cases.[23] On appeal, the Supreme Court interpreted *Powell* as "unequivocally declar[ing] that the right to the aid of counsel [at trial] is of [a] fundamental character."[24] As a result, the Court set aside the defendant's state conviction, holding that a criminal defendant "who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[25]

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18. *See* Betts v. Brady, 316 U.S. 455 (1942). In *Betts,* the Court held that the refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the due process clause of the fourteenth amendment. *Id.* at 473. The Court stated that the "[a]sserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Id.* at 462. The *Betts* decision was later overruled in Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Powell decision "turned upon the fact that in the particular situation laid before [the Court] . . . the benefit of counsel was essential to the substance of a hearing").

19. 304 U.S. 458 (1938).

20. *Id.* at 463.

21. 372 U.S. 335 (1963).

22. *Id.* at 342-44.

23. *Id.* at 337. In a development related to the quality of counsel on appeal, the Court decided in Cuyler v. Sullivan, 446 U.S. 335 (1980), that all defendants, whether represented by appointed or privately retained counsel, have a sixth amendment right to effective assistance of counsel. Courts formerly found a basis in the state action requirement of the fourteenth amendment for a less stringent standard of review of the quality of assistance of retained counsel. The state action requirement was construed by the courts to impose a duty on the state to ensure the quality of state-employed, appointed counsel. At the same time, the courts disaffirmed any duty to review the conduct of privately retained counsel, outside of grievous misconduct that must have been obvious to the forum (the "farce or sham" standard). The *Cuyler* Court rejected this distinction. It found that defendants with retained counsel are often uninformed about legal matters, and cannot usually make independent judgments about the quality of representation provided by their lawyers. Such defendants, the Court concluded, depend on the courts to protect their right to representation. *Id.* at 342-45.

24. *Id.* at 342-43.

25. *Id.* at 344. The trial level right to counsel established in *Gideon* has been extended to misdemeanants whom the state intends to incarcerate. In Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), the Court stated: "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial." *See also* Scott v. Illinois, 440 U.S. 367, 373 (1979) (central

Although a criminal defendant's right to counsel at trial emanates from the due process clause, the court has been more equivocal about the source of the criminal defendant's right to counsel on a first appeal of right. The Supreme Court first addressed the rights of indigent criminal appellants in *Griffin v. Illinois,*[26] which was decided in 1956. In *Griffin,* two indigent criminal defendants claimed that a trial court violated their rights to equal protection and due process when it did not provide a transcript for them to use on appeal.[27] The Court concluded that the defendants' constitutional rights had been denied, but it relied on both the equal protection and due process clauses as its rules of decision.

The Court also addressed the criminal appellant's right to counsel in *Douglas v. California.*[28] In *Douglas,* two indigent criminal defendants requested the assistance of counsel for their first appeals of right. The California District Court of Appeals denied the defendants' request, concluding that " 'no good whatsoever could be served by appointment of counsel.' "[29] The Supreme Court reversed the California court, and found that criminal defendants have a right to counsel on appeals of right. The Court, however, again relied on both equal protection and due process as bases for the right. According to the Court, the equal protection clause forbids the use of a wealth-based standard—measured by the ability of a criminal defendant to afford counsel—to limit access to appeals.[30] The Court also observed that, under the due process clause, the defendant's statutory right to appeal was unconstitutionally terminated without hearing by California's practice of not appointing counsel to defendants whose appeals were perceived as frivolous.[31] Thus, while the *Douglas* court found the existence of a criminal appellant's right to counsel, they did not explicitly set forth the constitutional basis of that right.

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premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or mere threat of imprisonment—warrants adoption of actual imprisonment as standard for constitutional right to appointment of counsel).

The trial level right to counsel has also been extended to cases in which a litigant may be imprisoned. *See* Lassiter v. Department of Social Serv., 452 U.S. 18, 25 (1981); *see also In re* Gault, 387 U.S. 1, 41 (1967) (due process clause of fourteenth amendment requires that child have right to appointed counsel in proceedings to determine delinquency, if decision may result in incarceration). *But see* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973) (no per se rule requiring counsel at probation revocation hearings because when one has been convicted of a crime a more limited due process right is involved). A right to counsel can also be created by statute. *See* Baldwin v. Benson, 584 F.2d 953, 956 (10th Cir. 1978) (federal Parole Commission and Reorganization Act, 18 U.S.C. § 4214(a)(2)(B) (1982), was intended "to provide counsel in all revocation proceedings unless the parolee waived such right").

26. 351 U.S. 12 (1956).

27. *Id.* at 14-15.

28. 372 U.S. 353 (1963).

29. *Id.* at 355 (quoting People v. Douglas, 187 Cal. App. 2d 802, 812, 10 Cal. Rptr. 188, 195 (1960)).

30. *Id.* at 356-57.

31. *Id.* at 357-58.

The Court also addressed the conduct of appellate counsel in *Anders v. California,*[32] *Entsminger v. Iowa,*[33] and *Jones v. Barnes.*[34] In *Anders,* the court-appointed attorney for a criminal appellant refused to proceed with the appeal because he found it meritless. Instead, the attorney filed a no-merit letter with the California Court of Appeals.[35] The Supreme Court held that if a court-appointed attorney determines, after a conscientious examination of the record, that the client's appeal is wholly frivolous, the attorney should advise the court and request permission to withdraw.[36] In *Entsminger,* the Court held that the attorney's failure to notify the defendant of the decision not to perfect a full appeal deprived the defendant of an adequate and effective appeal.[37] Finally, in *Jones,* the Court held that an indigent defendant does not have a constitutional right to have appointed counsel press particular non-frivolous points on appeal, if the appellant's counsel decides as a matter of professional judgment not to present those points.[38]

Thus, prior to *Lucey,* criminal defendants had already been granted the

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32. 386 U.S. 738 (1967).

33. 386 U.S. 748 (1967).

34. 463 U.S. 745 (1983).

35. 386 U.S. at 742-43.

36. The lawyer's request to withdraw, however, must be accompanied by a brief referring to anything that might arguably support the general appeal. The Court determined that only in this manner would a lawyer's duty to act as an active advocate on behalf of the client be fulfilled. *Id.* at 744.

37. 386 U.S. at 753. *Entsminger* involved a convicted defendant who asked his appointed attorney to perfect a plenary appeal that involved a complete trial court record, briefs, and argument by counsel. Counsel, believing that the appeal was without merit, did not file the entire trial court record, thereby limiting the appeal to a modified transcript of the lower court proceedings. Iowa law provides alternate methods for appealing criminal convictions. One method is an appeal based on a modified transcript prepared by the trial court clerk as a matter of course after a notice of appeal is filed. This modified transcript contains only the information or indictment, the grand jury minutes, the bailiff's oath statement and intructions, and the trial court's order and judgment entries. It contains neither a transcript of the evidence nor the briefs and arguments of counsel. In contrast, the second method, which is available on request, involves the entire trial court record briefs and oral argument. *Id.* at 749-50.

38. 463 U.S. at 747. In *Jones,* the defendant, Barnes, advised his appellate counsel by letter of the arguments he wanted made on appeal, "including specifically that identification testimony should have been suppressed because it was a product of an unconstitutional pretrial show-up, that the Assistant District Attorney's cross-examination . . . exceeded permissible legal limits, that the trial court improperly excluded the psychiatric evidence, and that [he] had been denied effective assistance of trial counsel." Barnes v. Jones, 665 F.2d 427, 430 (2d Cir. 1981).

In his brief and oral argument Barnes' appellate counsel argued the "improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony and improper cross-examination of [Barnes] by the trial judge." 463 U.S. at 748. Barnes' appointed counsel, however, failed to argue most of the defendant's suggested claims in either his brief or oral argument. The defendant challenged his conviction charging that he had been denied effective assistance of counsel. *Id.* The *Jones* Court found that counsel's emphasis on the stronger legal arguments did not render his assistance ineffective. *Id.* at 751. The Court stated further that "[f]or judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders.*" *Id.* at 754.

right to counsel for a first appeal of right.[39] The prior cases instructed appointed counsel regarding the rudiments of professional conduct: appellate counsel must advocate their client's interests zealously and must observe basic appellate rules. In addition, the *Jones* Court concluded that decisions that involve an attorney's professional judgment would be given deference by the reviewing court.[40] In all of these cases, the Court failed to state whether a criminal appellant's right to counsel is based on due process, equal protection, or both. In *Lucey,* the Court finally held that due process requires that a criminal defendant receive effective assistance of counsel on a first appeal of right.[41]

EVITTS V. LUCEY

Procedural Background

On March 21, 1976, a Kentucky jury convicted Keith E. Lucey of two counts of trafficking in controlled substances.[42] He was sentenced to concurrent prison terms of five and ten years.[43] Lucey's retained counsel subsequently filed a timely notice of appeal,[44] a trial court record, and a brief with the Kentucky Court of Appeals. The appellate court dismissed Lucey's appeal, however, because the retained counsel failed to file a statement of appeal as required under Kentucky's rules of appellate procedure.[45] Lucey's

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39. *See supra* notes 28-31 and accompanying text.

40. *See supra* note 38.

41. 105 S. Ct. at 836.

42. *Id.* at 832.

43. Lucey v. Kavanaugh, 724 F.2d 560, 561 (6th Cir. 1984).

44. The Kentucky Constitution states that "[i]n all cases civil and criminal, there shall be allowed as a matter of right at least one appeal to another court . . . ." KY. CONST. art. 6, § 115.

45. Kentucky Rule of Appellate Procedure 1.095(a)(1) required that the pleading in the Court of Appeals contain the same information as required in a statement of appeal in the Kentucky Supreme Court pursuant to Rule 1.090.

Kentucky Rule of Appellate Procedure 1.090 provides:

> In all cases the appellant shall file with the record on appeal a statement setting forth:
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> (a) The name of each appellant and each appellee . . . .
>
> (b) The name and address of counsel for each appellant and appellee.
>
> (c) The name and address of the trial judge.
>
> (d) The date the judgment appealed from was entered, and the page of the record on appeal on which it may be found . . . .
>
> (e) The date the notice of appeal was filed and the page of the record on appeal on which it may be found.
>
> (f) Such of the following facts, if any, as are true:
>
> (1) a notice of cross appeal has been filed;
>
> (2) a supersedeas bond has been executed;
>
> (3) any reason the appeal should be advanced;
>
> (4) this is a suit involving multiple claims and judgment has been made final . . . ;

counsel moved for reconsideration, arguing that all the information required in a statement of appeal was contained in his briefs.[46] At the same time, Lucey's counsel filed a statement of appeal that formally complied with Kentucky's rules of appellate procedure.[47] After the court of appeals denied Lucey's motion for reconsideration, Lucey sought discretionary review in the Kentucky Supreme Court; the supreme court affirmed the appellate court in a one sentence order.[48] In a final effort to gain state review of his conviction, Lucey moved the trial court to vacate his original conviction or to grant him a belated appeal.[49] The trial court denied this motion.[50]

After Lucey exhausted all of the state avenues for review, he filed for federal habeas corpus relief in the United States District Court for the Eastern District of Kentucky. Lucey argued that the dismissal of his state appeal deprived him of his right to effective assistance of counsel on appeal, as established under the fourteenth amendment due process clause.[51] The district court adopted a magistrate's factual determination that Lucey had been denied effective assistance of counsel on appeal. Thereupon, the court issued a conditional writ of habeas corpus[52] that ordered the state of Kentucky to release Lucey and to either reinstate his appeal or to retry him.[53]

The state of Kentucky appealed to the United States Court of Appeals for the Sixth Circuit. The court of appeals remanded the case to the district court to determine whether the dismissal of Lucey's appeal violated the equal protection clause of the fourteenth amendment.[55] On remand, the parties stipulated that there was no equal protection issue. The sole issue, therefore,

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(5) there is another appeal pending in a case which involves the same transaction or occurrence, or a common question of law or fact, with which this appeal should be consolidated, given the style of the other case; and

(6) . . . the appellant is free on bond . . . .

Lucey, 105 S. Ct. at 832. The current formulation of rule 1.090 is KY. R. CIV P. 76.06.

46. 105 S. Ct. at 832.

47. *Id.*

48. *Id.* at 833.

49. If the defendant can prove on a post-conviction motion that his appellate counsel was ineffective, the Kentucky Supreme Court allows the trial court to vacate the judgment and enter a new one upon which appeal can be taken. Stahl v. Commonwealth, 613 S.W.2d 617, 618 (Ky. 1981).

50. 105 S. Ct. at 833.

51. *Id.*

52. Lucey v. Kavanaugh, 724 F.2d 560, 561 (6th Cir. 1984).

53. 105 S. Ct. at 833. "The District Court also referred petitioner's counsel to the Board of Governors of the Kentucky State Bar Association for disciplinary proceedings for attacking his own work product." *Id.* at 833 n.3.

54. *Id.* at 833.

55. Lucey v. Kavanaugh, 724 F.2d 560, 561-62 (6th Cir. 1984). Apparently, Lucey stipulated that equal protection was not involved because his attorney on appeal had been retained, and not appointed. 105 S. Ct. at 834 n.5. Thus, Lucey could not claim membership in a class comprised of indigents being discriminated against. *But see* Cuyler v. Sullivan, 446 U.S. 335 (1980) (constitutional standard for effective assistance of counsel the same for retained and appointed counsel).

was whether due process required that a criminal defendant receive effective assistance of counsel for a first appeal of right.[56] In an unreported decision, the district court reissued the conditional writ of habeas corpus.[57] The Court of Appeals for the Sixth Circuit affirmed the district court and recognized the existence of a due process right to the effective assistance of counsel on appeal.[58] The United States Supreme Court subsequently granted Kentucky's petition for certiorari.[59]

MAJORITY'S HOLDING

Before the Supreme Court, the state first argued that states have no due process obligation to offer criminal appeals,[60] and that the due process clause therefore does not govern court procedures at the appellate level.[61] The state consequently argued that Lucey did not have a due process right to challenge his conviction based on his attorney's incompetence at the appellate level.[62] The state also argued that even if the due process clause applied to state appellate courts, due process did not require the state to guarantee a criminal

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56. 105 S. Ct. at 833.

57. Lucey v. Kavanaugh, 724 F.2d 560, 562 (6th Cir. 1984); *see also* Gilbert v. Sowders, 646 F.2d 1146, 1150 (6th Cir. 1981) (failure of retained appellate counsel to file a record on appeal denied defendant due process); Cleaver v. Bordenkircher, 634 F.2d 1010, 1012 (6th Cir. 1980) (court uses equal protection analysis to find that appointment of overworked counsel deprived defendant of right to effective assistance of counsel); Boyd v. Cowan, 519 F.2d 182, 183 (6th Cir. 1975) (appellant was denied due process because retained counsel failed to give timely notice that he did not intend to file or process appellant's appeal); Woodall v. Neil, 444 F.2d 92, 93 (6th Cir. 1971) (petitioner's allegation that he was denied effective assistance of counsel when his retained counsel failed to perfect a requested appeal requires a hearing at the district court level).

58. Lucey v. Kavanaugh, 724 F.2d 560, 522 (6th Cir. 1984).

59. Kavanaugh v. Lucey, 104 S. Ct. 2149 (1984). Five days before oral arguments, Kentucky informed the Supreme Court that Lucey had been released from custody and that his civil rights, including suffrage and the right to hold public office, were restored as of May 10, 1983. The Court determined that the case was not moot because some of the collateral consequences of the conviction remained. The conviction could still be used to impeach any future testimony Lucey might give, and it could subject Lucey to persistent felony offender prosecution if he should be tried on any other felony charges in the future. 105 S. Ct. at 833 n.4.

60. *See* McKane v. Durston, 153 U.S. 684, 687 (1894) ("[i]t is wholly within the discretion of the State to allow or not to allow . . . [an appellate] review"). Contrast Justice Brennan's view as expressed in a footnote in his dissent in Jones v. Barnes, 463 U.S. 745 (1983):

> I . . . have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.

Id. at 756 n.1 (Brennan J., dissenting).

61. 105 S. Ct. at 838.

62. *Id.*

appellant the right to effective assistance of counsel on appeal.[63] The state contended that the *Griffin-Douglas* line of cases were based solely upon equal protection. Therefore, since the due process clause permits a state to dismiss an appeal if a defendant has no counsel at all, the due process clause also permits the state to dismiss an appeal that is brought by an incompetent attorney.[64]

The Supreme Court held that due process requires that a criminal appellant on a first appeal of right be given the right to the effective assistance of counsel.[65] In the majority opinion, in which seven Justices concurred, the Court observed that the "right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms."[66] The Court repeated from its earlier opinions the observation that a state court must observe due process when it hears a criminal appeal,[67] just as it must comport with constitutional due process requirements when it withholds welfare entitlements[68] or makes parole decisions.[69] The Court concluded that "when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with . . . the Due Process Clause."[70]

Justice Brennan, writing for the majority, found two distinct lines of cases that were dispositive of the due process issue in *Lucey*.[71] The first line was the *Griffin-Douglas* cases, which involved a criminal defendant's rights on a first appeal of right.[72] The second line was those cases which recognized that the trial level right to counsel incorporated the right to effective assistance of counsel.[73] While the Court agreed with the State of Kentucky that *Griffin* and *Douglas* involved equal protection concerns, the Court also

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63. *Id.* at 839.

64. *Id.* at 839-40.

65. *Id.* at 836.

66. *Id.* at 838.

67. *Id.* at 838-39. There are many other areas in which the due process clause limits state power to terminate state-granted rights. *See* Goss v. Lopez, 419 U.S. 565 (1975) (high school students threatened with brief disciplinary suspensions have right to hearing); Perry v. Sindermann, 408 U.S. 593 (1972) (non-tenured teacher at state college protected against termination, without notice and hearing, when school's practice was to grant automatic renewal of employment at end of each term); Bell v. Burson, 402 U.S. 535, 539 (1971) (state procedure that revoked, without hearing, licenses of uninsured drivers who had not paid state bond violates due process); *see also* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (disqualification of unemployment compensation violates freedom of religion under the first amendment).

68. The due process clause of the fourteenth amendment requires an adequate hearing before a state can terminate public assistance payments to a particular recipient. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

69. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (parolee's "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment").

70. 105 S. Ct. at 839.

71. *Id.* at 836.

72. *See supra* notes 26-38 and accompanying text.

73. *See supra* notes 13-25 and accompanying text.

found that those cases were also based on due process considerations.[74] Due process was implicated in each case because the states' appellate courts did not offer criminal defendants a fair opportunity to obtain an adjudication on the merits of their appeals.[75] The Court therefore found that the due process clause separately supported the scope and extent of a criminal defendant's right to counsel on a first appeal of right.[76]

Second, the *Lucey* Court relied upon the line of cases that apply the sixth amendment right to counsel to the states through the due process clause of the fourteenth amendment.[77] Because trial and appellate counsel employ similar skills, the Court found that the existence of a right to effective trial level counsel was partly dispositive of the existence of a right to appellate level counsel. To prosecute an appeal, a lawyer needs a significant degree of familiarity with intricate and complex legal and procedural rules, similar to an attorney at trial. Thus, the Court concluded that unrepresented appellants, like unrepresented defendants at trial, are unable to protect their vital interests.[78] Although the Court found that Lucey had nominal representation on appeal, the Court determined that "nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate."[79]

THE DISSENT

Chief Justice Burger and Justice Rehnquist each wrote dissenting opinions. Justice Rehnquist, in whose opinion Chief Justice Burger joined, found that the two lines of cases relied upon by the majority did not substantiate the Court's due process analysis.[80] Justice Rehnquist disagreed first with the majority's reading of the *Griffin-Douglas* line of cases. Rehnquist reasoned that the *Griffin* and *Douglas* decisions, because they dealt only with equal protection concerns, did not support the majority's due process analysis in *Lucey*.[81]

Justice Rehnquist also distinguished the roles of counsel at trial and on appeal.[82] Justice Rehnquist noted that at the trial level the defendant needs

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74. 105 S. Ct. at 840.

75. *Id.*

76. *Id.* at 841.

77. *Id.* at 836. *See supra* notes 19-26 and accompanying text.

78. 105 S. Ct. at 840.

79. *Id.*

80. *Id.* at 841 (Rehnquist, J., dissenting). Justice Rehnquist noted that the majority created "virtually out of whole cloth a Fourteenth Amendment due process right to effective assistance of counsel on the appeal of a criminal conviction." *Id.*

81. *Id.* at 842 (Rehnquist, J., dissenting). Justice Rehnquist indicated that these cases have "not imposed any procedural requirements on state appeals other than to bar procedures that operate to accord indigents a narrower scope of appellate review than nonindigents." *Id.* at 841-842. Thus, Justice Rehnquist concluded that the cases cited by the majority reveal a "uniform reliance on equal protection concepts and not due process." *Id.* at 842.

82. *Id.* at 843 (Rehnquist, J., dissenting).

effective assistance of counsel as a "shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence."[83] Justice Rehnquist argued that a criminal appellant, in contrast to a criminal defendant, has already been found guilty beyond a reasonable doubt and is "subject to the immediate deprivation of his liberty without any constitutional requirement of further proceedings."[84] Justice Rehnquist concluded that a criminal appellant "seeks 'to upset the prior determination of guilt' and [can] . . . *retain* an attorney to serve 'as a sword' in that endeavor."[85] In this vein, Chief Justice Burger observed in his separate dissenting opinion that, "few things have plagued the administration of criminal justice, or contributed more to the lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality."[86]

Justice Rehnquist also argued that, because the due process clause does not guarantee a right to a criminal appeal, a state can confer such a right upon its own terms.[87] Although the due process clause protects against unfair deprivations of liberty by the government,[88] Justice Rehnquist determined that Lucey was not deprived of liberty as a result of having his appeal dismissed. Instead, he concluded that Lucey was deprived of liberty through a lawful trial and conviction, in which the defendant apparently received effective assistance of counsel.[89] Thus, the due process clause could not serve as a basis for challenging the conviction.

ANALYSIS

In *Lucey,* the United States Supreme Court clarified the ambiguity caused by the *Griffin-Douglas* line of cases concerning the extent of an appellant's

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83. *Id.* (Rehnquist, J., dissenting) (quoting Ross v. Moffit, 417 U.S. 600, 610-11 (1974)).

84. *Id.* at 843 (Rehnquist, J., dissenting).

85. *Id.* (Rehnquist, J., dissenting) (emphasis added) (quoting Ross v. Moffit, 417 U.S. 600, 611 (1974)). As a result, Justice Rehnquist determined that the right to effective assistance of counsel applies only to trial level proceedings and is inapplicable to the appellate level issue in *Lucey.*

86. *Id.* at 841 (Burger, C.J., dissenting).

87. *Id.* (Rehnquist, J., dissenting). *See also* Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.). In *Arnett,* Justice Rehnquist stated his preferred analysis of procedural due process violations: "[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, . . . a litigant in the position of the appellee must take the bitter with the sweet." *Id.*

88. 105 S. Ct. at 841 (Rehnquist, J., dissenting) (due process clause expressly applies to deprivations of liberty).

89. *Id.* at 843-44 (Rehnquist, J., dissenting). Justice Rehnquist also faulted the majority decision from a policy standpoint. He predicted that the *Lucey* decision would produce a flood of federal habeas corpus petitions that would charge ineffective assistance of appellate counsel, providing lawfully convicted criminals with another means to attack their convictions collaterally. Justice Rehnquist was also concerned about the effect that the decision would have on the integrity of state rules of procedure. He argued that allowing ineffective assistance of appellate counsel claims would enable defendants to circumvent state rules of appellate procedure because

right to counsel on appeal. The Court determined that a criminal appellant's rights are defined independently by the equal protection and due process clauses of the fourteenth amendment.[90] The *Lucey* decision must be analyzed in two respects. First, whether the Court's interpretation that *Griffin* and *Douglas* involved both due process and equal protection concerns was valid. Second, whether the Court justifiably utilized sixth amendment cases, which involve the trial level right to effective counsel, to decide an appellate level issue that was based solely on the fourteenth amendment's due process clause.

Griffin and *Douglas* certainly addressed equal protection concerns.[91] Because both *Griffin* and *Douglas* involved indigents, the Court's concern focused on the disparity of treatment afforded two different classes of appellants, the rich and the poor. This wealth-based distinction in the court's procedures implied an equal protection analysis.[92] The equal protection analysis, however, does not preclude a separate due process analysis. Each clause implicates different interests.[93] The due process clause supports a persons right to be treated fairly by the government when the government seeks to deprive a person of a legal right; the equal protection clause requires that the government not make irrational classifications among persons when it distributes rights or imposes penalties.[94] Irrational classifications that deprive people of legal rights conceivably affect both clauses.

The Court has frequently observed that the *Griffin* and *Douglas* cases

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missing a reasonable filing deadline could be easily remedied by blaming counsel's incompetence. *Id.* at 844 (Rehnquist, J., dissenting).

90. *Id.* at 841 (both due process and equal protection concerns were implicated in *Griffin* and *Douglas* cases).

91. In Griffin v. Illinois, 351 U.S. 12, 19 (1956), the Court stated: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate [an] appellate review as defendants who have money enough to buy transcripts."

In Douglas v. California, 372 U.S. 353, 357-58 (1963), the Court stated: "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself."

The *Lucey* Court also recognized the equal protection concerns in *Griffin* and *Douglas* when it observed that those cases stood for the proposition that a "[s]tate could not . . . make [an appeal] available only to the wealthy [because] [s]uch a disposition violate[s] equal protection principles." *Lucey*, 105 S. Ct. at 840.

Some commentators have also viewed these cases as primarily involving equal protection analysis. *See, e.g.*, Qua, Griffin v. Illinois, 25 U. CHI. L. REV. 143, 147 (1957) (*Griffin* decision rests primarily on the equal protection clause); Note, *Cost and Judicial Management Considerations in the Right to Counsel for Indigents' Discretionary Appeals*—Ross v. Moffit, 24 DE PAUL L. REV. 813, 817 (1975); Comment, *Right to Counsel in Criminal Post-Conviction Review Proceedings*, 51 CALIF. L. REV. 970 (1963); 49 A.B.A. J. 588 (1963).

92. Ross v. Moffit, 417 U.S. 600, 611 (1974).

93. *Lucey*, 105 S. Ct. at 841 ("each Clause triggers a distinct inquiry").

94. *Id.; see also* Bearden v. Georgia, 461 U.S. 660 (1983) (analyzing state statute that provided alternative sentences of incarceration or restitution); Ross v. Moffit, 417 U.S. 600, 610-11 (1974) (analyzing right to counsel on discretionary appeals).

involved due process issues.[95] Justice Black, in a plurality opinion in *Griffin*, stated "that our . . . constitutional guarantees of due process and equal protection both call for procedures . . . which allow no invidious discrimination."[96] In *Douglas*, Justice Douglas wrote that when an indigent is forced to make a preliminary showing of merit before appointment of counsel is made, "the right to appeal does not comport with fair procedure."[97] Justice Harlan, in a dissenting opinion in *Douglas*, found that only due process was implicated because "the Equal Protection Clause does not impose on the States an 'affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"[98] Even Justice Rehnquist recognized the due process content of *Douglas* and *Griffin* in his opinion for the Court in *Ross v. Moffit*.[99] In *Ross*, Justice Rehnquist stated that "the precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitely stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment."[100] Therefore, the *Lucey* Court's interpretation of the *Griffin-Douglas* line of cases is not only justified, but also conforms to relevant precedent.

Because the *Lucey* decision was based solely on the due process clause, subsequent claims that involve an appellate level assistance of counsel issue will also probably be decided by due process analysis. The due process analysis bypasses the problem posed by the equal protection clause of having to remedy economic differences among criminal appellants. An equal protection analysis would probably require the government to raise the quality of counsel for indigent criminal appellants to some minimally acceptable level. However, the government would not have to provide indigents with counsel equal in quality to counsel retained by nonindigents.[101]

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95. *See* Bearden v. Georgia, 461 U.S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis [in the *Griffin-Douglas* line of cases]").

Commentators have also recognized the dual nature of the *Griffin-Douglas* line of cases. *See, e.g., The Supreme Court, 1962 Term*, 77 HARV. L. REV. 105, 107 (1963) (criminal appellant's right to counsel ambiguously stated as a "fourteenth amendment" right); 8 ST. LOUIS U.L.J. 125, 129 (1963) ("indivisible mixture of equal protection and due process language"); Note, *Criminal Procedure-Due Process and Equal Protection Held to Require Free Transcripts for Indigent Convicts*, 1956 U. ILL. L.F. 501; Note, *Constitutional Law: Due Process and Equal Protection: Right of an Indigent Defendant to a Transcript of the Trial*, 4 UCLA L. REV. 274 (1956); Comment, *Constitutional Law—Post-Conviction Due Process—Right of Indigent to Review of Non-Constitutional Trial Errors*, 55 MICH. L. REV. 413, 414 (1957) (Griffin is based upon an almost indistinguishable combination of due process and equal protection).

96. Griffin v. Illinois, 351 U.S. 1, 17 (1956). Justice Black also stated that "equal protection and due process emphasize the central aim of our entire judicial system"—that all people charged with a crime should stand equally before the law. *Id.*

97. Douglas v. California, 372 U.S. 353, 357 (1963).

98. *Id.* at 362 (Harlan, J., dissenting).

99. 417 U.S. 600 (1974).

100. *Id.* at 608-09.

101. For example, a state may be required to appoint effective counsel to an indigent, but can never actually put the poor man on the same level as a rich man who may be able to

Instead, when the right to effective assistance of counsel on appeal is at issue, the equal protection clause should be considered as subordinate to the due process clause.[102] A violation of the equal protection clause in this context should be treated as a per se violation of the due process clause. If a state fails to provide an indigent appellant with a minimally acceptable level of representation, then it violates the fairness guarantee inherent in the due process clause. In other words, the government does not satisfy due process when it allows indigent appellants to suffer ineffective assistance of counsel while wealthier appellants who are otherwise similarly situated can obtain and benefit from competent professional assistance. The failure to provide individuals with equal access to criminal appeals, therefore, violates the fundamental fairness guarantee of due process.

When the *Lucey* Court found a due process right to effective assistance of counsel on appeal, it also reviewed the line of cases that discussed the trial level right to counsel. The Court found that, because the roles of counsel are similar at the trial and appellate level, the right to effective assistance of counsel is constitutionally mandated at both levels.[103] The Court's analysis in this respect is consistent with the two policies that underlie the right to effective assistance of counsel. The first policy is that criminal defendants must, in fairness, be given the resources to confront government prosecutors.[104] The second policy is that a defendant who lacks familiarity with procedural and substantive law will be denied an effective hearing without the effective assistance of counsel.[105]

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afford retention of the best legal talent available. The fourteenth amendment "does not require absolute equality or precisely equal advantages." Ross v. Moffit, 417 U.S. 600, 612 (1974) (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973)). *See also* Douglas v. California, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting). In *Douglas*, Justice Harlan rejected the equal protection analysis based on wealth-based classifications:

> States, of course, are prohibited by the Equal Protection Clause from discriminating between the "rich" and "poor" as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.

Id. at 361 (Harlan, J., dissenting).

102. *See* Comment, *supra* note 4, at 759 (*Griffin* and *Douglas* both implied that due process incorporates a basic notion of equality).

103. *See supra* notes 77-79 and accompanying text. Numerous Supreme Court cases have stated that the trial level right to counsel includes the right to effective assistance of counsel. *See* United States v. Cronic, 104 S. Ct. 2039, 2044 (1984); Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932). *But see* Engle v. Isaac, 456 U.S. 107, 134 (1982) ("Constitution guarantees criminal defendants only a fair trial and a competent attorney").

104. *See* United States v. Ash, 413 U.S. 300, 309 (1973) (ordinary criminal defendants do not have professional legal skills to protect themselves in a trial setting, while state is represented by experienced counsel).

105. *See Lucey*, 105 S. Ct. at 835 (defendant's liberty depends upon defendant's ability to

At the appellate level, criminal appellants face the same problems encountered at trial. On appeal, as at trial, the states' lawyers muster the best arguments available to defeat criminal appeals. Furthermore, criminal appellants are as unfamiliar with law and procedure on appeal as they are at trial. The underlying rationale for the criminal defendant's right to effective assistance of counsel, therefore, applies to both the appellate and trial levels. This is true regardless of whether the right emanates from the sixth amendment or the due process clause. Thus, the majority's reliance on the right to counsel at trial to construct a similar appellate level right is justified.

The *Lucey* Court also addressed certain practical considerations in its decision. The Court noted that nominal but incompetent representation was as bad as no representation at all.[106] The Court also indicated that the promise of *Douglas*—that a criminal appellant has a right to counsel on appeal—would "be a futile gesture unless it comprehended the right to the effective assistance of counsel."[107] Thus, in finding the existence of an appellate level right to the effective assistance of counsel, the *Lucey* Court merely extended *Douglas* to its logical conclusion.

The right to effective assistance of counsel on appeal had become widely established even before the *Lucey* decision. Many courts, both federal[108] and state,[109] had already recognized a criminal appellant's right to the

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present case according to legal rules and against a trained advocate); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("lawyers in criminal courts are necessities not luxuries").

106. *Lucey*, 105 S. Ct. at 836 (appellant whose counsel does not provide effective representation is in no better position than appellant with no counsel). The *Lucey* Court found it difficult to distinguish Lucey's situation from that of someone who had no counsel at all because "counsel's failure was particularly egregious in that it essentially waived Lucey's opportunity to make a case on the merits." *Id.* at 835 n.6.

107. *Id.* at 836.

108. *See, e.g.*, Francois v. Wainwright, 741 F.2d 1275, 1284-85 (11th Cir. 1984); Tsirizotakis v. LeFevre, 736 F.2d 57, 65 (2d Cir.), *cert. denied*, 105 S. Ct. 216 (1984); Branch v. Cupp, 736 F.2d 533, 537-38 (9th Cir. 1984); Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), *cert. denied*, 105 S. Ct. 355 (1984); Cunningham v. Henderson, 725 F.2d 32 (2d Cir. 1984); Doyle v. United States, 721 F.2d 1195 (9th Cir. 1983); Gilbert v. Sowders, 646 F.2d 1146 (6th Cir. 1981); Perez v. Wainwright, 640 F.2d 596, 598 n.3 (5th Cir. 1981) (citing cases), *cert. denied*, 456 U.S. 910 (1982); Robinson v. Wyrick, 635 F.2d 757 (8th Cir. 1981); Cleaver v. Bordenkircher, 634 F.2d 1010 (6th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981); Miller v. McCarthy, 607 F.2d 854, 857-58 (9th Cir. 1979); Passmore v. Estelle, 594 F.2d 115 (5th Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); Cantrell v. Alabama, 546 F.2d 652, 653 (5th Cir.), *cert. denied*, 431 U.S. 959 (1977); Walters v. Harris, 460 F.2d 988, 990 (4th Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973); Macon v. Lash, 458 F.2d 942, 949-50 (7th Cir. 1972).

109. *See, e.g.*, Harkness v. State, 264 Ark. 561, 572 S.W.2d 835 (1978) (per curiam); People v. Barton, 21 Cal. 3d 513, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978); Erb v. State, 332 A.2d 137 (Del. 1974); Hines v. United States, 237 A.2d 827 (D.C. 1968); Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984); McAuliffe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974); State v. Erwin, 57 Hawaii 268, 554 P.2d 236 (1976); People v. Brown, 39 Ill. 2d 307, 235 N.E.2d 562 (1968); Burton v. State, 455 N.E.2d 938 (Ind. 1983); Wilson v. State, 284 Md. 664, 669-71, 399 A.2d 256, 258-260 (1979); Irving v. State, 441 So. 2d 846, 856 (Miss. 1983); People v. Gonzalez, 47 N.Y.2d 606, 393 N.E.2d 987 (1979); Shipman v. Gladden, 253 Or. 192, 453 P.2d 921 (1969); Commonwealth v. Wilkerson, 490 Pa. 296, 416 A.2d 477 (1980); Grooms v. State,

effective assistance of counsel on a first appeal of right. The majority in *Lucey* found that the Supreme Court had already implied that the right to counsel on appeal requires the effective assistance of counsel. The majority cited *Griffin* as "affording adequate and effective" appellate review to indigent defendants.[110] Additionally, in *Anders v. California,*[111] the Court held that appointed counsel who believed that a defendant's appeal was without merit must nevertheless provide assistance to the appellant by filing a brief that refers to anything that might arguably support the appeal.[112] In *Entsminger v. Iowa,*[113] the Court also reversed a conviction because the appellate counsel failed to assist his client in perfecting an appeal.[114] Thus, the *Lucey* Court viewed *Anders* and *Entsminger* as resting on the premise "that a State must supply indigent criminal appellants with attorneys who can provide specified types of assistance—that is, that such appellants have a right to effective assistance of counsel."[115]

Finally, the right to effective assistance of counsel on appeal was also implicitly recognized in *Jones v. Barnes.*[116] In *Jones,* the appellant's counsel failed to incorporate many of the appellant's suggestions in the appellate brief and oral argument. The defendant challenged his conviction on the basis of ineffective assistance of counsel. The *Jones* Court held that the appellate counsel's action did not amount to ineffective assistance of counsel.[117] The Court's analysis of the propriety of the appellate counsel's assistance, however, would have been superfluous if no appellate level right to the effective assistance of counsel existed in the first place.[118] Thus, the *Lucey* Court recognized explicitly what the Court had recognized indirectly in its earlier decisions.

IMPACT

The *Lucey* decision will create some problems for the administration of state criminal appeals. If a criminal appellant's attorney does not meet a critical filing deadline, the appellate court will be unable to dismiss the appeal without further investigation into the reason for the delay. Consequently, every time a criminal appellate counsel misses a filing deadline, an appellate court will have two possible choices. The court may convene a hearing to determine whether the failure of counsel to meet the deadline was a consequence of appellate counsel's incompetence. To avoid the time and

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320 N.W.2d 149 (S.D. 1982); *In re* Savo, 139 Vt. 527, 431 A.2d 482 (1981); Rhodes v. Leverette, 160 W. Va. 781, 239 S.E.2d 136 (1977).

110. *Lucey,* 105 S. Ct. at 834 (citing Griffin v. Illinois, 352 U.S. 1, 20 (1956)).

111. 386 U.S. 738 (1967). *See supra* notes 35-36 and accompanying text.

112. 386 U.S. at 744.

113. 386 U.S. 748 (1967). *See supra* note 37 and accompanying text.

114. 386 U.S. at 752.

115. *Lucey,* 105 S. Ct. at 840.

116. 463 U.S. 745 (1983). *See supra* note 38 and accompanying text.

117. *Id.*

118. *Lucey,* 105 S. Ct. at 836 n.8.

expense of an additional hearing, an appellate court could also automatically accept late filings. The first alternative would cause greater delays in processing appeals, while the second would effectively nullify state rules of appellate procedure that contain time limits.

When an attorney's incompetence results in an appellant's failure to meet a filing deadline, the state appellate court must determine how much additional time to allow to cure the defect. For a defendant whose sentence has been stayed pending appeal, the *Lucey* decision provides an additional means by which the consequences of a conviction can be delayed. Moreover, successive attorney incompetence would likely lengthen what might already be a substantial delay. Therefore, for the sake of finality, some maximum time limit will undoubtedly be established beyond which an appellant will be rebuttably presumed to have knowingly and intelligently waived his right to a further appeal.

These complications are minimal, however, when compared with the benefits of the *Lucey* decision. To allow an innocent person to remain in jail due to his attorney's incompetence in handling an appeal is clearly unjust. The protection of individual liberty should not be sacrificed when the countervailing administrative burdens on the state are so minimal. Moreover, the impact of *Lucey* on the adherence to state rules of procedure will be relatively slight. There is no incentive for an attorney to disregard state procedural rules and time limits because the attorney still remains subject to disciplinary action under the codes of ethics.[119] Thus, missed deadlines should remain the exception rather than the rule. Morever, a state may provide flexible procedural rules that permit a post-conviction attack on the trial judgment as a means of remedying a frustrated right of appeal caused by incompetent appellate counsel.[120]

As the dissent noted, the *Lucey* decision creates another means for persons convicted of crimes to collaterally attack their convictions.[121] However, Justice Rehnquist overstates the problem by predicting a flood of habeas corpus petitions that claim ineffective assistance of counsel on appeal. The burden of proof will be on the defendant to show the incompetence of appellate counsel. Furthermore, the professional judgment of appellate counsel will be given deference. For example, according to *Jones v. Barnes,* appellate counsel need not raise every nonfrivolous argument available to their clients on appeal.[122] When a decision on the merits has been obtained at the appellate level, most ineffective assistance of counsel claims will be related to an attorney's exercise of professional judgment. Thus, these claims will be disposed of quickly as a matter of law.

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119. Failure to meet a filing deadline could subject an attorney to disciplinary proceedings under the American Bar Association's Code of Professional Responsibility, DR 6-101: "A lawyer shall not . . . neglect a legal matter entrusted to him." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (1980).

120. *See supra* note 45 (statutory procedure in Kentucky).

121. *Lucey,* 105 S. Ct. at 844 (Rehnquist, J. dissenting).

122. Jones v. Barnes, 463 U.S. 745 (1983).

Correspondingly, the strongest ineffective assistance of counsel claims will likely involve situations in which an attorney's incompetence prevents a criminal appellant from obtaining an actual review on the merits. In states that have recognized a criminal defendant's right to the effective assistance of counsel, courts have found that an attorney's failure to obtain an appellate review on the merits constitutes ineffective assistance.[123] These states have upheld ineffective assistance of counsel claims when an attorney has failed to file an appeal,[124] has failed to timely perfect an appeal,[125] has failed to obtain an adequate record for appellate review,[126] has failed to file a brief,[127] or has filed a wholly deficient brief.[128] These situations are not unlike *Lucey,* in which the Court strongly implied that appellate counsel's failure to procure a decision on the merits will automatically constitute a denial of the effective assistance of counsel.[129] Thus, in light of *Lucey,* attorneys that handle appeals for indigent appellants will have a plain understanding of what is constitutionally required.

After *Lucey,* the right to effective assistance of counsel exists only on a first appeal as of right.[130] In the years since *Powell v. Alabama,* however, the constitutional right to effective assistance of counsel has expanded to

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123. *See infra* notes 124-28.

124. *See* Commonwealth v. Wilkerson, 490 Pa. 296, 299-300, 416 A.2d 477, 479 (1980) (counsel could be deemed ineffective for failing to file an appeal even if there was no issue of arguable merit).

125. State v. Erwin, 57 Hawaii 268, 270, 554 P.2d 236, 238 (1976) (indigent criminal defendant is entitled, on a first appeal of right, to court appointed counsel who may not deprive defendant of right to appeal by ignoring procedural rules); Shipman v. Gladden, 253 Or. 192, 199, 453 P.2d 921, 925 (1969) (retained counsel's failure to file a timely notice of appeal is incompetence as a matter of law and a denial of due process); Rhodes v. Leverette, 160 W. Va. 781, 786, 239 S.E.2d 136, 140 (1977) (failure of counsel to perfect appeal within appeal period allowed after resentencing).

126. People v. Barton, 21 Cal. 3d 513, 519-20, 579 P.2d 1043, 1047, 146 Cal. Rptr. 727, 731 (1978) (failure of counsel to include a transcript of a motion to suppress as part of the record for appellate review constituted ineffective assistance of appellate counsel); McAuliffe v. Rutledge, 231 Ga. 745, 746, 204 S.E.2d 141, 142 (1974) (failure to obtain a timely extension of time for filing the transcript of a lower court proceeding is ineffective assistance of counsel).

127. People v. Brown, 39 Ill. 2d 307, 235 N.E.2d 562 (1968) (claim of ineffective assistance of counsel upheld where appellate counsel filed a timely notice of appeal and nothing thereafter).

128. People v. Gonzalez, 47 N.Y.2d 606, 610, 393 N.E.2d 987, 990 (1979). In *Gonzalez,* counsel's brief consisted of a summary of each witness's testimony and four point headings with no discussion or argument of any sort under any point. *Id.* at 608, 393 N.E.2d at 988-89. *See also* Burton v. State, 455 N.E.2d 938, 939-40 (Ind. 1983) (defendant received ineffective assistance of appellate counsel when counsel's brief waived substantive legal issues without appellant's consent).

129. Harris v. Kuhlman, 601 F. Supp. 987 (E.D.N.Y. 1985). In *Harris,* the court cited *Lucey* as authority for the proposition that, "by any measure, counsel's failure to perfect an appeal must be considered ineffective assistance." *Id.* at 993.

130. *Lucey,* 105 S. Ct. at 836 n.7. The Court in *Ross* distinguished *Douglas* because "the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of [a] discretionary review . . . make . . . [the lack of counsel a] handicap far less than the handicap borne by the indigent defendant on his initial appeal as of right in *Douglas.*" Ross v. Moffit, 417 U.S. 600, 616 (1974).

cover all criminal defendants and appellants as of right. The next logical step, therefore, would be to find a right to effective assistance of counsel on discretionary appeals. Although the Court held in *Wainwright v. Torna,*[131] a 1982 per curiam opinion, that the sixth amendment guaranteed no right to effective assistance of counsel on discretionary appeals, the opinion leaves open the possibility that an attorney who conducts a discretionary appeal negligently may infringe a defendant's right to due process.[132]

Through its observation that the roles of counsel at trial are similar to those on appeal, the *Lucey* Court cast aside technical distinctions between trial and appellate advocacy. A basic concept of fairness has been used to determine the reach of the right to the effective assistance of counsel.[133] The basic fairness considerations that underlie the right to the effective assistance of counsel—that counsel is necessary to combat the government's hired prosecutors and to protect criminal defendants from their own ignorance of law and procedure—apply equally at the trial level, at a first appeal of right, and at the discretionary appellate level.[134] Consequently, fairness requires that the right to effective assistance of counsel also be extended to discretionary appeals.

Moreover, to extend the right to effective assistance of counsel to discretionary appeals would not create overly burdensome administrative problems. When retained counsel is involved, the denial of writ of certiorari or leave of appeal through an attorney's failure to meet technical requirements is as invidious a result as the dismissal of a direct appeal. In both situations, defendants are denied hearings not because of their own mistakes, but because of their attorneys' incompetence.

When an indigent defendant is involved, it is common practice to appoint counsel upon the granting of a discretionary appeal.[135] Therefore, the exten-

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131. 455 U.S. 586 (1982).

132. *Id.* at 589 (Marshall, J., dissenting). Justice Marshall argued in dissent that even "if defendant's Sixth Amendment right to effective assistance of counsel may not have been infringed, he was denied the rights to due process." *Id.* Marshall argued that for a defendant to lose the right to seek a discretionary appeal was fundamentally unfair, and that there was sufficient state action in some cases to warrant court review for due process violations. *Id.* at 589-90 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)).

133. 455 U.S. at 621 (Douglas, J., dissenting) ("Douglas v. California was grounded on concepts of fairness and equality").

134. *See* Wainwright v. Torna, 445 U.S. 586, 588 (1982) (Marshall, J., dissenting) (when defendant seeks discretionary review, assistance of counsel is vital); Ross v. Moffit, 417 U.S. 600, 620-21 (1974) (Douglas, J., dissenting) ("[a]n indigent defendant is as much in need of the assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an appeal of right"). See also Justice Harlan's dissent in *Douglas* where he stated:

> Nor can it well be suggested that having appointed counsel is more necessary to the fair administration of justice in an initial appeal . . . of right . . . which the reviewing court on the full record has already determined to be frivolous, than in a petition asking [for] a higher appellate court to exercise its discretion to consider what may be a substantial constitutional claim.

372 U.S. at 366 (Harlan, J., dissenting).

135. *Douglas,* 372 U.S. at 365 (Harlan, J., dissenting) ("Under the practice of . . . [the

sion of the right to effective assistance of counsel to discretionary appeals will, in most cases, require only the appointment of additional counsel for the purpose of preparing a memoranda to support an application for a discretionary appeal. The appointed counsel who handled the first appeal of right will be familiar with the facts and legal issues involved, so that "[it] would be a relatively easy matter for the attorney to apply his expertise in filing the writ of certiorari to a higher court."[136]

Because effective assistance of counsel is a basic necessity in judicial procedings,[137] states must assume the risk of frivolous claims rather than allow a potentially innocent person to stand convicted for lack of counsel after conviction.[138] There are few functions of the court more important than providing an individual charged with a crime full process before depriving him of his liberty.[139] Any resulting increase in expenditures will be well spent, as the methods employed "in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization will be judged."[140]

CONCLUSION

In *Evitts v. Lucey,* the Supreme Court held that a criminal appellant has a right to the effective assistance of counsel in a first appeal of right. The Court based its decision on the due process clause by interpreting past cases that involved the rights of criminal appellants to express equal protection as well as due process concerns. The Court also considered the policies that underlie the right to the effective assistance of counsel. Because criminal appellants must combat the intracacies of the law and the advocacy of the public prosecutor, the Court found that the right to the effective assistance of counsel is necessary to protect criminal appellants' liberty interests. These policies, however, apply equally to discretionary appeals. The right to effective assistance of counsel, therefore, should be further extended to discretionary appeals.

As a result of *Lucey,* criminal defendants will no longer be unfairly prejudiced by their appellate counsels' failure to meet filing deadlines. *Lucey's* impact on the integrity of state rules of appellate procedure will be minimal, because ethical codes already provide a means to discipline attorneys

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Supreme Court], only if it appears from the petition for certiorari that a case merits review is leave to proceed in forma pauperis granted . . . and counsel appointed").

136. Ross v. Moffit, 417 U.S. 600, 621 (1974) (Douglas, J., dissenting).

137. *See Lucey,* 105 S. Ct. at 835 ("*Gideon* rested on the obvious truth that lawyers are necessities not luxuries for our adversarial system of justice").

138. Day, *Coming: The Right to Have Assistance of Counsel at All Appellate Stages,* 52 A.B.A. J. 135 (1966). *See also* United States v. Cronic, 104 S. Ct. 2039, 2045 (1984); Herring v. New York, 422 U.S. 853, 862 (1975) (premise of adversarial system of criminal justice is that partisan advocacy on both sides of a case promotes accurate judgments of guilt and innocence).

139. Day, *supra* note 138, at 138.

140. Coppedge v. United States, 369 U.S. 438, 449 (1962).

who fail to comply with state rules. Moreover, any administrative burdens caused by the *Lucey* decision are far outweighed by the reduced possibility that an innocent person will remain unjustly convicted.

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