Pace Law Review

Volume 4
Issue 2 *Winter 1984*

Article 6

January 1984

Jones v. Barnes and the Right to Counsel on Appeal: Is Effective Assistance of Counsel More than Faerie Gossamer?

Richard N. Allman

Notes and Comments

Jones v. Barnes and the Right to Counsel on Appeal: Is Effective Assistance of Counsel More than Faerie Gossamer?

I. Introduction

In the movement to make legal services available to indigents, courts strive to assure the presence of professional counsel, with little apparent concern for the quality of service the counsel provides.[1] Recently, however, there has been an increasingly urgent call to make the effectiveness of counsel, not the availability of counsel, the important issue.[2]

---

1. Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291, 1291.

2. For a discussion of the right to effective assistance of counsel, see Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) (argues that society must have a humane criminal justice system which treats defendants with understanding and insight; proposes that a radical reconsideration of counsel's role is required); Craig, *The Right to Adequate Representation in the Criminal Process: Some Observations*, 22 SW. L.J. 260 (1968) (argues that in order for the adversary system to function, there must be effective assistance of counsel); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964) (examines the state of criminal defense representation; discusses the problems in a claim of ineffective assistance of trial counsel; and suggests improvements in the system of representation); Comment, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1 (1977) (comprehensive examination of ineffective assistance of counsel claims); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965) (examines specific circumstances where a defendant may charge his counsel was ineffective; considers some difficulties with the claim; suggests standards to protect defense attorneys from unwarranted attacks and courts from frivolous claims).

The United States Constitution provides only that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The term "effective assistance of counsel" comes from Justice Sutherland's opinion in *Powell v. Alabama*:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him

In 1981, the United States Court of Appeals for the Second Circuit examined the issue of effective assistance of counsel assigned by the state to prosecute an appeal.[3] A majority of the court proclaimed a rule designed to ensure an appellate attorney's effectiveness: when an appellant asks his assigned counsel to raise nonfrivolous[4] points on appeal, the attorney "must argue the additional points to the full extent of his professional ability."[5]

Last Term, the United States Supreme Court specifically declined to adopt this standard. In *Jones v. Barnes*,[6] the Supreme Court enounced the converse constitutional precept regarding performance of appellate counsel: assigned appellate counsel has no constitutional obligation to raise every nonfrivolous argument the defendant has requested him to present on appeal.[7]

Part II of the Casenote explores the legal background of the right to assistance of counsel. The following part sets out the factual background of *Barnes*. The fourth part summarizes the Supreme Court's opinion. Finally, Part V analyzes the impact of the *Barnes* rule on the right to counsel. The Casenote concludes that the *Barnes* rule does not trumpet the call in the legal community for effective assistance of counsel. Indeed, the holding cannot expedite that call, because it does not advance a fresh conception of effective assistance of counsel. *Barnes* does not ad-

---

as a necessary requisite of due process of law; and that duty 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.

Powell v. Alabama, 287 U.S. 45, 71 (1932).

3. Barnes v. Jones, 665 F.2d 427 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983).

4. Throughout the Casenote, the term "nonfrivolous" is used synonomously with the term "colorable."

5. Barnes v. Jones, 665 F.2d at 433. A rule requiring the appellate attorney to raise the additional claims is significant because the Supreme Court has recognized that state courts are not expected or assumed to address issues not raised by counsel. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128-29 (1982); Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

On the appeal, both Barnes and his attorney submitted briefs to the appellate division. The Second Circuit, however, asserted that Barnes' pro se briefs were no substitute for the advocacy of experienced counsel. Therefore, the court found that appellate counsel's failure to raise all the colorable claims urged by Barnes rendered the assistance ineffective. Barnes v. Jones, 665 F.2d at 434.

6. 103 S. Ct. 3308 (1983).

7. *Id.* at 3314.

dress the distinction between the problems of ensuring effective assistance of trial counsel and those of effective assistance of appellate counsel.

II. Legal Background

A. *An Indigent's Right to Assistance of Counsel*

1. *At trial*

In England, before the American Revolution, one accused of a felony had no right to employ counsel in his defense.[8] After the American Revolution, the sixth amendment of the United States Constitution guaranteed that counsel could be employed.[9] Yet, nowhere in the debates of the Congress which proposed what became the sixth amendment is there any indication that the amendment would require government to supply counsel for indigents.[10] The rule requiring appointment of counsel for de-

---

8. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 9 (1955). The only exception to this rule was the case of treason. *Id.*

Illogically, in crimes less serious than felonies, English law recognized the accused's right to retain counsel and to make a defense with counsel's assistance. *Id.* at 8. For instance, there was a group of misdemeanors, triable before the Star Chamber, where the presence of counsel was mandatory. In the Star Chamber, a defendant was required to have his answer to the charge signed by counsel. Failure to obtain counsel's signature was deemed a confession that the charge was true. In these minor cases, the common law provided punishment that was regarded as insignificant. The rationale behind this disparity was explained in terms of the state's interest: the state's interest in misdemeanors was so slight that the state could afford to be considerate toward these offenders. *See id.* at 8-9. *See also* Faretta v. California, 422 U.S. 806, 819 (1975) (Justice Stewart's discussion of the right to counsel in English criminal procedure).

9. By the time the sixth amendment was ratified in 1791, Congress had enacted two laws which indicated that anyone who could afford counsel was guaranteed that right. The Judiciary Act of 1789, ch. XX, § 35, 1 Stat. 73, 92, provided that, in federal courts, parties could plead and manage their own causes. This could be done personally or with the assistance of counsel as provided by the rules of the court.

The Act of April 30, 1790, ch. IX, § 29, 1 Stat. 112, 118, provided

> [t]hat any person who shall be accused and indicted of treason . . . and in other capital offences . . . shall . . . be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire.

10. W. BEANEY, *supra* note 8, at 23 ("The available debates on the various proposals throw no light on the significance or the interpretation which Congress attributed to the right to counsel."). Beaney offers an explanation for the paucity of meaning: "The lack of comment could be attributed to the general feeling in this formative period that the

fendants who could not afford one was not recognized until the 1930s.

In 1932, in *Powell v. Alabama*,[11] the Supreme Court held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .[12]

Justice Sutherland, writing for the Court, referred to the right to the aid of counsel as "fundamental in character,"[13] and a necessity.[14] The right to have counsel appointed was thus considered a "logical corollary from the constitutional right to be heard by counsel."[15]

In 1938, in *Johnson v. Zerbst*,[16] the Supreme Court relying on Justice Sutherland's invocation of the necessity of counsel, announced an absolute rule requiring assistance of counsel for all indigents on trial in federal courts.[17] Justice Black wrote: "The Sixth Amendment withholds from federal courts, 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."[18]

Four years later, in *Betts v. Brady*,[19] the Supreme Court refused to impose the *Zerbst* rule upon the states. In its view, the fourteenth amendment required fairness in state trials, but the Court was not convinced that the absence of counsel meant a trial was unfair per se.[20] Thus, under *Betts*, a state convict could

---

important processes of criminal law in the future would be those of the states." *Id.* at 27.

For a discussion of the various state constitutions which guaranteed that the accused was to be "allowed" counsel, see Faretta v. California, 422 U.S. at 829 n.38.

11. 287 U.S. 45 (1932).

12. *Id.* at 71. Note that the holding is specifically limited to capital cases.

13. *Id.* at 70.

14. *See id.* at 71.

15. *Id.* at 72.

16. 304 U.S. 458 (1938).

17. Powell v. Alabama, 287 U.S. at 70-71. *See supra* text accompanying notes 13-15.

18. Johnson v. Zerbst, 304 U.S. at 463 (footnote omitted).

19. 316 U.S. 455 (1942).

20. *See id.* at 471-72 (the effect of the absence of counsel must be judged in the totality of circumstances; facts in one setting which constitute a denial of due process may fall short of such a denial in light of other circumstances).

not get federal habeas corpus relief unless he made a reasonable showing that in fact he suffered from the absence of legal assistance.[21]

The Supreme Court abolished this distinction between state and federal courts in 1963. A unanimous Court extended the right to counsel to state criminal proceedings in *Gideon v. Wainwright*.[22] The Court held that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[23]

The Court in *Gideon* did not discuss, however, whether the right to assistance of counsel applied to indigent defendants charged with misdemeanors as well as to those charged with felonies.[24] Nevertheless, nine years after *Gideon*, the Supreme Court made it clear that no person may be incarcerated without assistance of counsel, unless he validly waives his right.[25]

The focal point of the Supreme Court's decisions securing the right to appointed counsel at trial has been that criminal law and criminal procedure cannot be easily understood by the untrained layman.[26] Indeed, in *Gideon*, Justice Black summarized

---

21. *See id.* at 462-63. During the *Betts* hiatus, the Supreme Court made it clear that denying a defendant the assistance of his own lawyer in any case at any stage was a per se violation of fundamental fairness. *See* Chandler v. Fretag, 348 U.S. 3, 9-10 (1954) (Supreme Court calls the right of petitioner to be heard through his own counsel "unqualified"). *See also* Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (right to have one's own counsel guide direct examination in order to guide the testimony).

22. 372 U.S. 335 (1963).

23. *Id.* at 344.

24. Clarence Earl Gideon was charged with having broken and entered a poolroom with intent to commit a misdemeanor. Under the applicable state law, this offense was a felony. *Id.* at 336-37.

25. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("We hold . . . that 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* Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981) ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.").

The right to assistance of counsel also applies to juvenile proceedings. *See In re* Gault, 387 U.S. 1, 34-42 (1967). Moreover, the sixth amendment guarantees a defendant the right to conduct his own defense, provided he knowingly and intelligently waives his right after being informed of the consequences of doing so. Faretta v. California, 422 U.S. 806 (1975).

26. This reality was recognized as early as 1938. In *Johnson v. Zerbst*, Justice Suth-

the rationale of the Court's decisions when he wrote:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and represent their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[27]

The logic of this rationale has not been limited to trial proceedings. The Supreme Court has also held that counsel must be provided for appeal.[28]

---

erland observed that the sixth amendment

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.

Johnson v. Zerbst, 304 U.S. at 462-63.

27. Gideon v. Wainwright, 372 U.S. at 344.

28. Rinaldi v. Yeager, 384 U.S. 305, 310 (1966) ("[I]t is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."); Draper v. Washington, 372 U.S. 487, 496 (1963) ("In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given an appellant with funds."). *See also* Entsminger v. Iowa, 386 U.S. 748, 751 (1967) ("As we have held again and again, an indigent defendant is entitled to the appointment of counsel to assist him on his first appeal."); Smith v. Bennett, 365 U.S. 708, 713-14 (1961) (indigents must be granted equal access to the appellate review of post-conviction proceedings).

2. *On appeal*

On appeal, as at trial, the basic thesis underlying the Supreme Court's decisions has been that the guidance of a lawyer is necessary to assure a fair hearing.[29] In particular, the Court has tried to prevent invidious discrimination on the basis of wealth.[30] Thus, a state may not grant appellate review of criminal convictions in a way which discriminates against defendants because of their poverty.[31]

In *Griffin v. Illinois*,[32] for example, the Supreme Court struck down a state rule that provided for appellate review of criminal convictions, but denied a trial transcript to those who could not afford to pay for the transcript. The Court asserted that if the state provides appellate review as of right, it must also provide an indigent with the tools to make appellate review meaningful.[33] Justice Black stated the rationale: "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 appellate review as defendants who have money enough to buy transcripts."[34]

---

29. *See, e.g.*, Anders v. California, 386 U.S. 738, 742 (1967). *See also supra* text accompanying note 27.

The Casenote does not address the rare circumstance when an indigent is the appellee, rather than the appellant. As a general rule, the double jeopardy clause, U.S. CONST. amend. V, prevents government appeals of acquittals. Nevertheless, appeals of pretrial rulings favorable to the defendant are generally permitted because jeopardy has not yet attached. *See* C. WHITEBREAD, CRIMINAL PROCEDURE 500 (1983). For instance, in the Criminal Appeals Act of 1971, 18 U.S.C. § 3731 (1982), Congress authorized the federal government to appeal any dismissal of an indictment not barred by the double jeopardy clause.

30. *E.g.*, Douglas v. California, 372 U.S. 353, 357 (1963).

31. *See, e.g., id.* at 358 (only when the indigent receives the assistance of counsel does he gain the constitutionally required equality with the "rich man, who appeals as of right [and] enjoys the benefit of counsel's examination into the record, research of the law and marshalling of arguments on his behalf"). *See also* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs.").

32. 351 U.S. 12 (1956).

33. *Id.* at 20. *See also* Lane v. Brown, 372 U.S. 477, 483-85 (1963); Burns v. Ohio, 360 U.S. 252, 257 (1959); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214, 215-16 (1957) (per curiam).

34. Griffin v. Illinois, 351 U.S. at 19. *See also* Burns v. Ohio, 360 U.S. at 257 ("[O]nce the State chooses to establish appellate review in criminal cases, it may not

On the same day that *Gideon* was decided, the Supreme Court used the *Griffin* rationale to require California to appoint counsel to indigent defendants on their first appeal following a felony conviction.[35] In *Douglas v. California*,[36] Justice Douglas noted that state appellate review is not constitutionally required in criminal cases, but he found "an unconstitutional line ha[d] been drawn between rich and poor . . . where the rich man can require the court to listen to argument of [appellate] counsel before deciding the merits, but a poor man cannot."[37]

Douglas assures that the *Gideon* rationale[38] inures to indigents who appeal. On the first appeal,[39] as at trial, a court can find no rational justification for denying an indigent appellant the benefit of counsel's professional examination of the record, his research of the law, and a thorough presentation of argu-

---

foreclose indigents from access to any phase of that procedure because of their poverty.").

35. Douglas v. California, 372 U.S. at 355-57. The Supreme Court has not indicated whether the same right to appointed counsel on a first appeal applies to indigents charged with a misdemeanor, but presumably it does. *See* Scott v. Illinois, 440 U.S. 367 (1979) (no indigent criminal defendant can be incarcerated unless the State has afforded him the right to appointed counsel in his defense); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (Court rejected suggestion that the constitutional right to counsel applied only to nonpetty offenses).

36. 372 U.S. 353 (1963).

37. *Id.* at 357. *See also* Smith v. Bennett, 365 U.S. at 714 ("[T]he fourteenth amendment weighs the interests of rich and poor criminals in equal scale, and its hands extend as far to each.").

In his dissent, Justice Harlan strenuously objected to the ramifications apparent in the *Griffin* and *Douglas* decisions. When the Court applied the equal protection clause to invalidate the discriminatory impact on indigent defendants, Justice Harlan said the equal protection clause

> does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some what others can afford.

Douglas v. California, 372 U.S. at 362 (Harlan, J., dissenting) (quoting Griffin v. Illinois, 351 U.S. at 34).

38. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). *See supra* text accompanying note 27.

39. In Ross v. Moffit, 417 U.S. 600 (1974), a majority of the Supreme Court refused to extend the *Douglas* rationale to appeals beyond the first appeal as of right: "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages' . . . ." *Id.* at 612 (quoting San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 24 (1973)).

ments on his behalf.[40]

B. *An Indigent's Right to* Effective *Assistance of Counsel*

Inherent in the "noble ideal"[41] of guaranteeing the advantage of counsel to the poor is the expectation that the representation will be effective.[42] Indeed, recognizing that ineffective representation is really the equivalent of no representation at all, some commentators argue that the courts need to develop a clearer standard of the adequacy of representation by counsel.[43]

The Supreme Court took a step in that direction in 1967 when it articulated criteria to assure full and fair appellate review for all indigent appellants.[44] In *Anders v. California*,[45] petitioner's court-appointed counsel reviewed the record and submitted a conclusory letter stating that there was no merit in petitioner's appeal. The Court found that the appellate *court*, not appellate counsel, must decide whether there is a basis for appeal.[46] It admonished counsel to provide more assistance to the petitioner and to the court. Relying on *Griffin* and on *Douglas*, the Court explained that

> [t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *ami-*

---

40. *See* Douglas v. California, 372 U.S. at 357-58; *but cf.* Ross v. Moffit, 417 U.S. at 614-18 (on a *discretionary* appeal, there is no constitutional mandate to provide counsel where the indigent has enjoyed the benefit of counsel on his initial appeal as of right).

41. Gideon v. Wainwright, 372 U.S. at 344. *See supra* text accompanying note 27.

42. Effective representation is crucial because "[o]f all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956). *See also supra* notes 1-7 and accompanying text.

43. *See, e.g.*, Bazelon, *supra* note 2 (proposing that a radical reexamination of the role of counsel is required); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973) (examining the law on ineffective assistance and urging the courts to take a more active role to assure effective assistance); Comment, *supra* note 2, at 4 (clear and articulate rules regarding the right to effective representation is essential for just disposition of the claims).

44. The Court required counsel to advise the appellate court if he conscientiously decides that the appeal is wholly frivolous. Counsel must support his decision by furnishing to the court and the indigent a brief of anything that arguably supports the appeal. Anders v. California, 386 U.S. 738, 744 (1967).

45. 386 U.S. 738, 739 (1967).

46. *Id.* at 744.

> *cus curie*. . . . His role as advocate requires that he support his client's appeal to the best of his ability.[47]

This requirement affords an indigent appellant advocacy which a nonindigent can obtain.

In *Anders*, the constitutionally adequate standard of assistance of counsel was measured by the fourteenth amendment's standard of fundamental fairness.[48] The *Anders* rule protects an indigent appellant against the possibility that he will be totally deprived of counsel upon appellate review of his conviction. For example, when counsel believes there are no colorable issues to appeal, *Anders* nevertheless requires counsel to present all possible claims of error for judicial scrutiny.[49] In this way, *Anders* reflects the fourteenth amendment's focus on fairness in the criminal process as a whole; the indigent may not be totally deprived of access to the appellate court.

After *Anders* some commentators suggested that the adequacy of representation should be measured by the sixth amendment, rather than the fourteenth amendment.[50] Grounding the right to the adequate assistance of counsel on the sixth amendment suggests a focus on the quality of the representation provided the individual indigent, while the fourteenth amendment concerns itself only with fairness in the criminal process as a whole.[51] A sixth amendment standard, it is argued, would embody something more than notions of fundamental fairness.[52] It

---

47. *Id.* In dictum, the Supreme Court declared that an appellate court may permit appointed counsel to withdraw, thereby depriving the indigent of the benefit of counsel, if there are no colorable issues to raise on appeal.

48. The *Anders* rule is premised on notions of "substantial equality and fair process," *id.*; as such the decision has roots in both the equal protection clause and due process clauses.

49. *Id. See supra* note 44.

50. *See* Bazelon, *supra* note 2, at 29-30; Craig, *supra* note 2, at 263-64; Comment, *supra* note 2, at 7.

51. Comment, *supra* note 2, at 7.

52. One commentator observed:

> Even though the historical development of the right to effective representation cannot be clearly linked to the recognition of the sixth amendment's right to counsel, as a practical matter this is the most appropriate way to read the Constitution. Conceptually, the right to effective representation is closely tied to the right to counsel. The guarantee of the presence of an attorney is nugatory unless there is also some assurance that the attorney will genuinely assist the accused.
>
> The sixth amendment is also a more appropriate source for the right to effec-

would entail review of counsel's effectiveness in the particular case at hand.[53] While the Supreme Court has never formulated a sixth amendment standard of effectiveness,[54] several recent cases have suggested such a constitutional standard.

In *McMann v. Richardson*,[55] for instance, the Supreme Court suggested, in dictum, that "defendants facing felony charges are entitled to the effective assistance of competent counsel."[56] The defendant in *McMann* pleaded guilty on the advice of counsel.[57] The defendant's attorney thought the admissibility of defendant's confession was sufficiently probable to warrant a plea of guilty.[58] Thus, the Supreme Court ruled that counsel's advice on whether to plead guilty was "within the range of competence demanded of attorneys in criminal cases."[59] It refused to set aside the conviction.[60] On the issue of effective representation, the Court simply acknowledged that "defendants cannot be left to the mercies of incompetent counsel."[61] The Court did not announce a standard giving content to the right of effective assistance of counsel.[62] Rather, the Court posited that

---

tive representation where ineffectiveness claims are involved. The language of the fourteenth amendment inclines courts to consider the overall fairness of the trial without analyzing the particular acts or omissions of which the defendant complains. Deciding an appeal becomes a matter of adding up the errors in the case, deciding how much each side was harmed, and figuring whether the end result was fair in light of what ought to have happened. Reliance on the sixth amendment, on the other hand, promotes a salutary thoroughness in the review of ineffectiveness claims in that it requires a reviewing court to look directly at the challenged conduct to determine whether it was "effective."

Comment, *supra* note 2, at 7 (footnotes omitted).

53. *Id.*

54. *See* Maryland v. Marzullo, 435 U.S. 1011 (1978) (White, J., with Rehnquist, J., dissenting from denial of certiorari).

55. 397 U.S. 759 (1970).

56. *Id.* at 771 (dictum).

57. *Id.* at 761-62. In *McMann*, the Supreme Court reviewed three separate habeas corpus petitions wherein each defendant sought reversal of his respective conviction. Each petition alleged that the defendant's representation was incompetent. References in the text refer only to defendant Dash.

58. *See id.* at 762, 770.

59. *Id.* at 771.

60. The Supreme Court said it would not set aside a conviction unless the defendant can "demonstrate gross error on the part of counsel," *id.* at 772, and can "prove serious derelictions on the part of counsel sufficient to show that his plea [is] not, after all, a knowing and intelligent act." *Id.* at 774.

61. *Id.* at 771.

62. Note that the case involved an examination of the assistance provided by trial

"the matter, for the most part, should be left to the good sense and discretion of the trial courts."[63]

A result similar to *McMann* was reached in *Chambers v. Maroney*.[64] Once again, the Supreme Court declined to set aside a conviction for ineffective assistance of counsel.[65] The Court rejected a petition which alleged that tardy appointment of counsel[66] was a denial of effective assistance of counsel.[67] Justice White wrote:

> Unquestionably, the courts should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.[68]

Lastly, dictum in *Tollett v. Henderson*[69] provides some indication of how a defendant might obtain reversal on sixth amendment grounds. There the Court held that a criminal defendant who pleads guilty on the advice of counsel is not automatically entitled to habeas corpus relief.[70] Nevertheless, after quoting the *McMann* requirement[71] that the advice of counsel must be outside the range of competence demanded of attorneys in criminal cases to merit relief,[72] the Court commented: "Counsel's failure to evaluate properly facts giving rise to a constitu-

---

counsel. *See id.* Reviewing courts are very reluctant to scrutinize these cases closely. *See infra* notes 133-52 and accompanying text.

63. McMann v. Richardson, 397 U.S. at 771.

64. 399 U.S. 42 (1970).

65. *Id.* at 53-54. *Chambers v. Maroney* focused upon the assistance provided at trial. *See id.* See *infra* note 163 and accompanying text for the critical distinction between judging the performance of trial counsel and that of appellate counsel.

66. Counsel was appointed only a few minutes before trial. Chambers v. Maroney, 399 U.S. at 53.

67. *Id.* at 54.

68. *Id.*

69. 411 U.S. 258 (1973).

70. *Id.* at 266 (dictum). Advice on pleading guilty is advice which is provided by *trial* counsel, not appellate counsel. See *infra* note 163 for a discussion of the role of counsel on appeal.

71. Tollett v. Henderson, 411 U.S. at 266 (quoting McMann v. Richardson, 397 U.S. at 771). *See supra* text accompanying note 59.

72. Tollett v. Henderson, 411 U.S. at 266. *See also supra* note 60.

tional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations"[73] rise to the level of ineffective assistance.

While the preceding cases seem to suggest that a sixth amendment analysis would be proper in evaluating the effectiveness of counsel, there has been no definitive ruling to that effect.[74] The Supreme Court was provided another opportunity to enunciate a standard for effectiveness of *appellate* counsel in *Jones v. Barnes*.[75]

III. Factual Background

A. *The Trial*

In *Jones v. Barnes*,[76] defendant David Barnes and three accomplices robbed Richard Butts on March 15, 1976.[77] Barnes was arrested and charged with robbery, assault and grand larceny. On October 26, 1976, a jury convicted Barnes of robbery and assault.[78] Barnes was sentenced, on January 17, 1977, to a term of imprisonment of seven and one-half to fifteen years.[79]

---

73. Tollet v. Henderson, 411 U.S. at 266-67.

74. Perhaps this is because all of these cases have necessitated evaluation of *trial* counsel's effectiveness.

75. 103 S. Ct. 3308 (1983).

76. 103 S. Ct. 3308 (1983).

77. The accomplices were never apprehended. Brief for Petitioner at 2 n.1, Jones v. Barnes, 103 S. Ct. 3308 (1983), in Record of Jones v. Barnes, No. 81-1794, presented to the United States Supreme Court. Butts lost his watch, *id.*, and the amount of money taken was $60. Joint Appendix at 12 n*, Jones v. Barnes, 103 S. Ct. 3308 (1983), in Record of Jones v. Barnes, No. 81-1794, presented to the United States Supreme Court.

The state's case was based primarily on Butts' testimony. At trial, Butts claimed that Barnes was one of his four assailants. Barnes v. Jones, 665 F.2d 427, 429 (2d Cir. 1981). The prosecution's case was buttressed by Butts' previous identification of Barnes which occurred while Butts was in the hospital. *Id.*

Barnes testified in his own behalf. He presented the alibi that he was at home at the time of the robbery. *Id.* at 430. Trial counsel did not call any witnesses to corroborate this alibi; nor did counsel allude to the testimony in summation. *Id.*

78. Joint Appendix, *supra* note 77, at 4.

79. Joint Appendix, *supra* note 77, at 32. This term was imposed for conviction of robbery in the first and second degree. *See* N.Y. PENAL LAW §§ 160.15, 160.10 (McKinney 1975). Barnes was sentenced as a second felony offender and thus is serving a concurrent term of three and one-half to seven years on the assault conviction. *See* N.Y. PENAL LAW § 120.05 (McKinney 1975).

B. *The Direct Appeal*

Following Barnes' conviction, the Appellate Division of the Supreme Court of New York, Second Department, granted Barnes permission to proceed *in forma pauperis*.[80] The court assigned Michael Melinger, Esquire, to prosecute the appeal.[81]

In a letter to his assigned counsel, Barnes suggested several possible claims of error for appeal.[82] Melinger responded to the letter in writing, commenting that some of Barnes' suggestions did not provide a sufficient basis for appeal.[83] Melinger listed seven potential claims of error which he was thinking of including in his brief.[84] He asked for Barnes' reflections and suggestions on these issues.[85] Later, when Melinger submitted his brief to the appellate division, he raised only three claims of error.[86] The record reveals that Melinger argued only the points he

---

80. Brief for Petitioner, *supra* note 77, at 4. *See also* N.Y. COUNTY LAW § 722 (McKinney Supp. 1982) (procedure for appointing counsel to indigents).

81. Joint Appendix, *supra* note 77, at 24-25.

82. Barnes' letter is not found in the record. Some of the claims, however, are found in a letter from Melinger to Barnes. All of these claims refer to new facts or factual arguments that did not form the basis of appeal. *See* Letter from Michael Melinger to David Barnes (Nov. 9, 1977), in Joint Appendix, *supra* note 77, at 27 [hereinafter cited as Letter]. By contrast, the arguments Melinger suggested for the appellate brief he was preparing on behalf of Barnes, *see infra* note 84, and the actual claims he raised and argued, *see infra* note 86 and text accompanying note 87, were *legal* arguments which did form the basis of appeal.

83. Letter, *supra* note 82, at 27.

84. *Id.* at 28. The seven suggested claims were: (i) the facts do not support the judge's determination at the conclusion of the *Wade* hearing that the complaining witness had independent knowledge of Barnes; (ii) the denial by the trial court of Butts' prior medical or psychiatric testimony (as a means to impeach his identification) was improper; (iii) the court improperly took over cross-examination of Barnes at trial; (iv) the court allowed the identification in contradiction to N.Y. CRIM. PROC. LAW § 60.30 (McKinney 1981) (rule of evidence governing identification by means of previous recognition); (v) the trial court improperly expressed its opinion during the course of the proceedings; (vi) the prosecutor's summation exceeded permissible grounds; (vii) the court improperly denied the defense's request to charge on accessorial liability. Letter, *supra* note 82, at 28.

85. *Id.* at 26. The record at the Supreme Court gives no indication whether or not Barnes presented his thoughts on the seven potential claims to Melinger.

86. The three claims were: (i) the exclusion of evidence relating to the psychiatric history of Butts was improper; (ii) the trial court's finding that the identification of Barnes was based on an independent source was an error; (iii) the trial judge improperly cross-examined Barnes. *See* Joint Appendix, *supra* note 77, at 32-33 (reprint of Brief for Defendant-Appellant, People v. Barnes, 63 A.D.2d 865, 405 N.Y.S.2d 621 (2d Dep't 1978) (submitted by Michael Melinger)).

raised in this brief during oral argument at the appellate division.[87] In addition to Melinger's brief, Barnes filed several pro se briefs in which he raised numerous points other than those Melinger argued.[88] Barnes later claimed that Melinger should have raised these points.[89] The appellate division, however, affirmed the conviction without opinion,[90] and the New York Court of Appeals denied leave to appeal.[91]

C. *Further State and Federal Court Proceedings*

After an unsuccessful habeas corpus petition to the federal district court,[92] and an unsuccessful appeal to the circuit court,[93] Barnes petitioned the New York Court of Appeals to reconsider its denial of leave to appeal.[94] In this petition, he contended for the first time that he had received ineffective assistance of appellate counsel.[95] The application was denied.[96]

---

87. Letter from Michael Melinger to David Barnes (May 4, 1978), in Joint Appendix, *supra* note 77, at 70.

88. Among the numerous other points raised was the claim that Barnes' trial counsel was ineffective because he failed to investigate an alibi defense and because he did not discover inaccuracies in Butts' testimony. *See* Joint Appendix, *supra* note 77, at 16-17, 19-20 (reprint of Defendant's First Pro Se Brief, People v. Barnes, 63 A.D.2d 865, 405 N.Y.S.2d 621 (2d Dep't 1978) (notarized Sept. 6, 1977; filed Feb. 23, 1978).

89. For example, Barnes argued that Melinger should have raised the issue of trial counsel's ineffectiveness. *See* Brief for Petitioner, *supra* note 77, at app. I, 5a-6a.

90. People v. Barnes, 63 A.D.2d 865, 405 N.Y.S.2d 621 (2d Dep't 1978).

91. People v. Barnes, 45 N.Y.2d 786, 381 N.E.2d 179, 409 N.Y.S.2d 1044 (1978).

92. In 1978, Barnes petitioned, pro se, for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He raised five issues he had raised in his pro se briefs to the appellate division, including the claim that he was denied effective assistance of counsel at trial. Brief for Petitioner, *supra* note 77, at app. I, 5a. The district court denied the application. *Id.* at app. I, 7a-15a (reprint of Barnes v. Jones, No. 78-C-1717 (E.D.N.Y. Nov. 28, 1978), *aff'd*, 607 F.2d 994 (2d Cir.), *cert. denied*, 444 U.S. 853 (1979)).

93. On May 10, 1979, the United States Court of Appeals for the Second Circuit affirmed this decision without opinion. Barnes v. Jones, 607 F.2d 994 (2d Cir.), *cert. denied*, 444 U.S. 853 (1979).

94. People v. Barnes, 49 N.Y.2d 1001, 406 N.E.2d 1083, 429 N.Y.S.2d 1029 (1980).

95. Specifically, Barnes argued that he was denied effective assistance of appellate counsel on direct appeal because Melinger did not raise the following claims Barnes requested: (i) trial counsel failed to investigate and prepare the defense; (ii) trial counsel failed to make an offer of proof with regard to the relevance of the psychiatric history of Butts when the trial judge refused to admit this evidence to impeach Butts; (iii) trial counsel failed to object to the prosecutor's summation. *See* Brief for the Petitioner, *supra* note 77, at app. I, 6a.

The last two claims were also raised by Barnes as evidence that he was denied effec-

Subsequently, Barnes petitioned the United States district court. He contended a writ of habeas corpus should issue, because he was denied effective assistance of appellate counsel.[97] Once again the district court denied Barnes' application.[98] The Second Circuit Court of Appeals, however, reversed the district court's order and remanded with instructions to grant the writ of habeas corpus unless the state assigned new counsel and granted Barnes leave to appeal from his 1978 conviction.[99]

The Second Circuit ruled that assigned counsel's willful refusal to raise colorable issues, despite his indigent client's insistence to do so, was a deprivation of the right to the assistance of counsel on appeal.[100] The Second Circuit based its ruling upon *Anders v. California*.[101]

While the Second Circuit recognized that appellate counsel has substantial discretion to make decisions regarding the tactics and strategy of appeal,[102] it emphasized that a decision to forego "potentially meritorious issues on appeal requires as much input from client as does the decision whether to appeal in the first instance."[103] Thus, the Second Circuit announced a per

---

tive assistance of counsel at trial. *Id.* Barnes also challenged his conviction under New York's coram nobis procedure. Respondent's Brief in Opposition to the Petition for a Writ of Cert. at 6, Jones v. Barnes, 103 S. Ct. 3308 (1983), in Record of Jones v. Barnes, No. 81-1794, presented to the United States Supreme Court.

96. People v. Barnes, 49 N.Y.2d at 1001, 406 N.E.2d at 1083, 429 N.Y.S.2d at 1029.

97. Barnes raised the same claims he raised when he petitioned the N.Y. Court of Appeals for reconsideration. *See supra* note 95.

98. Barnes v. Jones, No. 80-C-2447 (E.D.N.Y. Jan. 30, 1981), *reprinted in* Petition for Writ of Cert., *supra* note 95, at app. 25a.

99. Barnes v. Jones, 665 F.2d 427, 436 (2d Cir. 1981). As Chief Justice Burger noted in Jones v. Barnes, 103 S. Ct. 3308, 3311 n.3 (1983), at least 26 state and federal judges had considered Barnes' claims before anyone found merit in them.

100. Barnes v. Jones, 665 F.2d at 433.

101. 386 U.S. 738 (1967). *Anders* held that appointed counsel must represent his client vigorously and cannot simply abandon an appeal he considers frivolous. *See id.* at 742-44. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*." *Id.* at 744.

102. Barnes v. Jones, 665 F.2d at 435.

103. *Id.* The Second Circuit's reasoning was made emphatically clear when the court declared:

> Appointed counsel's judgment that appellant is unlikely to prevail on the merits of his nonfrivolous arguments is no substitute for an active advocate's presentation of those arguments to the appellate court, which is the appropriate forum for making a decision on the merits. The past half century of Supreme Court deci-

se rule: court-appointed appellate counsel must prosecute every nonfrivolous issue the defendant specifically asks counsel to raise on appeal.[104]

IV. The Supreme Court Opinions

A. *The Majority*

The majority, in an opinion authored by Chief Justice Burger, reversed the Second Circuit. It held that assigned appellate counsel has no constitutional obligation to raise every nonfrivolous issue the defendant requests the attorney to present on appeal.[105]

As a preliminary matter, the Chief Justice noted that there is no constitutional right to appeal.[106] He commented, however,

---

sions confirms that the right to counsel is perhaps the most crucial right afforded criminal defendants . . . . [A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial—the very right that an appointment of appellate counsel was designed to preserve.

Id. at 433-34.

104. Judge Meskill filed a vigorous dissent in which he argued that the Second Circuit's per se rule was unjustified. *Id.* at 437 (Meskill, J., dissenting). Judge Meskill thought the Second Circuit incorrectly extended the rationale of *Anders v. California*. He wrote:

The instant case is unlike *Anders*, where appellate counsel's complete refusal to brief and argue claims left the defendant totally without the aid of counsel in pressing his appeal. Here petitioner Barnes complains that his lawyer argued some issues before the appellate court, but declined to argue every nonfrivolous claim that Barnes had requested him to present. . . . [I]n exercising the professional skill and judgment for which he is retained, an appellate lawyer might well decide to forgo presentation of some issues urged by his client precisely to "support his client's appeal to the best of his ability."

Id. (Meskill, J., dissenting) (quoting Anders v. California, 386 U.S. 738, 744 (1967)).

105. Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983).

106. *Id.* at 3312. Justice Brennan claimed, in his dissent, that the Court's statement about the constitutional right to appeal was unnecessary to its decision. *Id.* at 3315 n.1 (Brennan, J., dissenting). This is not necessarily so. If there is no constitutional right to appeal, it follows that an indigent appellant may have no constitutional right to compel his appointed attorney to raise all nonfrivolous points he requested. As a practical matter, such an argument is inapposite. The question is unlikely to arise because the right of appeal is universally provided for all significant criminal convictions. *Id.* (Brennan, J., dissenting).

The Supreme Court has never held that there is a constitutional right to appellate review of criminal convictions. Spradling v. Texas, 455 U.S. 971, 973 (1982) (Brennan, J.,

that when a state provides for appeals, it cannot foreclose an indigent from the process.[107] Moreover, he agreed with the Second Circuit that a defendant has the "ultimate authority" to make certain fundamental decisions regarding his case.[108] Nevertheless, the Chief Justice stated that *Anders v. California*[109] does not require that a defendant have the right to compel his attorney to argue all colorable issues on appeal.[110] The decision regarding what particular issues to present on appeal is left to the professional judgment of the appellate attorney.[111]

The Chief Justice also charged that the Second Circuit's per se rule seriously undermines counsel's ability to exercise his pro-

---

dissenting from denial of certiorari); Abney v. United States, 431 U.S. 651, 656 (1977); Chaffin v. Stynchcombe, 412 U.S. 17, 24 n.11 (1973). In fact, for the first 100 years of the republic, no appeals from convictions were permitted in federal courts. Griffin v. Illinois, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring). In 1894, the Supreme Court held that there was no constitutional right to appeal. McKane v. Durston, 153 U.S. 684, 687 (1894). The right to appeal as it exists today is based upon statutory law. *See, e.g.*, Abney v. United States, 431 U.S. at 656.

In federal courts, appeals as of right in criminal cases were first permitted in 1889. The Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656, allowed these appeals "in all cases of conviction of crime the punishment of which provided by law is death." The general right to appeal criminal convictions in federal court was created in 1911. *See* Act of Mar. 3, 1911, ch. 6, § 128, 36 Stat. 1131, 1133; *see also* Abney v. United States, 431 U.S. at 656 n.3.

A more comprehensive review of the constitutional right to appeal is beyond the scope of the Casenote. It is enough to note that the dissent in *Barnes* takes issue with the majority's point of view. *See Barnes*, 103 S. Ct. at 3315 n.1 (Brennan, J., dissenting). In regard to the validity of *McKane v. Durston* as precedent, Justice Brennan wrote:

> I also 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. (Brennan, J., dissenting).

107. *Barnes*, 103 S. Ct. at 3312.

108. *Id.*

109. 386 U.S. 738 (1967).

110. *Barnes*, 103 S. Ct. at 3312.

111. *See id.* More particularly, the Chief Justice noted that "neither *Anders* nor any other decision of this Court suggests . . . that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, *as a matter of professional judgment*, decides not to present these points." *Id.* (emphasis added).

fessional judgment.[112] He explained that advocates must winnow out the weaker arguments on appeal and focus on the central question of the appeal.[113] Yet, he observed, the Second Circuit's rule requires an advocate to add all colorable arguments, irrespective of their strength, and thereby cloud the key issues.[114] Such a rule, he wrote, would "disserve the very goal of vigorous and effective advocacy that underlies *Anders*."[115]

B. *Justice Blackmun, Concurring in Judgment*

Justice Blackmun did not join the majority opinion.[116] He thought it was improper for the Court to opine whether there is a constitutional right to the first appeal from a criminal conviction.[117] Justice Blackmun also sympathized with the dissent: as an *ethical* matter,[118] he exhorted, an attorney should argue all colorable claims urged by his indigent client.[119]

C. *The Dissent*

Justice Brennan wrote the dissent in which Justice Marshall joined. Justice Brennan argued that the case should be remanded for a determination of whether Barnes did in fact insist that his lawyer brief the nonfrivolous issues which were not argued on appeal.[120]

Unlike the majority, Justice Brennan argued that the right to counsel is more than the right to have one's case presented

---

112. *Id.*

113. *Id.*

114. *Id.* at 3313.

115. *Id.* at 3314.

116. Although Justice Blackmun did not join the majority opinion, he concurred in the judgment because he thought counsel's performance was " 'within the range of competence demanded of attorneys in criminal cases.' " *Id.* (Blackmun, J., concurring) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970). In addition, Justice Blackmun thought that the indigent had adequate opportunity to present his claims in the state's appellate process. *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring).

117. *Id.* at 3314 (Blackmun, J., concurring).

118. *Id.* (Blackmun, J., concurring). The dissent considers the matter to be a constitutional requirement, rather than merely an ethical obligation. *See id.* at 3316-18 (Brennan, J., dissenting).

119. *Id.* at 3314 (Blackmun, J., concurring).

120. *Id.* at 3315 (Brennan, J., dissenting). For issues which were not raised, see *supra* note 95.

competently and effectively.[121] He contended that the function of counsel is to protect the dignity and autonomy of the person on trial by *assisting* the person to make choices which are his to make.[122] Justice Brennan viewed the right to assistance of counsel as a personal right. The sixth amendment, in his view, means more than that the indigent shall have a defense.[123] To Justice Brennan, the ultimate authority to decide what nonfrivolous issues are presented belongs to the defendant.[124]

In support of his position, Justice Brennan noted that an appointed lawyer and his indigent client often have to get along under imperfect conditions.[125] An indigent client often mistrusts

---

121. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting).

122. *Id.* (Brennan, J., dissenting).

123. *See id.* (Brennan, J., dissenting). Justice Brennan's position is not a novel one. His view of counsel's function had the support of six justices in Faretta v. California, 422 U.S. 806 (1975). In *Faretta*, the Supreme Court affirmed a defendant's constitutional right to proceed without counsel after making a voluntary and intelligent choice to do so. *Id.* at 835. *Faretta* is particularly pertinent here. Justice Stewart, acting on behalf of the majority, wrote:

> The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

Id. at 819-20 (footnotes omitted).

124. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting); *accord* Faretta v. California, 422 U.S. at 834 ("The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."). Justice Brennan reasons that the indigent appellant can press nonfrivolous issues even against the advice of counsel if he chooses. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting). Justice Brennan, however, does not ignore the Chief Justice's argument that the lawyer, not the layman, is best able to prosecute an appeal. *See id.* at 3312. *See also supra* text accompanying notes 26-27. Instead he retorts:

> It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments. The Constitution, however, does not require clients to be wise.

Barnes, 103 S. Ct. at 3317-18 (Brennan, J., dissenting).

125. *See id.* at 3318 (Brennan, J., dissenting).

his attorney.[126] Moreover, if there are differences in socio-economic class or in education, these differences may interfere with their relationship.[127] Therefore, Justice Brennan would not fashion a rule which encourages an appointed lawyer to disregard his client's wishes or which exacerbates the client's suspicion of his lawyer.[128] Such a rule, he thought, would not guarantee that an indigent is provided effective assistance of counsel.[129]

V. Analysis

A. *A Distinction Between Assistance at Trial and on Appeal*

In one sense, the Supreme Court's vacillation over the constitutional standards for the effective assistance of counsel is understandable.[130] The claim of ineffective assistance is a popular one. Few convicted defendants are satisfied with the results. It is easy to blame counsel for the conviction.[131] Furthermore, the claim is somewhat subjective. Appellate courts are reluctant to overturn an otherwise error free conviction merely because an

---

126. *Id.* at 3318 (Brennan, J., dissenting). *See also* Carrington, *supra* note 1, at 1300-03.

127. *Barnes*, 103 S. Ct. at 3318 (Brennan, J., dissenting).

128. *Id.* (Brennan, J., dissenting). Justice Brennan does not want an appointed lawyer to become one of the "many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system." *Id.* at 3319 (Brennan, J., dissenting).

129. *See id.* at 3318-19 (Brennan, J., dissenting).

130. The underlying problem is aptly captured in the following passage:

> A retrospective examination of a lawyer's representation to determine whether it was free from any error would exact a higher measure of competency than the prevailing standard. Perfection is hardly attainable and is certainly not the general rule, especially in professional work where intuitive judgments and spontaneous decisions are often required in varying circumstances. The artistry of the advocate is difficult to judge retrospectively because the elements influencing judgment usually cannot be captured on the record. The kaleidoscopic range of possibilities often seems limitless, and it is proverbial that the finest ideas emerge on the way back from the courthouse. The [trial] advocate's work, therefore, is not readily capable of later audit like a bookkeeper's.

Moore v. United States, 432 F.2d 730, 736-37 (3d Cir. 1970) (footnote omitted). *See also infra* note 144.

131. Since few convicted defendants are happy with the results, a natural reaction is to blame the attorney that the *state* appointed to represent him, for being incompetent or unprepared. It was the state which convicted him. The convicted indigent may very well believe that the attorney and the state have contrived against him. *See, e.g.*, Jones v. Barnes, 103 S. Ct. 3308, 3318 (1983) (Brennan, J., dissenting); Faretta v. California, 422 U.S. 806, 834 (1975).

indignant indigent charges that he was given ineffective representation.[132] Nonetheless, ineffective assistance of counsel is a serious problem[133] which the Supreme Court has not adequately confronted.[134] For instance, *Jones v. Barnes*[135] considered the assistance provided by appellate counsel, not trial counsel. The earlier Supreme Court cases involving claims of ineffective assistance of counsel focused upon the assistance provided by trial counsel.[136] In *Barnes*, the Supreme Court had an opportunity to expound upon a standard of effective assistance and, at the same time, limit its application to appellate counsel. The Court, however, did not adopt this approach. It declined to adopt a precise standard of effective assistance of counsel on appeal.[137]

In contrast to the appellate stage, there is, perhaps, good reason to be reluctant to establish a precise standard of effective assistance in criminal trials.[138] The courtroom performance of an attorney, for example, ordinarily involves many tactical and strategic judgments that are not subject to categorical prescrip-

---

132. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258, 266-67 (1973); Chambers v. Maroney, 399 U.S. 42, 54 (1970); McMann v. Richardson, 397 U.S. 759, 771 (1970).

133. *See* Bazelon, *supra* note 2, at 2:

> The adversary system assumes that each side has adequate counsel. This assumption probably holds true for giant corporations or well-to-do individuals, but what I have seen in 23 years on the bench leads me to believe a great many — if not most — indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.

134. *Id.* One commentator advanced several policy reasons to justify the Supreme Court's posture. Among these policies (or fears) underlying the reluctance to find that counsel was ineffective are: 1) to honor such claims is to implicitly censure the trial court; 2) appellate courts should not second guess defense tactics with the benefit of hindsight; 3) there would be a flood of ineffectiveness claims; and 4) appellate courts would have to overturn a great number of convictions if a more active approach were adopted. *See* Bazelon, *The Realities of Gideon and Argersinger*, 33 NAT'L LEGAL AID DEF. A. (NLADA) BRIEFCASE 57, 60 (1975); Bazelon, *supra* note 2, at 22-28. *See generally* Comment, *supra* note 2, at 4.

135. 103 S. Ct. 3308 (1983). On certiorari to the Second Circuit, the only issue reviewed by the Supreme Court was the performance of appellate counsel. *See supra* note 89 (Barnes' argument as to why he was denied effective assistance of appellate counsel).

136. *See* Tollett v. Henderson, 411 U.S. 258, 266-67 (1973); Chambers v. Maroney, 399 U.S. 42, 53 (1970); McMann v. Richardson, 397 U.S. 759, 771 (1970). *See also* Powell v. Alabama, 287 U.S. 45, 49-52 (1932). *Cf.* Ross v. Moffitt, 417 U.S. 600, 610 (1974) ("[T]here are significant differences between the trial and appellate stages of a criminal proceeding.").

137. *Barnes*, 103 S. Ct. at 3312.

138. *See supra* note 134.

tion.[139] But there is no good reason to presume a precise standard of effective assistance on appeal would be detrimental in any way. For instance, trial circumstances are unpredictable, and counsel must be free to respond to the vagaries of the situation.[140] By contrast, on appeal, counsel must operate under the constraints of what has been established on the record.[141]

Arguably, the appellate counsel's task is better suited for post hoc review. On appeal, the reviewing court has the record which provides a concrete yardstick. The reviewing court can fairly and objectively determine whether the appellate representation violated the sixth amendment.[142] If appellate counsel did not properly evaluate the facts on the record which gave rise to a substantial claim for relief, a reviewing court can discover counsel's error by evaluating the argument presented by the record.[143]

Conversely, because the trial establishes the record, a reviewing court examining a claim of ineffective *trial* counsel has no reference point. The reviewing court's job is necessarily more subjective and arbitrary. It cannot simply determine if a substantial claim, present on the record, was not raised on appeal. Instead, the appellate court would have to discover what counsel actually knew at trial; the court would have to examine the tactics and strategy of trial counsel. Under these circumstances, the indigent may, in effect, ask the reviewing court to substitute its judgment for that of the appointed counselor. Courts are naturally wary to proceed in this manner.[144]

---

139. *See supra* note 130.

140. *See* United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1976) (Leventhal, J.) ("A defense counsel's representation of a client encompasses an almost infinite variety of situations that call for the exercise of professional judgment."). *See also id.* at 276 n.69 (Bazelon, C.J., dissenting).

141. *E.g.*, R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 37 (1981).

142. A violation should not be determined under the fourteenth amendment. *See supra* note 52.

143. *See* Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) (sufficiency of preparation and knowledge of relevant law is not a highly subjective determination).

144. Unless there is some extraordinary circumstance, an appellate court will not review an action if it can do nothing but substitute its judgment. *See generally* NLRB v. Universal Camera Corp., 179 F.2d 749, 752 (2d Cir.) (deference to procedure below), *vacated*, 340 U.S. 474 (1950), *on remand*, 190 F.2d 429 (2d Cir. 1951). "In appeals from the Board we have over and over again refused to upset findings which in cold type seemed to us extremely doubtful just because we were aware that we could not know what may

B. *Effective Assistance on Appeal and* Barnes

Essentially, assistance of counsel claims fit into two categories. In the first category are cases where there is an actual denial of assistance of counsel. The classic example of this type of case is *Gideon v. Wainwright*.[145] In the second category are cases where the constitutional right to assistance of counsel is denied by virtue of the ineffective representation that is rendered.[146] Cases in the second category involve, in essence, a constructive denial of counsel. *Barnes* falls within this category. It does not involve total deprivation since Barnes' counsel raised and argued several claims.[147]

In *Barnes*, there is sharp disagreement over what would constitute effective assistance of appellate counsel.[148] The disagreement is not about the value of the lawyer's professional training.[149] Both the majority and minority agree that an indigent, seeking to reverse his conviction, can benefit from a concise, selective argument advanced by an able, experienced lawyer.[150] Rather, the core of the disagreement envelops a definition of "assistance of counsel."

---

have been the proper deciding factors." NLRB v. Universal Camera Corp., 190 F.2d at 431.

For a further illustration of the need to avoid substituting judgment, compare Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971) (where the Court found there was law to apply, because the action complained of was not committed to agency discretion) with Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318 (1958) (where the duty to act was a matter of highly debatable inference, requiring profound exercise of discretion) and Switchmen's Union v. National Mediation Bd., 320 U.S. 297, 304-05 (1943) (peculiar nature and functions of agency determine lack of reviewability).

145. 372 U.S. 335 (1963). *See also* Geders v. United States, 425 U.S. 80, 91 (1976) ("[A]n order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between direct-and cross-examination impinged upon his right to assistance of counsel guaranteed by the Sixth Amendment."); Herring v. New York, 422 U.S. 853, 864-65 (1975) (trial court's refusal to permit final argument in a non-jury case is a violation of the sixth amendment).

146. *See* Avery v. Alabama, 308 U.S. 444, 446 (1940). The Court commented that the state cannot "convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment". *Id.* (footnote omitted).

147. *See supra* notes 86-87 and accompanying text.

148. *Barnes*, 103 S. Ct. at 3313; *see also id.* at 3317. *See supra* text accompanying notes 106-15, 120-28.

149. *Barnes*, 103 S. Ct. at 3312; *see also id* at 3317.

150. *Id.* at 3317.

To the majority, the right guaranteed by the sixth amendment "reflects nothing more than the obvious fact that it is [the indigent] who is on trial and therefore has need of a defense."[151] The majority does not interpret the sixth amendment in a way to inhibit counsel's ability to exercise his professional judgment.[152] To the majority, assistance on appeal is not ineffective because the appointed attorney avoids cluttering the appeal with barely colorable issues.[153] By comparison, for the dissent, because the indigent is at trial and has need of a defense, the sixth amendment must protect his dignity and autonomy as a person.[154] In the dissent's view, the sixth amendment is the indigent's personal right.[155] The amendment should be interpreted to function as the instrument of the indigent's autonomy and dignity in all phases of the criminal process.[156] These conflicting perspectives have widely disparate consequences. The majority places the decisions about the content of the appeal in the attorney's hands, while the dissent contends these decisions are within the defendant's province.[157]

Given the facts of *Barnes*, its outcome is probably correct. Although Michael Melinger specifically requested Barnes' input when he was preparing Barnes' appeal,[158] the record contains no

---

151. Faretta v. California, 422 U.S. 806, 837 (1975) (Burger, C.J., dissenting) (footnote omitted). *Cf. supra* note 139.

152. *See* Barnes, 103 S. Ct. at 3312. Note that the focus here is on counsel's role, not the indigent's rights. *Id.* By contrast the dissent focuses upon the indigent's personal rights under the sixth amendment. *Id.* at 3318 (Brennan, J., dissenting). *See infra* note 156 and accompanying text.

153. *See Barnes*, 103 S. Ct. at 3312-13. That conciseness is often the key to effective advocacy is clear from the fact that appellate courts often impose page limits on appellate briefs and time limits on oral arguments. *See, e.g.*, SUP. CT. R. 34.3 (page limits); *id.* at 38.3 (time limits); N.Y. SUP. CT. R. APP. DIV. (2d Dep't) § 670.17(g)(2) (page limits); *id.* at § 670.22 (time limits).

154. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting).

155. *Id.* (Brennan, J., dissenting).

156. *Id.* at 3318 (Brennan, J., dissenting). The image of counsel as a tool for the indigent is imminently clear when one examines the other rights guaranteed by the sixth amendment. A full and effective defense would hardly be possible but for the indigent's right "to a speedy and public trial, by an impartial jury . . ., and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI. *Accord* Faretta v. California, 422 U.S. 806, 819 (1975).

157. See *infra* note 167 for the ideal allocation of authority on appeal.

158. *See supra* note 85 and accompanying text.

evidence that Barnes ever responded to Melinger's offer.[159] Thus, as far as the facts are known, the representation was effective. The constitutional right to counsel[160] and the right to equal access to the courts[161] should not require assigned counsel to advocate issues which are not in the best interest of the client,[162] unless the client insists that those issues be raised on appeal.[163] Barnes' right to effective assistance of appellate counsel is not eviscerated by his decision not to participate in the appellate process. Indeed, in such a case, the attorney must take control of the appeal if the indigent is to get full and fair review.

Notwithstanding a just result for the parties before the Court, the rationale employed to reach the result is troublesome. A majority of the Supreme Court failed to give substance to the doctrine of effective assistance of appellate counsel. Instead, it left the responsibility of ensuring effective assistance to the individual lawyer appointed to assist the indigent appellant.[164] Moreover, the majority of the Court applied a rationale more suited to an inquiry into effective assistance at trial than to the kind of assistance counsel provides on appeal.[165] As the Court correctly observed, at trial, matters of strategy and tactics properly belong in the attorney's domain.[166] It was arguably wrong,

---

159. *See supra* note 85.

160. *See generally supra* Part II.

161. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Draper v. Washington, 372 U.S. 487, 496 (1963).

162. This requirement meets Chief Justice Burger's concern that a brief which raises every nonfrivolous claim runs the risk of clouding the important issues. *See Barnes*, 103 S. Ct. at 3313-14.

163. *See, e.g., id.* at 3314-15 (Brennan, J., dissenting).

164. *Id.* at 3312.

165. *Compare* ABA STANDARDS FOR CRIMINAL JUSTICE, 1 *The Defense Function*, Standard 4-5.2 (2d ed. 1980) *with* 4 ABA STANDARDS FOR CRIMINAL JUSTICE, *Criminal Appeals*, Standard 21-3.2 Comment, at 21-42 (2d ed. 1980) [hereinafter cited as *Criminal Appeals*] (describing the different roles performed by trial counsel and appellate counsel respectively).

166. *Barnes*, 103 S. Ct. at 3313 n.6; *accord* Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring).

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate — and ultimate — responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.

Id. (footnote omitted).

though, to assume that counsel's performance on appeal is within the same domain.

The Supreme Court did not base its decision on the critical distinction between counsel's role at trial and his role on appeal.[167] Strategy and tactics necessarily imply improvisation. During the trial, a lawyer must be free to object at any point. He must be free to make motions on his own initiative; he cannot consult with his client before making every move. In short, the realities of the trial environment place these responsibilities on the attorney, not the client.

Contrarily, on appeal, the split-second decision making is already part of the record.[168] Therefore, the record governs the available strategy and tactics.[169] The realm of attorney discretion is therefore constrained. The attorney has more time to consult with his indigent client. The client can exercise greater command over his representation on appeal. Hence, if the indigent client wants to raise specific colorable issues, nothing in the nature of the appellate process restrains him from doing so.

Identifying and developing appellate issues is a well-considered, thorough exercise. It would be easy for the attorney to incorporate his indigent client's direction. The appellate counsel could evaluate the indigent's input in light of the record and the applicable law. If the attorney believes including the indigent's ideas would weaken the appeal, he can so advise his client. If the client decides, in spite of the professional evaluation of his counsel, that he wants to present a particular issue, the assigned attorney should assist him to do so. In this way, the attorney acts as a true assistant for the indigent's defense. Moreover, the fiber

---

167. *Compare supra* note 166 (description of counsel's role at trial) *with Criminal Appeals, supra* note 165, at Standard 21-3.2 (description of counsel's function on appeal). The ABA's conception of appellate counsel's role varies greatly from counsel's job at trial. The ABA's position on appellate counsel's role is:

> [w]hen, in the estimate of counsel, the decision of the client to take an appeal, *or the client's decision to press a particular contention of appeal,* is incorrect[, c]ounsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. *Counsel's role, however, is to advise. The decision is made by the client.*

Barnes, 103 S. Ct. at 3317 (Brennan, J., dissenting) (emphasis added by Justice Brennan) (quoting *Criminal Appeals, supra* note 165, Comment at 21-42).

168. *See supra* text accompanying notes 140-43.

169. *See supra* text accompanying notes 141-43

of the sixth amendment assumes a meaningful form.

VI. Conclusion

Since the early 1930s, the Supreme Court has consistently recognized the importance of providing counsel to assist an indigent defendant.[170] In the 1960s, the Court assured that counsel would be provided any time the indigent's physical liberty is placed in jeopardy by the criminal process.[171] In the 1970s, the Court suggested that the mere presence of counsel is not enough, intimating that the indigent has a right to effective assistance of counsel.[172]

As of 1983, the meaning of effective assistance has not been adequately defined. In *Jones v. Barnes*,[173] the Supreme Court had the opportunity to clarify the concept, at least in the context of an appeal. By failing to distinquish adequately between the role of counsel at trial and on appeal, however, the Court's decision added nothing of substance to the right to effective assistance of counsel.

Richard N. Allman

170. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932). *See also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

171. *See, e.g.*, Gideon v. Wainwright, 372 U.S. at 344-45. *See also* Lassiter v. Department of Social Servs., 452 U.S. 18, 25 (1981); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

172. *E.g.*, McMann v. Richardson, 397 U.S. 759 (1970). *See supra* notes 54-74 and accompanying text.

173. 103 S. Ct. 3308 (1983).