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A Constitutional Determination of the Duty of Court-Appointed Appellate Counsel: An Analysis of Jones v. Barnes

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I. INTRODUCTION

Throughout the history of criminal justice, the right to counsel has been expansive. The injustice that would result from severe limitations or deprivations of this right would make life intolerable in a free society. Ours is an era that requires personal control over important issues in each individual's life, yet a constitutional limitation has been imposed upon the indigent defendant's control over his own appeal when the right to appointed counsel is invoked.

In *Jones v. Barnes*,[1] the United States Supreme Court was asked to determine whether court-appointed appellate counsel must raise every nonfrivolous issue requested by the indigent criminal defendant. The Court ruled that the indigent defendant has no constitutional right to demand such control. Prior to *Barnes,* there existed no holding based squarely upon constitutional grounds,[2] leaving the division of decision-making power between client and counsel to be governed primarily by the legal profession's ethical codes.[3]

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1. 103 S. Ct. 3308 (1983).

2. *Id.* at 3317 (Brennan, J., dissenting).

3. Inconsistencies in the following ethical codes and standards were noted in the *Barnes* decision:

> The American Bar Association Model Rules of Professional Conduct provide, in pertinent part:
>
> A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. . . . *In a criminal case, the lawyer for the defendant shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.*

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (Final Draft 1982) (emphasis added).

The American Bar Association Code of Professional Responsibility ethical considerations provide in part:

> EC 7-7. In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. *But otherwise the authority to make*

Barnes' significance is two-pronged: first, it creates a clear constitutional rule to be applied in conflicts between appointed counsel and the indigent defendant; second, it defines the constitutional scope of control by court-appointed counsel in the presentation of the defense of an indigent criminal defendant. The *Barnes* decision announced the rule that court-appointed appellate counsel is not required by the Constitution to raise all nonfrivolous issues, even if requested by the indigent criminal defendant.[4]

In analyzing the Supreme Court's decision in *Barnes,* this note traces the history of the right to effective assistance of counsel for the indigent criminal defendant by examining constitutional,

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> *decisions is exclusively that of the client* and, if made within the framework of the law, such decisions are binding on his lawyer. . . . *A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.*

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) (emphasis added).

> EC 7-8. A lawyer should exert his best efforts to [e]nsure that decisions of his client are made only after the client has been informed of relevant considerations. . . . In the final analysis, however, the lawyer should always remember that *the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself.*

Id. at EC 7-8 (emphasis added).

The American Bar Association Defense Function Standards provide:

> Standard 4-5.2. Control and direction of the case.
> (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:
> (i) what plea to enter;
> (ii) whether to waive jury trial; and
> (iii) whether to testify in his own behalf.
> (b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, *and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.*
> (c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and the client, the lawyer should make a record of the circumstances, the lawyer's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

STANDARDS FOR CRIMINAL JUSTICE 4-5.2 (2d ed. 1980) (emphasis added).

The American Bar Association Standards for Criminal Appeals provides in the commentary in pertinent part:

> [A] question arises when, in the estimate of counsel, the decision of the client to take an appeal, or the client's decision to press a particular contention on appeal, is incorrect. Counsel 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.*

STANDARDS FOR CRIMINAL JUSTICE 21-3.2 at 21-42 (2d ed. 1980) (emphasis added).

4. 103 S. Ct. at 3312.

practical, and ethical considerations. Furthermore, this note probes questions raised by the decision and some predictions of future ramifications for the indigent defendant and the criminal justice system.

II. The Problem

A. The State Court Proceedings

In 1976, David Barnes was convicted of first and second degree robbery and second degree assault of Richard Butts.[5] The state's case focused primarily on the testimony of Butts, who identified Barnes as one of his four assailants.[6] On cross-examination, court-appointed defense counsel sought to impeach Butts' credibility by introducing a psychiatric report which suggested that Butts had a history of "blacking out." The trial court, *sua sponte*,[7] instructed Butts not to answer any questions regarding psychiatric treatment, and defense counsel did not make an offer of proof on the substance or relevance of the question.[8]

Barnes' case relied primarily on the defendant's own testimony; he stated that he was at home with his father at the time of the robbery. Defense counsel did not call Barnes' father as a witness or allude to the alibi testimony in the summation argument.[9] At the close of the trial, the judge declined defense counsel's request for a jury instruction on accessorial liability.[10]

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5. Jones v. Barnes, 103 S. Ct. at 3310. Butts was robbed at knifepoint and badly beaten by four men in the lobby of an apartment building. *Id.* The three other alleged assailants were never apprehended. Respondent's Brief at 3, *id.*

6. 665 F.2d 427, 429 (2d Cir. 1981), *rev'd,* 103 S. Ct. 3308 (1983). After testifying falsely about where he had been immediately preceeding the robbery, Butts recalled that Barnes was the one who grabbed him from behind. Butts conceded that Barnes was not the man who took his watch and that he did not know which of the four actually took his money. *Id.*

The trial judge concluded that the in-court identification was based on an independent source because Butts had known Barnes for several years prior to the robbery. This identification was critical because the court found Butts' previous bedside identification of Barnes to have been "the worst possible way of having a showing made." *Id.*

7. Black's Law Dictionary 1277 (rev. 5th ed. 1979) defines *sua sponte* as "[o]f his or its own will or motion; voluntarily; without prompting or suggestion."

8. 103 S. Ct. at 3310.

9. Barnes v. Jones, 665 F.2d at 430 (2d Cir.), *rev'd,* 103 S. Ct. 3308 (1983).

10. The charge was apparently to read as follows: "[a] defendant cannot be held criminally liable for the acts of another unless he knew of the acts and intended the result." *Id.*

B. *The Appeal to the Appellate Division*

Barnes' application for leave to appeal *in forma pauperis*[11] was granted by the Appellate Division of the Supreme Court of New York. New counsel was assigned to prosecute his appeal.[12] Barnes sent a letter to his counsel listing four substantive issues that he believed should be raised, including ineffectiveness of trial counsel.[13] In addition, Barnes enclosed a supplemental *pro se*[14] brief.[15] The new appellate counsel replied in writing that he had rejected most of the suggested claims,[16] including the ineffectiveness of trial counsel issue,[17] because the claim was not based on evidence in the record.[18] Counsel then listed seven potential claims of error which he considered raising on appeal.[19] The brief and oral argument presented by counsel to the Appellate Division concentrated on three of the seven points he had raised in his letter to Barnes.[20] The Appellate Division affirmed the conviction by

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11. BLACK'S LAW DICTIONARY 701 (rev. 5th ed. 1979) defines *in forma pauperis* as follows:

> In the character or manner of a pauper. Describes permission given to a poor person (*i.e.* indigent) to proceed without liability for court fees or costs. An indigent will not be deprived of his rights to litigate and appeal; if the court is satisfied as to his indigence he may proceed without incurring costs or fees of court. FED. R. CRIM. P. 44.

Id.

For a discussion concerning indigency, see *infra* note 38.

12. 665 F.2d at 430.

13. 103 S. Ct. at 3310. For a discussion of effective assistance of counsel see generally Note, *Ineffective Assistance of Counsel Resulting from Conflicts Between Court-Appointed Counsel and Indigent Defendant—State v. Hutchins*, 18 WAKE FOREST L. REV. 83 (1982).

Barnes also requested that his counsel raise the following issues: (1) improper cross-examination by the prosecutor; (2) failure to supress the identification testimony given by Butts; and (3) the trial court's improper exclusion of the psychiatric evidence. Respondent's Brief at 4, Jones v. Barnes, 103 S. Ct. 3310.

14. BLACK'S LAW DICTIONARY 1099 (rev. 5th ed. 1979) defines *pro se* in part as: "[f]or himself; in his own behalf; in person."

15. 103 S. Ct. at 3310. Counsel did not necessarily agree with all of the points made in the brief. 665 F.2d at 430.

16. Counsel indicated that he would not argue that the show-up was unconstitutional, but that he would argue that the facts relative to Butts' prior acquaintance with Barnes did not substantiate an independent identification. 665 F.2d at 430.

17. *See infra* note 28.

18. 665 F.2d at 430. The Second Circuit Court of Appeals stated this was a mistake, as counsel could have returned to the trial court in a *coram nobis* proceeding to supplement the record if necessary. *Id.* at 430 n.1.

19. 103 S. Ct. at 3310.

20. *Id.* at 3311. The three claims were: (1) improper exclusion of psychiatric evidence; (2) failure to supress Butts' identification testimony; and (3) improper cross-examination of Barnes by the trial judge.

These claims did not include any of the arguments raised in Barnes' original *pro se* brief or in two subsequent *pro se* briefs which raised three more of the seven issues which assigned counsel had identified. *Id.*

summary order.[21]

C. Subsequent State and Federal Proceedings

Barnes moved for a writ of habeas corpus[22] in the Federal District Court in New York, raising the substantive issues addressed in his original *pro se* brief.[23] After considering the ineffectiveness of trial counsel claim in light of the "farce and mockery" standard,[24] the district court denied the writ.[25]

Subsequently, Barnes filed complaints in the state and federal courts, claiming for the first time that his *appellate* counsel had provided ineffective assistance.[26] Barnes first petitioned the state court of appeals for reconsideration, which was denied.[27] He then returned to the federal district court for a writ of habeas corpus, which was also denied.[28] A divided panel of the court of appeals

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21. New York v. Barnes, 63 A.D.2d 865, 405 N.Y.S.2d 621, *appeal denied,* 45 N.Y.2d 786, 381 N.E.2d 179, 409 N.Y.S.2d 1044 (1978). *See also* 665 F.2d at 430.

22. BLACK'S LAW DICTIONARY 638 (rev. 5th ed. 1979), defines *habeas corpus,* in pertinent part, as:

> [T]he name given to a variety of writs . . . having for their object to bring a party before a court or judge. . . . The primary function of the writ is to release from unlawful imprisonment. . . . The office of the writ is not to determine prisoner's guilt or innocence, and [the] only issue which it presents is whether [the] prisoner is restrained of his liberty by due process.

Id.

23. One of the claims raised in the brief was ineffectiveness of trial counsel. 665 F.2d at 430.

24. The "farce and mockery" standard is one of two prevailing tests among the lower courts to determine effective assistance of counsel, a right expressly recognized by the Supreme Court in 1942. Glasser v. United States, 315 U.S. 60 (1942). The standard requires that defense counsel's inadequate performance be "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950).

Although all federal courts of appeals have, in some form, relied on this standard at some time, all but the Second Circuit have abandoned the standard. *See* Note, *supra* note 13, at 89-90 nn.57-59. The new standard adopted by the courts was the "reasonableness" standard. The District of Columbia Circuit Court of Appeals, for example, requires that the assisting counsel be a reasonably competent advocate for the defendant. *Id.* at 91. The exact standard of reasonableness may vary from court to court. *Id.* at 90 nn.60-62.

25. United States *ex rel.* Barnes v. Jones, No. 78-C-1717 (E.D.N.Y. 1978), *aff'd,* 607 F.2d 994 (2d Cir.), *cert. denied,* 444 U.S. 853 (1979).

26. 103 S. Ct. at 3311. In the meantime, Barnes had filed a motion in the trial court for collateral review of his sentence, which was denied. *Id.*

27. New York v. Barnes, 49 N.Y.2d 1001, 406 N.E.2d 1083, 429 N.Y.S.2d 1029 (1980).

28. United States *ex rel.* Barnes v. Jones, No. 80-C-2447 (E.D.N.Y.), *rev'd,* 665

reversed.[29] Laying down a new standard, the majority held the willful refusal of appointed counsel to raise colorable issues on appeal, despite insistence from his indigent client to do so, was a deprivation of the constitutional right to the assistance of counsel.[30]

The court of appeals expressly based its decision on *Anders v. California,*[31] which had barred an attorney from withdrawing from a nonfrivolous appeal.[32] The majority concluded that if counsel could not abandon a nonfrivolous *appeal,* neither could the attorney abandon a nonfrivolous *issue* on appeal.[33]

The Supreme Court granted certiorari[34] and subsequently reversed the lower court's decision in *Jones v. Barnes.*[35] In an opinion written by Chief Justice Burger, the Court held that an indigent defendant has no constitutional right to compel appointed counsel to press nonfrivolous points if, as a matter of professional judgment, counsel decides not to present those claims.[36]

F.2d 427 (2d Cir. 1981), *rev'd,* 103 S. Ct. 3308 (1983). The district court found appellate counsel's performance adequate even under the more lenient standard of "reasonable competence" adopted by other circuits and proposed by some judges in the Second Circuit. 665 F.2d at 431. See also Note, *supra* note 13, at 88-93, for a discussion of the "reasonable competence" standard for attorney effectiveness.

29. 665 F.2d at 427 (2d Cir. 1981), *rev'd,* 103 S. Ct. 3308 (1983). By this time, at least twenty-six state and federal judges had rejected Barnes' claim that he was unjustly convicted of a crime committed five years earlier. 103 S. Ct. at 3311 n.3.

30. 665 F.2d at 433.

The sixth amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The Court referred to laying down a new standard because prior to Jones v. Barnes, 665 F.2d at 427, decisions regarding legal issues on appeal were ultimately left to the lawyer's professional judgment. *See* Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied,* 435 U.S. 976 (1978).

31. 386 U.S. 738 (1967). The court of appeals did not base its decision on the "reasonable competence" standard for evaluating attorney effectiveness, as the district court had done. 665 F.2d at 431 n.4. *See supra* note 24.

32. 665 F.2d at 430. If upon conscientious examination, counsel finds the defendant's appeal to be wholly frivolous, he may advise the court and request permission to withdraw; the brief to this effect has come to be known as the *Anders* brief. *Id.* For a critique of the use of the *Anders* brief, see Mendelson, *Frivolous Criminal Appeals: The Anders Brief or the Idaho Rule?,* 19 CRIM. L. BULL. 22 (1983).

33. 665 F.2d at 430. Judge Meskill dissented, stating that the majority had overextended *Anders.* In his view, *Anders* concerned only whether an attorney must pursue nonfrivolous *appeals,* not *issues. Id.* at 437.

34. 457 U.S. 1104 (1982).

35. 103 S. Ct. at 3308.

36. *Id.* at 3312.

III. HISTORICAL BACKGROUND

A. The Right to Court-Appointed Counsel[37]

1. A Sixth Amendment Requirement

The sixth amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[38] Based on this provision, the constitutional right of an indigent defendant to the assistance of a court-appointed counsel was first established in the United States[39] in the 1932 case of *Powell v. Alabama.*[40] The *Powell* Court

37. Most of the decisions dealing with the right to counsel have been concerned with court-appointed counsel assisting the indigent defendant rather than privately retained counsel in assisting the more affluent defendant.

38. U.S. CONST. amend. VI. Although the Supreme Court opinions have referred to the "indigent defendant" on numerous occasions, no special definition of "indigency" has ever been offered by the Court. Lower courts have, however, ruled on the issue of determining indigency. *See, e.g.,* People v. Eggers, 27 Ill. 2d 85, 188 N.E.2d 30 (1963) (a defendent should be classified as indigent if his available resources are not sufficient to both retain counsel and to post bond); McCraw v. State, 476 P.2d 370 (Okla. 1970) (the owner of assets does not have to be destitute before he can be classified as indigent).

BLACK'S LAW DICTIONARY 695 (rev. 5th ed. 1979), defines indigent defendant as:

> A person indicted or complained of who is without funds or ability to hire a lawyer to defend him and who, in most instances, is entitled to appointed counsel, consistent with the protection of the Sixth and Fourteenth Amendments to the U.S. Constitution. Gideon v. Wainwright, 372 U.S. 335 [(1963)].

Id.

There is an absolute right to retained counsel at a criminal trial in both state and federal courts. In federal courts, the right is guaranteed by the sixth amendment; in state courts, it is guaranteed by the due process clause of the fourteenth amendment and by state constitutional provisions. *See* Comment, *An Historical Argument for the Right to Counsel During Police Interrogation,* 73 YALE L.J. 1000, 1003 (1964).

The Supreme Court has characterized the right to retain counsel as unqualified. *See* Chandler v. Fretag, 348 U.S. 3, 9 (1954); Powell v. Alabama, 287 U.S. 45 (1932).

See also Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and The Legal Profession,* 23 SW. L.J. 488, 496-501 (1969).

39. Parliament gave a defendant accused of treason the right to a court-appointed counsel in 1695. 7 & 8 Will. 3, cl. 3, § 1 (1695). This right was extended to all felony cases involving an indigent defendant in 1903. 3 Edw. 7, ch. 38, § 1 (1903). *See* Note, *Right to Counsel: A New Standard,* 27 SW. L.J. 406 (1973).

40. 287 U.S. 45 (1932) (indigent defendants, sentenced to death for the conviction of rape, had been denied the right to counsel by failure of the trial court to allow reasonable time and opportunity to secure counsel, consult with counsel, and prepare a defense). The Court stated:

> [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 requi-

carefully limited the decision to an indigent defendant accused of a capital offense in a federal court.[41]

In 1938, the Supreme Court extended the right to court-appointed counsel to all indigent defendants in felony cases tried in federal courts.[42] Subsequently, in *Betts v. Brady,*[43] the Court refused to apply this rule to the states via the fourteenth amendment.[44] In 1963, however, the Court decided *Gideon v. Wainwright,*[45] in which the sixth amendment right to counsel was ultimately incorporated[46] into the fourteenth amendment's due process clause.[47] While the *Gideon* opinion did not specify whether the right was limited only to felony defendants, the case

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site 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.

Id. at 71.

41. *Id.* at 73. Despite the limited holding in the *Powell* opinion, affirmation of the need for the appointment of counsel, generally, was made. The Court stated:

> *Even the intelligent and educated layman* has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [has] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Id. at 69 (emphasis added).

42. Johnson v. Zerbst, 304 U.S. 458 (1938). This case has frequently been cited for establishing the test for waiver as knowing and intelligent. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* at 464. The Court also recognized that the federal courts lacked "the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at 463.

43. 316 U.S. 455 (1942) (the defendant, convicted of robbery, was denied appointment of counsel at the trial because he was a man of ordinary intelligence, familiar with the courts due to a prior conviction of larceny, and was able to adequately represent his own case).

44. *Id.* The majority held that due process did not require counsel to be appointed in all criminal cases, but only where the absence of counsel would result in a trial lacking in "fundamental fairness." *Id.* at 473. Due process, the Court said is:

> [A] concept less rigid and more fluid than those [concepts] envisaged in other specific and particular provisions of the Bill of Rights. . . . Asserted denial is to be tested by an appraisal fo 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 . . . fall short of such denial.

Id. at 462.

45. 372 U.S. 335 (1963) (the defendant was convicted of a non-capital felony in a Florida state court after he was denied assistance of appointed counsel).

46. Made obligatory upon the states by the fourteenth amendment. *Id.* at 340 (quoting Betts v. Brady, 316 U.S. at 471 (1942)).

47. The result was the demise of fundamental fairness as the standard which

itself involved a felony prosecution.[48]

Confusion concerning the rights of an indigent defendant accused of a misdemeanor developed after the *Gideon* decision. Consequently, the courts were sharply divided[49] as to whether *Gideon* should be interpreted narrowly or broadly.[50] The Supreme Court, however, repeatedly denied certiorari.[51] The courts were free to develop their own standards for application of court-appointed counsel to criminal indigent defendants.[52]

In 1972, the Supreme Court clarified the confusion concerning the application of *Gideon.* In *Argersinger v. Hamlin,*[53] the Court held that, absent a knowing and intelligent waiver, no person may be *imprisoned for any offense*—petty crime, misdemeanor, or felony—unless he was represented by counsel at his trial.[54] The Court rejected the state's contention that the sixth amendment

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determined whether a defendant should have counsel at trial in state courts. The *Gideon* standard is an absolute standard. *Id.*

In the years following *Betts* and prior to *Gideon,* decisions had so frequently found the "special circumstances" necessary to require appointment of counsel that the *Betts* rule was no longer a reality. *Id.* at 350-51 (Harlan, J., concurring). *See* Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States,* 3 CREIGHTON L. REV. 103, 104 nn.11-12 (1970) [hereinafter cited as Comment, *Impact of Gideon*].

48. 372 U.S. at 336-37.

49. For a survey of the state and federal courts' treatment of the right to counsel after *Gideon,* see Comment, *Impact of Gideon, supra* note 47.

50. The narrow interpretation by some courts as requiring appointment of counsel only for the indigent felon was based on *Gideon's* felony charge. *E.g.,* City of Toledo v. Frazier, 10 Ohio App. 2d 51, 226 N.E.2d 777 (1967); Cortinez v. Flournoy, 249 La. 741, 190 So. 2d 909 (1966).

The broad interpretation by other courts had resulted from the broad language in *Gideon* which makes reference to "crime" and to "any person hauled into court, who is too poor to hire a lawyer." 372 U.S. at 344. *See, e.g.,* City of Tacoma v. Heater, 67 Wash. 2d 736, 409 F.2d 867 (1966); People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965).

A third view, between the narrow and broad interpretations of *Gideon,* held that the right to counsel exists for non-felons where the punishment might be serious. *E.g.,* Irvin v. State, 44 Ala. App. 101, 203 So. 2d 283 (1967); State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964).

51. *E.g.,* Heller v. Connecticut, 389 U.S. 902 (1967); DeJoseph v. Connecticut, 385 U.S. 982 (1966); Winters v. Beck, 385 U.S. 907 (1966).

52. Basically, there were two general standards: whether the offense was serious or petty. For further discussion of the standards see Note, *Right to Counsel, supra* note 39, at 407. *See also* Comment, *Impact of Gideon, supra* note 47, at 105-10.

53. 407 U.S. 25 (1972) (the indigent defendant had been denied the right to court-appointed counsel by the Florida court for an offense for which he was convicted and sentenced to serve 90 days in jail).

54. *Id.* at 37.

right to counsel, like the sixth amendment right to a jury trial, should not apply to "petty offenses" even where a jail sentence is imposed.[55] The holding in *Argersinger* was specifically limited to cases involving loss of liberty, further clarifying the earlier confusion in the wake of *Gideon.*[56]

2. An Equal Protection Requirement

Aside from the sixth amendment requirement of *Gideon,* the appointment of counsel to assist the indigent may be required by the equal protection clause of the fourteenth amendment[57] and incorporated within the fifth amendment due process clause.[58] The equal protection clause of the fourteenth amendment states in part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[59] Consistent with the nondiscriminatory function of this clause, the Supreme Court, in *Griffin v. Illinois,*[60] held that where a state law conditioned appellate review upon the availability of a transcript, the state must make such transcript available without cost to the indigent defendant to ensure equal access to appellate review.[61] Subsequently, in *Douglas v. California,*[62] the Court relied on *Griffin* to hold that *counsel* must be furnished to the indigent defendant on first appeal as a matter of right.[63] Additionally, *Anders v. California*[64] established the requirement that counsel may not withdraw from an appeal he considers frivolous, unless he files a brief set-

55. Duncan v. Louisiana, 391 U.S. 145 (1968), had restricted the right to jury trials to offenses punishable by six months or more. Justice Douglas in *Argersinger* observed that the right to jury trial "has a different geneology and is brigaded with a system of trial to a judge alone. . . . While there is historical support for limiting . . . trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel." 407 U.S. at 29-30. The Court, therefore, rejected "the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." *Id.* at 30-31.

56. 407 U.S. at 37.

57. U.S. CONST. amend. XIV, § 1.

58. "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

59. U.S. CONST. amend. XIV, § 1.

60. 351 U.S. 12 (1956) (after the indigent defendants were convicted of armed robbery, they were denied a transcript, because the could not pay for one, as was a necessary requirement of the state's appellate court).

61. *Id.* at 18-19.

62. 372 U.S. 353 (1963) (indigent defendants, jointly convicted of thirteen felonies, were denied appointment of counsel to assist them on the first appeal).

63. The Court stated that "equality [is] demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record . . . while the indigent . . . is forced to shift for himself." *Id.* at 358.

64. 386 U.S. 738 (1967). *See supra* note 32 and accompanying text.

ting forth the arguable issues on appeal.[65] In 1974, *Ross v. Moffitt*[66] limited the *Griffin-Douglas* concept of equal protection, which had suggested that the question of appointment of counsel would rest on the need for providing equal treatment rather than the need for an attorney's assistance to assure a fair hearing.[67] In *Ross,* a divided Court[68] held that the equal protection clause does not require appointment of counsel for discretionary appellate review, by either a state supreme court or the United States Supreme Court pursuant to a petition for certiorari.[69]

B. The Right to Effective Assistance of Court-Appointed Counsel

The Supreme Court has indicated that the right to the assistance of counsel is a right to *effective* assistance. The constitutional guarantee of effective assistance of counsel was first recognized as a corollary to the basic right to counsel enunciated in *Powell v. Alabama.*[70] The Supreme Court has yet to explain an overall standard for determining attorney effectiveness,[71] addressing the issue instead on a case-by-case basis.[72]

Current standards of review used by the lower courts in determining ineffective assistance of counsel for various claims[73] have

65. *Id.* at 744.

66. 417 U.S. 600 (1974) (an indigent defendant was denied appointment of counsel for review by the North Carolina Supreme Court of a conviction of forgery in the state court).

67. Broadly construed, the *Griffin-Douglas* concept of equal protection could require the appointment of counsel at every stage in a criminal proceeding where the affluent defendent is allowed to have privately retained counsel. Thus, even though due process may not require appointment of counsel, equal protection would make such a requirement. *See, e.g.,* Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1966).

68. The decision was 6 to 3. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell joined. Justice Douglas filed a dissenting opinion, in which Justices Brennan and Marshall joined. 417 U.S. at 602.

69. *Id.* at 619. The Court distinguished these reviews as deciding issues of legal significance, not adjudication of guilt. *Id.* at 615. The Court also recognized that on application for review, the Court would have before it a transcript, the lower court brief, and perhaps an opinion of an intermediate court. *Id.*

70. 287 U.S. 45 (1932).

71. *See* United States v. Decoster, 624 F.2d 196, 247 (D.C. Cir. 1976) (en banc) (Robinson, J., concurring), *cert. denied,* 444 U.S. 944 (1979).

72. *See* Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1, 21 (1973). *See also* Lasater, *The Role of Harm in Ineffective Assistance of Counsel Cases: Practice and Policy,* 32 SYRACUSE L. REV. 759, 765 n.50 (1981).

73. *See, e.g.,* United States v. Baynes, 622 F.2d 66 (3d Cir. 1980) (claim based on defense counsel's failure to introduce exculpatory evidence); Brinkley v. Lefevre,

emerged in an attempt to define the Supreme Court's requirement of "effective assistance of counsel."[74] The two prevailing tests are the "reasonableness"[75] and the "farce and mockery"[76] standards. Most courts have abandoned the use of the latter standard[77] and have adopted the "reasonableness" test for determining effective assistance of counsel.[78] Until the Supreme Court specifically addresses the issue and determines the level of attorney competence required by the Constitution, the lower courts will continue to use different standards in evaluating effective assistance of appointed counsel for the indigent defendant.[79]

IV. THE MAJORITY OPINION

A. Refusal to Extend Anders*: A Constitutional Consideration*

In *Jones v. Barnes,*[80] the Court based its decision on a constitutional analysis of *Anders v. California.*[81] In the view of the majority, the court of appeals[82] had overextended *Anders* by holding that appointed counsel may not abandon a nonfrivolous issue on appeal.[83]

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621 F.2d 45 (2d. Cir.), *cert. denied,* 449 U.S. 868 (1980) (claim based on failure to cross-examine a witness); Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980) (claim based on failure to subpoena witnesses); Henson v. United States, 617 F.2d 510 (8th Cir. 1980) (claim based on failure to present a witness); Strader v. Garrison, 611 F.2d 61 (4th Cir. 1979) (claim based on failure to advise effectively as to guilty pleas).

74. 287 U.S. at 71-73.

75. *See, e.g.,* McMann v. Richardson, 397 U.S. 759 (1970). *See generally* Note, *Ineffective Assistance of Counsel, supra* note 13.

76. *See, e.g.,* Diggs v. Welch, 148 F.2d 667 (D.C. Cir.) *cert. denied,* 325 U.S. 889 (1945). *See generally* Note, *Ineffective Assistance of Counsel, supra* note 13, at 89-90.

77. The Second Circuit is alone in requiring the farce and mockery standard, Barnes v. Jones, 665 F.2d 427, 431 n.4 (2d Cir. 1981), *rev'd,* 103 S. Ct. 3308 (1983).

78. *Id.*

79. The decisions of this Court recognize that the right to counsel is fundamental to a fair trial . . .; and . . . it is this Court's responsibility to determine what level of competence satisfies the constitutional imperative. It also follows that we should attempt to eliminate disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the Courts of Appeals, the Court shirks its central responsibility as the court of last resort, particularly its function in the administration of criminal justice under a Constitution such as ours.

Maryland v. Marzullo, 435 U.S. 1011, 1012-13 (1978) (White, J., dissenting to denial of certiorari).

80. 103 S. Ct. 3308 (1983).

81. 386 U.S. 738 (1967). *See supra* notes 32, 64 and accompanying texts.

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

83. Circuit Judge Meskill had dissented in *Barnes v. Jones,* stating:

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

The Court recognized that the indigent criminal defendant has some rights and authority, including the right to court-appointed counsel on first appeal;[84] ultimate authority to decide whether to plead, waive a jury, testify in his or her own behalf, or take an appeal;[85] and the right to elect to act as his or her own advocate.[86] The Court stated, however, that "[n]either *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 those points."[87]

B. Recognition of Court-Appointed Counsel's Professional Judgment: A Practical and Ethical Consideration

Chief Justice Burger, writing for the majority, cited several practical considerations involved in determining whether an indigent criminal defendant or his court-appointed counsel should select which nonfrivolous issues to present on appeal. The Court expressed concern that the new per se rule established by the court of appeals,[88] which granted client control over the choice of issues on appeal, would "seriously undermine" the ability of counsel to present the client's case in accord with counsel's professional judgment. Therefore, the Court held that court-appointed appellate counsel need not raise every nonfrivolous issue requested by the client if it conflicts with his professional judgment.[89]

To support the importance for counsel to choose and present one central or a few key issues on appeal, Justice Jackson's article, *Advocacy Before the Supreme Court,*[90] and an appellate practice manual[91] were cited as authority. Reference was also made

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lawyer argued some issues before the appellate court, but declined to argue every nonfrivolous claim that Barnes had requested him to present.

The *Anders* standard for judging the effectiveness of appellate counsel requires "that [appointed counsel] support his client's appeal to the best of his ability."

Id. at 437 (citation omitted). *See supra* note 32.

84. *See* Douglas v. California, 372 U.S. 353 (1963).
85. *See* Wainwright v. Sykes, 433 U.S. 72, 92 (1977) (Burger, C.J., concurring).
86. *See* Faretta v. California, 422 U.S. 806 (1975).
87. 103 S. Ct. at 3312 (emphasis added).
88. 665 F.2d at 433.
89. 103 S. Ct. at 3312.
90. 24 TEMP. L.Q. 115, 119 (1951).
91. B. STERN, APPELLATE PRACTICE IN THE UNITED STATES 266 (1981).

to the current practical limitations encountered by counsel on appeal, including page limitations on briefs and time limitations on oral arguments.[92]

The majority also recognized the ethical considerations and inconsistencies involved in representing a criminal defendant on appeal.[93] The Court viewed the Model Rules of Professional Conduct[94] as granting *limited* authority to the criminal client to decide the plea to be entered, whether to waive a jury, and whether to testify.[95] Although the Court conceded that the ABA Standards for Criminal Appeals[96] appear to indicate that counsel should accede to a client's insistence on pressing a particular issue, Chief Justice Burger focused on the ABA Defense Function Standards,[97] which provide that strategic and tactical decisions are the exclusive province of the defense counsel, after consulting with the client. The majority concluded its analysis of ethical considerations by stating "the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution."[98]

V. The Concurring Opinion

Justice Blackmun, in his concurring opinion, viewed the issue in a strictly ethical and procedural sense. He agreed with the dissent[99] that, as an *ethical* matter, an attorney should argue on appeal all nonfrivolous claims upon which his client insists.[100] However, Justice Blackmun agreed with the majority that the ideal allocation of decision-making power between the attorney and the client does not necessarily assume constitutional status where counsel's performance is reasonable and assures the indigent a fair presentation of claims.[101] Justice Blackmun's remedy

92. 103 S. Ct. at 3313.
93. *Id.* at 3313 n.6.
94. *See supra* note 4 and accompanying text.
95. 103 S. Ct. at 3313 n.6.
96. *Id.*
97. *Id.*
98. *Id.*
99. Brennan & Marshall, JJ., dissenting.
100. 103 S. Ct. at 3314 (Blackmun, J., concurring).
101. Justice Blackmun stated:

> I agree with the Court, however, that neither my view, nor the ABA's view, of the ideal allocation of decision-making authority between client and lawyer necessarily assumes constitutional status where counsel's performance is "within the range of competence demanded of attorneys in criminal cases," McMann v. Richardson, 397 U.S. 759, 771 (1970) . . . and "assure[s] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process," Ross v. Moffitt, 417 U.S. 600, 616 (1974) . . . I agree that both these requirements were met here.

for a failure to fulfill these requirements is a writ of habeas corpus.[102] He concluded by stating that counsel's failure to raise nonfrivolous constitutional claims on appeal at the insistence of his client must constitute "cause and prejudice" for a procedural default under state law.[103]

VI. THE DISSENTING OPINION

A. Constitutional Definitions of Assistance of Counsel

Justice Brennan, joined by Justice Marshall in dissent, was in fundamental disagreement with the majority over the meaning of the sixth amendment right to the "assistance of counsel." Constitutional sources for the well-established right to the assistance of counsel for the indigent defendant were acknowledged, including the fourteenth amendment's equal protection clause and the due process clause incorporation of sixth amendment standards.[104] However, Justice Brennan believed that the Constitution does not clearly define the phrase "assistance of counsel."[105]

Justice Brennan referred specifically to the function of counsel under the sixth amendment. The protection of dignity and autonomy of a person on trial by *assisting* him in making his *own* choices was required by the dissent to fulfill that function.[106] *Anders v. California*[107] and *Faretta v. California*[108] were cited as clearly extending the defendant's interests in his case to matters other than the basic structure of his case, such as how to plead

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103 S. Ct. at 3314.

102. *Id.* However, the majority had previously noted as follows:

> The only question present[ed] by this case is whether a criminal defendant has a constitutional right to have appellate counsel raise every nonfrivolous issue that the defendant requests. The availability of federal habeas corpus to review claims that counsel declined to raise is not before us, and we have no occasion to decide whether counsel's refusal to raise requested claims would constitute "cause" for a petitioner's default within the meaning of Wainwright v. Sykes, 433 U.S. 72 (1977). . . .

103 S. Ct. at 3314 n.7.

103. *Id.* at 3314. *See* Wainwright v. Sykes, 433 U.S. 72, 78-80 (1977).

104. *See supra* notes 38, 57-59 and accompanying text.

105. The sixth amendment provides 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. *See* 103 S. Ct. at 3315-16 (Brennan & Marshall, JJ., dissenting).

106. 103 S. Ct. at 3316 (Brennan & Marshall, JJ., dissenting).

107. 386 U.S. 738 (1967). *See supra* notes 32, 64 and accompanying texts.

108. 422 U.S. 806 (1975) (the state court erred in denying a defendant the right to self-representation).

and whether to appeal.[109] The dissent saw the proper role of counsel in the wording of the constitutional provisions itself: to *assist* the defendant with his case.[110]

B. Professional/Ethical Definitions of Assistance of Counsel

Justice Brennan also looked to the legal profession's conception of its proper role in determining the meaning of "assistance of counsel." The ABA Standards for Criminal Appeals state clearly that counsel's role in an appellate proceeding is to advise the client so that the client can make his or her own decisions.[111] Justice Brennan noted that the majority disregarded this clear statement of the profession's definition of the "assistance of counsel."[112] He also noted a distinction at the trial level, where decisions must often be made quickly; however, a decision regarding which issues to bring forth on appeal should be more deliberate.[113]

C. An Attack on the Practicality of the Majority's Decision

Although Justice Brennan complimented the majority's advice that good appellate advocacy demands selectivity among arguments, constitutionality and other policies also should be weighed in the balance. A constitutional rule that encourages attorneys to disregard their client's wishes without cause could only exacerbate the client's probable suspicions of court-appointed attorneys. In addition, Justice Brennan expressed his confidence in appellate judges' abilities to recognize arguments that are meritorious, with truly skillful advocacy making a difference in only a few cases.[114]

The dissent's final disagreement with the majority centered on the individual autonomy and dignity central to fifth and sixth amendment rights. Justice Brennan criticized the majority's conception of the defense attorney's role, that counsel should do nothing beyond what the state considers important. Rather, he saw the role of an attorney in the defense of the client "as the instrument and defender of the client's autonomy and dignity in all

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109. 103 S. Ct. at 3316.

110. *Id.* at 3317.

111. *See supra* note 4.

112. 103 S. Ct. at 3317.

113. *Id.*

114. Justice Brennan commented that most clients would take their lawyers' advice, however, he did not want to deepen the mistrust between clients and lawyers in order to ensure "optimal presentation for that fraction-of-a-handful" of cases where presentation may be determinative. *Id. See infra* note 127 and accompanying text.

phases of the criminal process."[115] Finally, *Von Moltke v. Gillies*[116] was cited in Brennan's dissent to illustrate, in the words of Justice Black, that "undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer."[117]

VII. QUESTIONS RAISED

Prior to the *Barnes*[118] decision, the question of division of power between attorney and client stemmed from an ethical origin, as set out in the ABA Code of Professional Responsibility, the Model Rules for Professional Conduct, and the ABA Standards for Criminal Justice.[119] Due to the inconsistent interpretation and application of ethical standards by individual attorneys,[120] the role of the indigent defendant in his defense is unclear.

The Supreme Court's decision in *Barnes* is significant in that, although it has clarified the constitutional question of the duty of an appointed attorney to his indigent client, it raises and leaves unanswered the ethical considerations. The Court cites the inconsistencies among the ABA Code of Professional Responsibility, the Model Rules for Professional Conduct, and the ABA Standards for Criminal Justice, but does not regard the practices outlined as required by the Constitution.[121] If the ethical standards are subject to various interpretations, however, the duty an attorney has toward one client may differ from his duty toward another client. If the standards differ between court-appointed and retained counsel, a situation may occur in which the indigent defendant is unable to raise certain claims on appeal due to counsel's interpretation of the ethical duty. When a client with retained counsel is able to raise the *same* claims on appeal due to his counsel's interpretation of the ethical duty, the indigent client may be denied, under equal protection, his right to effective coun-

115. *Id.*
116. 332 U.S. 708 (1948).
117. *Id.* at 725-26. 103 S. Ct. at 3319. The majority recognized that the record was ambiguous with regard to what Barnes had requested. The Court, however, assumed that Barnes insisted that his appellate counsel raise the issues and did not simply accept counsel's decision not to press those issues. *Id.* at 3312 n.4.
118. 103 S. Ct. at 3308.
119. *See supra* note 4 and accompanying text.
120. 103 S. Ct. at 3318 n.6 (Brennan, Marshall, J.J., dissenting).
121. *Id.* at 3313 n.6. *See supra* note 4.

sel on appeal. In this way, ethical practices may one day reach constitutional status.

Another area open to question was that of the right to appeal. The majority correctly recognized that there is no *right* to appeal,[122] although there is a right to counsel if appeal is granted.[123] The dissent noted, however, that, as a practical matter, an appeal of a criminal conviction is granted by the states and, therefore, reversal of the notion of no right to appeal is probably forthcoming.[124] If the indigent defendant's counsel does not interpret his ethical duty in such a way as to raise all issues requested by the client, the question remains whether the defendant has been denied his right to appeal if the issue excluded was determinative.

The Court's analysis of *Anders* raises one final question. *Anders*[125] requires counsel to file a brief raising the arguable issues in order to withdraw from an appeal that he believes is frivolous.[126] The Court failed to consider whether a similar document should be required in order to determine if certain nonfrivolous issues should be raised. This exclusion may have been due to the fact that all of the issues demanded by *Barnes* concerned only those excluded in the oral argument.[127] Counsel's brief concentrated on three of the seven meritorious issues suggested in the letter to Barnes.[128] It did not raise any of the issues upon which Barnes insisted. The Court may have considered Barnes' *pro se* brief[129] to adequately represent, in writing, the issues demanded. In this respect, the issues which Barnes insisted should be raised would be only the issues not raised in oral argument. This would alleviate the need for a document setting forth all nonfrivolous issues, as they would be before the court in writing either in counsel's or the defendant's brief.

A practical effect of the decision may be noted. It is possible that the future criminal indigent defendant may become dismayed with his counsel, depending upon which interpretation of ethical standards the attorney practices. Unable to make a consti-

122. *Id.* at 3312.

123. *Id. See* Douglas v. California, 372 U.S. 353 (1963). *See also supra* note 62 and accompanying text.

124. 103 S. Ct. at 3315 n.1.

125. 366 U.S. 738 (1967). *See supra* notes 32, 64 and accompanying text.

126. 386 U.S. at 744.

127. The dissent spoke of *advocacy* making a difference in only a few cases, which indicates that only claims to be raised in oral argument were at issue. 103 S. Ct. at 3316. However, the majority spoke of both *time* limitations and *brief page number* limitations as a rationale for allowing counsel to decide which issues to raise on appeal. *Id.* at 3313 (quoting Jackson, *Advocacy Before the Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951)).

128. 103 S. Ct. at 3311.

129. *See supra* notes 13, 23 and accompanying text.

tutional demand for particular issues to be raised at his appeal, the indigent defendant may choose *pro se* representation. If so, *Barnes* will have created a block to the efficient and effective advocacy that the decision sought to ensure.[130]

VIII. CONCLUSION

Jones v. Barnes[131] was the first determination by the Supreme Court on the constitutional right of an indigent criminal defendant to require his court-appointed counsel to raise certain nonfrivolous legal issues on appeal. Prior to *Barnes,* the allocation of decision-making power between attorney and client was rooted in the legal profession's ethical codes and manuals of standards.[132] Although the Court determined that the indigent defendant has no constitutional right to require counsel to raise every nonfrivolous issue on appeal, the ethical guidelines remain.[133] For the attorney who considers the ethical codes standards manuals, which are often subject to various interpretations, to require an attorney to abide by the requests of the client,[134] the decision in *Barnes* will have no effect. For the attorney who reads his ethical duty to the client as a limited one, the *Barnes* decision reinforces his interpretation of the duty, but on constitutional grounds.[135] The indigent defendant's control over the issues on his appeal will, therefore, depend entirely upon individual ethical interpretation by attorneys, as the constitutional dimensions have now been clearly provided by the Supreme Court.

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130. The Court stated, "a duty [imposed on appointed counsel] to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders.*" 103 S. Ct. at 3314.
131. *Id.* at 3308.
132. *See supra* note 4.
133. *See* ABA STANDARDS FOR CRIMINAL APPEALS, *supra* note 4.
134. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 4.
135. 103 S. Ct. at 3314.