Jones v. Barnes

Lewis F. Powell Jr.

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BOBTAIL BENCH MEMORANDUM

Jones v. Barnes
No. 81-1794

Jim

February 22, 1983

I. Question Presented

Did the CA2 err in holding that, on appeal from a criminal conviction, the 6th and 14th A's require assigned appellate counsel to raise every nonfrivolous issue requested by the deft?
II. Facts

Resp was convicted of robbery and assault. A new attorney, Michael Melinger, was appointed to represent resp on appeal. Resp informed the attorney by letter of a number of points he wanted raised on appeal, including that he had been denied effective assistance of trial counsel. Resp accompanied his letter with a pro se supplemental brief. Melinger responded, however, that he would not argue the ineffective assistance claim, although he identified a number of other points he intended to pursue. Resp then prepared a supplemental pro se brief, and Melinger and resp each submitted briefs to the NY App. Div., although at oral argument Melinger asserted none of the arguments raised in the pro se briefs. Resp's conviction was affirmed by order. The NY Ct. App. denied leave to appeal. After his first federal habeas petn was denied (an ineffective-of-trial-counsel claim for failure to introduce certain evidence), resp petitioned the NY Ct. App. for reconsideration. That petn also was denied.

III. Proceedings Below

Resp then filed this habeas action, essentially arguing that his appellate representation had been ineffective. The DC concluded that resp had exhausted his state remedies by alleging ineffective assistance of appellate counsel in his petn for reconsideration before the NY Ct. App. The DC denied relief on the merits, however, concluding that Melinger had provided reasonably competent representation: "It is not required that an attorney argue every conceivable issue on appeal .... Indeed it is his professional duty to choose
among potential issues, according to his judgment as to their merit and his tactical approach."

The CA2 reversed. It agreed that resp had exhausted his state remedies, because he had properly presented his ineffective assistance argument in his rehearing petn to the Ct. App. On the merits, however, the CA2 concluded that, when "the appellant requests that [his attorney] raise additional colorable points [on appeal], counsel must argue the additional points to the full extent of his professional ability." This conclusion follows from *Anders v. California*, 386 U.S. 738 (1967), where the Court held that an appointed attorney must advocate his client's cause vigorously. While *Anders* acknowledged that attorneys need not press frivolous appeals, the Court held that an attorney may not withdraw from a nonfrivolous appeal. "By extension, *Anders* instructs that" an attorney is similarly barred from abandoning a nonfrivolous issue. The CA2 concluded that, "[h]aving demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims."

Applying these principles to the facts here, the CA2 concluded that Melinger had erred. His failure to press resp's claims had not been cured by his submission of resp's pro se briefs to the NY App. Div. And resp had urged Melinger to press at least two claims that were nonfrivolous: (i) the ineffectiveness of trial counsel, whose failure both to challenge the TC's ruling on the psychiatric testimony and to call resp's father as an alibi witness may, under NY decisions, have constituted error of constitutional dimensions; and (ii) the TC's refusal to offer an accessorial liability instruction.
The CA2 concluded by noting that decisions involving strategy and tactics are committed to the attorney, but that the lawyer's discretion does not extend to the decision to forego potentially meritorious claims.

Judge Meskill dissented. He accepted the majority's conclusion that resp had exhausted his state remedies. But he maintained that the court had overextended Anders. In his view, that case reached only an attorney's attempt to abandon nonfrivolous appeals; it did not suggest that attorneys are barred from declining to advance nonfrivolous issues. To the contrary, Anders recognized that attorneys are those best able to make legal judgments. Thus an appellate lawyer might conclude for tactical reasons to forego making certain claims. And even accepting the majority's legal standard, Judge Meskill rejected the court's characterization of the record: "The record does not support the conclusion that [resp] did more than suggest certain claims to his lawyer and accept his lawyer's judgment that these claims were not useful."

IV. Summary of the Parties' Contentions

A. Petr. By its decision, the CA2 has established a standard for the performance of appellate counsel that will undermine rather than promote effective representation of indigent defts on appeal. This standard has no basis in the Constitution and threatens to interfere substantially with the orderly administration of the appellate process. In order to provide reasonably competent representation, appellate attorneys must be allowed to select issues for presentation to an appellate court in accordance with their professional judgment.
Although the CA2 faults counsel for not yielding to deft's requests to raise several specific issues, no such request can be found in the record. The court relies on the fact that deft chose to supplement his counsel's work by filing several pro se briefs, but those briefs, signed by deft as co-counsel to his assigned counsel, do not constitute a request to raise the issues contained in them. The court also relies on the fact that counsel wrote a letter to deft identifying a number of potential issues for appeal, and then omitted some of those issues from his brief, but that letter from counsel to deft does not constitute a request from deft to counsel.

In any event, the omitted issues were frivolous, or at best barely colorable. Deft's inability to demonstrate that he suffered any prejudice by the omission of the claims compels the conclusion that the CA2 erred in granting the habeas writ.

2. Resp. The CA2 was correct in holding that the constitutional right to counsel and equal access to the courts requires assigned counsel to advocate, on direct appeal of a criminal conviction, those issues urged on him by his indigent client. The CA2's opinion confirms the traditional role of counsel to evaluate the case and consult with his client in the determination of the issues to be raised on appeal. In the few instances in which a client desires to participate in the appellate process and insists, despite his lawyer's advice to the contrary, that particular colorable issues be presented, the client's decision must control.

It is settled that the client, and not his attorney, maintains the absolute right to determine whether he will appeal from his
judgment of conviction. The only way to assure judicial consideration of a particular claim of error is to address the issue in the brief. Indeed, in light of *Wainwright v. Sykes*, 433 U.S. 72 (1977), issues not raised may well be foreclosed forever from review.

The CA2 unanimously found that the issues counsel in this case refused to raise were colorable. Indeed, in light of the weakness of the prosecution's case, it appears that the issues resp wanted counsel to raise in the appellate division would have substantially improved his chance for reversal. In any event, counsel's abandonment of resp on those issue, thereby denying him access to the court, requires that the writ be granted without any additional showing of prejudice.

V. Discussion

A. Request. Given the CA2's holding, the first issue is whether there was any request by resp that certain issues be raised. The CA2 relied on the fact that deft chose to file several *pro se* briefs. I am inclined to agree with Judge Meskill that the record does not support the conclusion that resp did more than suggest certain claims to his lawyer and that the filing of *pro se* briefs, signed by deft as co-counsel to appointed counsel, does not constitute a request to counsel to raise the points that appear in the *pro se* briefs.

Resp did, however, raise the claim of ineffectiveness of trial counsel in both his first letter to resp and in his *pro se* brief sent in response to Melinger's request for suggestions. Although resp did not renew any suggestion that counsel raise the point other
than by filing his pro se briefs, it is plausible to say that resp requested his appellate counsel to raise the ineffective-assistance-of-trial-counsel claim. If I were the DJ, I would say that, as a factual matter, there was no request, but I am less inclined to say that the CA2 was clearly erroneous in assuming that there was such a request. I think the Court would be safe to assume that resp requested that at least the claim of ineffective assistance of trial counsel be raised.

B. Frivolousness. I do not think the claim of ineffective assistance of trial counsel can be considered frivolous.

C. The Right. The CA2 could not, of course, rely on its "farce and mockery" standard of review to create the constitutional right at issue here. Rather, it relied only on Anders. That decision, in turn, was based on Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963), which relied generally on principles of fair process and equal justice drawn from the due process and equal protection Clauses of the 14th A. Neither clause of the 5th A provides an entirely satisfactory basis for evaluating the performance (rather than the availability) of counsel on direct appeal.

This Court has never held that due process requires the State to furnish any right of appeal from a criminal conviction, see Abney v. United States, 431 U.S. 651, 656 (1977) (w/POWELL, J.), and it is not evident how the assistance of counsel becomes an essential element of due process whenever the State elects to provide a right of appeal, see Ross v. Moffitt, 417 U.S. 600, 611 (1974) (w/POWELL, J.) ("Unfairness results only if indigents are singled out by the State..."
and denied meaningful access to the appellate system because of their poverty."). Even more troublesome is whether due process requires that an appellant be afforded an opportunity for a new appeal because his attorney, in the exercise of what is "essentially a private function," see Polk County v. Dodson, 102 U.S. 445, 450 (1981) (POWELL, J.), failed to make a particular argument. There is a substantial question whether such conduct of appellate counsel, whose independence the State is constitutionally obligated to respect, see id., at 451-452, can in any way be considered "state action" for purposes of the due process clause of the 14th A, at least where the state appellate court, in affirming the conviction, did not know or have reason to know of counsel's allegedly inadequate performance. To find state action would be to impose on the State responsibility for conduct for which it cannot fairly be blamed.

Unless the Constitution requires a different level of competence for retained counsel on appeal—and the Court has not so held, cf. Cuyler v. Sullivan, 446 U.S. 335, 342-345 (1980) (POWELL, J.)—-the State may not be said to have deprived an indigent appellant of the equal protection of the laws when appointed counsel does not satisfy the controlling standard of performance. Moreover, if a particular court-appointed attorney handles a case in an ineffective manner, that performance cannot necessarily be attributed to the appellant's indigency, rather than to variation in the training, experience, or dedication among attorneys generally, which non-indigent appellants experience as well. It would not appear, in other words, that the State has treated indigents differently as a class, see Ross, 417 U.S., at 609, simply because the attorney ap-
pointed to represent an indigent deft in a particular case performed in a substandard manner.

This case is totally unlike Anders. Anders involved counsel's role in an entire case; appellate counsel here did not act in the role of an amicus curiae. This case presents the narrow question whether appointed counsel must argue every issue in a direct appeal.

If the Court turns to the standards that guide an attorney's advocacy generally to define due process on direct appeal, it seems clear to me that an attorney has the ethical obligation to make nonfrivolous legal arguments that his client asks him to make. See ABA, Code of Professional Responsibility, EC 7-8 ("In the final analysis, ... the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."). But it is equally clear that raising every nonfrivolous argument is not generally effective advocacy. Thus, to find that the Constitution requires such a course may enforce ethical rules, but has little to do with fairness or "due process."

E. Prejudice. Resp's contention is not that he was denied a lawyer, but that his lawyer was ineffective. Therefore, his claim cannot provide a basis for relief unless he can show that his lawyer's omissions had some likely effect on the outcome of the case. No such showing has been made.

VI. Summary

This case could probably be disposed of on the facts, but I think it is fair to assume that the issue presented is here. On the merits of that issue, I find no constitutional basis for the right
identified by the CA2. I also find the policy arguments persuasive against finding a constitutional duty to raise every nonfrivolous issue on appeal: My limited experience leads me to believe that such a tactic is not generally effective.

I recommend reversing.
CAZ decision holding that appointed counsel must present all non-provocative Qs requested by D.
CA 2 found a request - at least an implied request by Δ to include his arguments.

CA 2 relied on Anderw — a case in which counsel decided not to appeal. 

Due in quite a different selection of issues should be presented.

Consider that a particular issue may be of such relevance that failure to raise it — whether requested or not — could be "ineffective assistance."

Here CA 2 laid down a per se rule that counsel must (eventually) on any issue requested by Δ

There is "state action" here.
Mr. Riesel (Resp)

Facts: C.A. held Riesel's court rights were violated by counsel's refusal to present requested issues. Counsel barred access to appellate court's review.

"Right of access" predicated on D/P. Griffin & Douglas were "access" cases.

If P.S. cases more of "access" cases require that counsel present all requested issues.

Riesel said Brown v. Smith 430 U.S. 817 (law library) is her best authority.

(TM suggests she is relying on 64 Annot.)
Justice Marshall

Affirm

But not the CA2's opinion. It was too extreme. Oakes is an excellent judge. Client has responsibility to tell lawyer what he wants. If lawyer doesn't agree — if appointed — should explain her position to Court.

Justice Blackmun

Rev,

Close & vexing case.

Q: In how much control a client has over the lawyer?

Oakes did go too far. CA2's rationale is "access." ABA supports Oakes. Burden on client to show he insisted Rev. on theory of waiver.

Justice Powell

Rev.

Agree generally with R.W.

No per se rule.

This is essentially an ineffective assistance issue. We should not create some new basis of analysis.

All's for indigent is under same standard as a retained lawyer — but a lawyer has duty to exercise professional judg.
Justice Rehnquist

Rev.
Agree with L.F.P.
What Earl Warren said in Capp and to appointed counsel.

Justice Stevens

Rev.
If we put this case into the "mold" of ineffective assistance we'd have to address what is "ineffective." Perhaps time has come to do this.
Clients' views on fundamental Q's
- e.g., whether to sue - should be respected.
CA 2's OP would unduly burden
Lawyer's prof. duty.
Tactical decisions must be left to counsel.

Justice O'Connor

Rev.
No Court right to have every non-meritorious claim raised.
Client is protected by ineffective assistance doctrine.
Reserve quest of "waiver" by client (?)
CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether defense counsel assigned to prosecute an appeal from a criminal conviction has a constitutional duty to raise every nonfrivolous issue requested by the defendant.

I

In 1976, Richard Butts was robbed at knifepoint by four men in the lobby of an apartment building; he was badly beaten and his watch and money were taken. Butts informed a Housing Authority Detective that he recognized one of his assailants as a person known to him as "Froggy," and gave a physical description of the person to the detective. The following day the detective arrested respondent David Barnes, who is known as "Froggy."

Respondent was charged with first and second degree robbery, second degree assault, and third degree larceny. The prosecution rested primarily upon Butts' testimony and his identification of respondent.1 During cross-examination,

1 This identification, which took place in a one-on-one meeting arranged by the police, was the subject of a pretrial hearing. The trial judge found it unnecessary to rule on the validity of that identification. He concluded
defense counsel asked Butts whether he had ever undergone psychiatric treatment; however, no offer of proof was made on the substance or relevance of the question after the trial judge *sua sponte* instructed Butts not to answer. At the close of trial, the trial judge declined to give an instruction on accessorial liability requested by the defense. The jury convicted respondent of first and second degree robbery and second degree assault.

The Appellate Division of the Supreme Court of New York, Second Department, assigned Michael Melinger to represent respondent on appeal. Respondent sent Melinger a letter listing several claims that he felt should be raised. Included were claims that Butts' identification testimony should have been suppressed, that the trial judge improperly excluded psychiatric evidence, and that respondent's trial counsel was ineffective. Respondent also enclosed a copy of a *pro se* brief he had written.

In a return letter, Melinger accepted some but rejected most of the suggested claims, stating that they would not aid respondent in obtaining a new trial and that they could not be raised on appeal because they were not based on evidence in the record. Melinger then listed seven potential claims of error that he was considering including in his brief, and invited respondent's "reflections and suggestions" with regard to those seven issues. The record does not reveal any response to this letter.

Melinger's brief to the Appellate Division concentrated on three of the seven points he had raised in his letter to respondent: improper exclusion of psychiatric evidence, failure to suppress Butts' identification testimony, and improper

that Butts' subsequent in-court identification was based upon an independent source, since Butts had known respondent for several years prior to the robbery.

2 Respondent's letter is not in the record. Its contents may be inferred from Melinger's letter in response.
cross-examination of respondent by the trial judge. In addition, Melinger submitted respondent's own pro se brief. Thereafter, respondent filed two more pro se briefs, raising three more of the seven issues Melinger had identified.


In 1980, respondent filed two more challenges in state court. On March 4, 1980, he filed a motion in the trial court for collateral review of his sentence. That motion was denied on April 28, and leave to appeal was denied on October 3. Meanwhile, on March 31, 1980, he filed a petition in the New York Court of Appeals for reconsideration of that court's denial of leave to appeal. In that petition, respondent for the first time claimed that his appellate counsel, Melinger, had provided ineffective assistance. The New York Court of Appeals denied the application on April 16, 1980, New York v. Barnes, 49 N. Y. 2d 1001 (1980).

Respondent then returned to United States District Court for the second time, with a petition for habeas corpus based on the claim of ineffective assistance by appellate counsel. The District Court concluded that respondent had exhausted
his state remedies, but dismissed the petition, holding that
the record gave no support to the claim of ineffective assis­
tance of appellate counsel on “any . . . standard which could
reasonably be applied.” No. 80-C-2447 (EDNY, Jan. 30,
1981), reprinted in App. to Pet. for Cert. 25a, 28a. The Dis­
trict Court concluded:

“It is not required that an attorney argue every conceiv­
able issue on appeal, especially when some may be with­
out merit. Indeed, it is his professional duty to choose
among potential issues, according to his judgment as to
their merit and his tactical approach.” Id., at 28a–29a.

A divided panel of the Court of Appeals reversed, 665 F. 2d 427 (CA2 1981). Laying down a new standard, the ma­
jority held that when “the appellant requests that [his attor­
ney] raise additional colorable points [on appeal], counsel
must argue the additional points to the full extent of his pro­
fessional ability.” Id., at 433 (emphasis added). In the
view of the majority, this conclusion followed from Anders v. California, 386 U. S. 738 (1967). In Anders, this Court held
that an appointed attorney must advocate his client’s cause
vigorously and may not withdraw from a nonfrivolous appeal.
The Court of Appeals majority held that, since Anders bars
counsel from abandoning a nonfrivolous appeal, it also bars
counsel from abandoning a nonfrivolous issue on appeal.

 “[A]ppointed counsel’s unwillingness to present particu­
lar 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. . . .” Ibid.

By this time, at least 26 state and federal judges had considered re­
respondent’s claims that he was unjustly convicted for a crime committed five
years earlier; and many of the judges had reviewed the case more than
once. Until the latest foray, all courts had rejected his claims.
The Court of Appeals went on to hold that, "[h]aving demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims." *Id.*, at 434.

The court concluded that Melinger had not met the above standard in that he had failed to press at least two nonfrivolous claims: the trial judge’s failure to instruct on accessory liability and ineffective assistance of trial counsel. The fact that these issues had been raised in respondent’s own *pro se* briefs did not cure the error, since “[a] pro se brief is no substitute for the advocacy of experienced counsel.” *Ibid.* The court reversed and remanded, with instructions to grant the writ of habeas corpus unless the State assigned new counsel and granted a new appeal.

Circuit Judge Meskill dissented, stating that the majority had overextended *Anders*. In his view, *Anders* concerned only whether an attorney must pursue nonfrivolous *appeals*; it did not imply that attorneys must advance all nonfrivolous *issues*.

We granted certiorari, --- U. S. --- (1982), and we reverse.

In announcing a new *per se* rule that appellate counsel must raise every nonfrivolous issue requested by the client, 4 the Court of Appeals relied primarily upon *Anders v. California*, supra. There is, of course, no constitutional right to an appeal, but in *Griffin v. Illinois*, 351 U. S. 12, 18 (1955), and *Douglas v. California*, 372 U. S. 353 (1963), the Court held that if an appeal is open to those who can pay for it,

4The record is not without ambiguity as to what respondent requested. We assume, for purposes of our review, that the Court of Appeals majority correctly concluded that respondent insisted that Melinger raise the issues identified, and did not simply accept Melinger’s decision not to press those issues.
an appeal must be provided for an indigent. It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, see Wainwright v. Sykes, 433 U. S. 72, 93 n.1 (1977) (BURGER, C. J., concurring); ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980). In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, Faretta v. California, 422 U. S. 806 (1975). Neither Anders nor any other decision of this Court suggests, however, 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.

This Court, in holding that a State must provide counsel for an indigent appellant on his first appeal as of right, recognized the superior ability of trained counsel in the "examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf," Douglas v. California, 372 U. S., at 358. Yet by promulgating a per se rule that the client, not the professional advocate, must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermines the ability of counsel to present the client's case in accord with counsel's professional evaluation.

Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated:

"One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is
habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.” Jackson, Advocacy Before the Supreme Court, 25 Temple L. Q. 115, 119 (1951).

Justice Jackson’s observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

“Most cases present only one, two, or three significant questions. . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.” R. Stern, Appellate Practice in the United States 266 (1981).

There can hardly be any question about the importance of having the appellate advocate examining the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed. See, e. g., Fed. Rules App. Proc. 28(g); McKinney’s 1982 New York Rules of Court §§ 670.17(g)(2), 670.22. Even in a

Similarly, a manual on practice before the Court of Appeals for the Second Circuit declares: “[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claim of error can be serious.” Committee on Federal Courts of the Association of the Bar of the City of New York, Appeals to the Second Circuit 38 (1980).
court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 A. B. A. J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, e. g., Godbold, Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal, 30 Sw. L. J. 801 (1976).*

This Court’s decision in Anders, far from giving support to the new per se rule announced by the Court of Appeals, is to the contrary. Anders recognized that the role of the advocate “requires that he support his client’s appeal to the best of his ability.” 386 U. S., at 744. Here the appointed coun-

*The ABA Model Rules of Professional Conduct provide:

“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 shall abide by the client’s decision, . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify.” Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982) (emphasis added).

With the exception of these specified fundamental decisions, an attorney’s duty is to take professional responsibility for the conduct of the case, after consulting with his client.

Respondent points to the ABA Standards for Criminal Appeals, which appear to indicate that counsel should accede to a client’s insistence on pressing a particular contention on appeal, see ABA Standards for Criminal Justice 21–3.2, at 21–42 (2d ed. 1980). The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client. See ABA Standards for Criminal Justice 4–5.2 (2d ed. 1980). See also ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function § 5.2 (Tent. Draft 1970). In any event, 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.
sel did just that. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders. Nothing in the Constitution or our interpretation of that document requires such a standard.

The judgment of the Court of Appeals is accordingly

Reversed.
May 24, 1983

81-1794 Jones v. Barnes

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference
May 25, 1983

Re: No. 81-1794

Jones v. Barnes

Dear Chief,

I cannot agree that we should reverse outright in this case. I would vacate and remand for consideration whether the defendant in this case actually demanded that his attorney brief these issues after receiving the benefit of the attorney's professional advice. I shall accordingly in due course circulate a dissent, not to affirm but to vacate and remand.

Sincerely,

[Signature]

The Chief Justice

Copies to the Conference
May 25, 1983

Re: No. 81-1794 Jones v. Barnes

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

cc: The Conference
May 25, 1983

No. 81-1794  Jones v. Barnes

Dear Chief,

I join your opinion, but I am circulating a separate concurrence to cover the reservation I expressed at Conference concerning a subsequent claim in a habeas petition covering an issue counsel refuses to raise on appeal.

Sincerely,

[Signature]

The Chief Justice

Copies to the Conference
Re: 81-1794 - Jones v. Barnes

Dear Chief,

I agree.

Sincerely,

The Chief Justice

Copies to the Conference

cpm
Chambers Of
Justice John Paul Stevens

May 26, 1983

Re: 81-1794 - Jones v. Barnes

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference
Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1983

Re: No. 81-1794-Jones v. Barnes

Dear Chief:

I await the dissent.

Sincerely,

T.M.

The Chief Justice

cc: The Conference
No. 81-1794 Jones v. Barnes

May 31, 1983

Dear Chief,

I join and my separate concurrence is withdrawn.

Sincerely,

The Chief Justice

Copies to the Conference
81-1794  Jones v. Barnes  (Jim)

CJ for the Court
1st draft 5/24/83
3rd draft 6/30/83
    Joined by BRW, LFP, WHR, JPS, SOC

WJB dissent
1st draft 6/28/93
2nd draft 6/29/83
3rd draft 6/30/83
    Joined by TM

HAB concurring in the judgment
Typed draft 6/29/83
1st printed draft 6/29/83