10-1984

Evitts v. Lucey

Lewis F. Powell, Jr.

dac 04/04/84

PRELIMINARY MEMORANDUM

April 13, 1984 Conference
List 1, Sheet 3

No. 83-1378

KAVANAUGH, et al. OK
v.

LUCEY

Cert to CA 6
(Edwards, Contie, Spiegel)

Federal/Civil

Timely

1. SUMMARY: Petr challenges the federal courts' conclusion that resp was deprived of his due process right to effec-

Dear David

tive assistance of counsel by his counsel's failure to perfect an appeal.

2. FACTS AND DECISION BELOW: Resp was convicted in state court of drug trafficking. Resp's retained counsel filed an appellate brief, but he failed to file a Statement of Appeal, as required by Kentucky law, and his appeal was dismissed.

Resp then filed a habeas corpus action in federal DC, contending that he had been deprived of effective assistance of counsel on appeal. During the course of proceedings, resp and petr stipulated that there was no equal protection violation. The DC granted the petition, although it stayed the writ to permit the state to reinstate petr's direct appeal. The CA affirmed. Although the states are not required to create an appellate system, the federal courts on habeas can correct violations of due process that occurred in the course of appellate proceedings. E.g., Ross v. Moffit, 417 U.S. 600 (1974). Resp's counsel's blunder in seeking an appeal denied petr effective assistance of counsel and thereby violated due process.

CA 6

3. CONTENTIONS: As long as the state's procedural rules comport with the requirements of due process and equal protection, the state constitutionally may dismiss an appeal that does not comply with the rules. See McKane v. Durston, 153 U.S. 684, 687 (1894). The Sixth Amendment by its terms applies to "criminal prosecutions" not appeals. And this Court's cases on the rights of indigents in the appeals process have rested on equal protection, that is concededly not violated in this case.

Griffin v. Illinois, 351 U.S. 12 (1956); Smith v. Bennett, 365 U.S. 708 (1961); Draper v. Washington, 372 U.S. 487 (1963).

Resp: Ross v. Moffitt, 417 U.S. 600 (1974), established that the Due Process as well as the Equal Protection clause places constraints upon the state's operation of its appellate processes. The Court has established that an indigent's appellate counsel must provide a minimum level of competent representation. Entsminger v. Iowa, 386 U.S. 748 (1967); Anders v. California, 386 U.S. 738 (1967). The CAs have reached the same result as the decision here in indistinguishable factual circumstances. See, e.g., Macon v. Lash, 458 F.2d 942, 949-950 (CA7 1972) (opinion of JUSTICE STEVENS, then Circuit Judge); Leventhal v. Gavin, 396 F.2d 441 (CA1 1968). (The response includes three pages listing citations to cases from the CAs and the state courts. Resp, at 9-10, 12-13.) If resp's attorney negligently failed to file the petition in accord with the state court's rules, a sanction should be imposed upon the attorney, rather than requiring the client to forfeit his legal rights. E.g., 496 F.2d 1274, 1278 (CA5 1974).

4. DISCUSSION: As resp observes, there are a host of cases holding that a defendant was denied effective assistance of counsel where counsel's error effectively denied defendant a right of appeal. Those cases seem to be generally distinguishable in two ways. They generally (although not always) involve appointed rather than retained counsel; and they rest upon factors in addition to the mere failure to comply with the state's rules of appellate procedure, such as that attorney was negligent

or inept or that a good faith effort to comply with the rules was made, at least by the defendant. E.g., Horsley v. Simpson, 400 F.2d 708, 711-712 CA5 1968); Rosinski v. United States, 450 F.2d 59 (CA6 1972); Blanchard v. Brewer, 429 F.2d 89, 91-92 (CA8 1970). Here, in contrast, the federal court found ineffective assistance on the basis solely of retained counsel's failure to comply with the rules of the appellate court. It does not appear from the papers filed here that resp was indigent at the time of his trial or appeal.

It is true that the present decision deprives the state of all power to enforce its procedural rules on appeal. If counsel's failure to comply with those rules leads to dismissal, the appellant has received ineffective assistance of counsel and must be permitted to appeal again with new counsel. The courts are well familiar with the tension between relieving a defendant of the consequences of counsel's error and enforcing state rules of procedural default. The tension is particularly acute when evaluating claims of ineffective assistance at the appellate stage because counsel's failure to take the simple steps required to perfect an appeal seems to be in itself sufficient to establish incompetence. One way out of this dilemma, implicit in the CA decisions such as those noted above, is to require on habeas at least some evidence that the failure to comply with appellate rules was not a tactic deliberately adopted by counsel or defendant.

I would not grant this case plenary consideration. It appears, as noted above, that the CAs have adopted an approach

that leaves some efficacy to state procedural rules. The present decision appears to be an unfortunate aberration. Petr neither cites a conflict nor shows that the CAs in elaborating the doctrine of ineffective assistance generally have eviscerated state procedural rules. Further, the case does not promise to clarify the narrow issue that it raises. Petr's brief focuses upon the question whether there is any constitutional right to effective assistance of appellate counsel and emphatically denies that the Due Process clause speaks to the question. In light of the substantial body of precedent on this subject in the federal courts, including this Court, Petr's approach to the problem seems misguided. In sum, the Court should wait to see whether other CAs adopt the indiscriminate approach to appellate ineffective assistance cases exemplified here before itself taking up the matter.

Summary reversal would not be unreasonable, as the decision below does deprive state appellate procedural rules of all effect. The difficulty with summary reversal is that the Court should announce no general standard for this area without plenary consideration. An opinion reversing summarily could say only that the present decision went "too far," without indicating how far was far enough.

IFP Status: Petr has submitted the necessary affidavit.

5. RECOMMENDATION: I recommend denial.

There is a response.

April 4, 1984 Charny Opin in petn

Court ..... *Voted on* ....., *19*April 13, 1984

Argued ....., *19*... *Assigned* ....., *19*... No.

Submitted ....., *19*... *Announced* ....., *19*... 83-1378

KAVANAUGH, Supt.

vs.

LUCEY

Relist
for
5 0'c

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.					~~R~~	Pass							
Brennan, J.			✓										
White, J.		✓											
Marshall, J.					Pass								
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.		✓			~~Pass~~								
Stevens, J.			✓										
O'Connor, J.		✓											

April 20, 1984

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 83-1378

KAVANAUGH, Supt.

vs.

LUCEY

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓		Pass								
Powell, J.			✓										
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

LFP/djb 7/27/84

No. 83-1378, Kavanaugh (Prison Superintendent) v. Lucey

Memorandum for File

This is a summary memorandum on the basis of a preliminary reading of the briefs.

The opinions below and the briefs of the parties are, for the most part, poorly written. This is not unusual in Kentucky cases, though the federal court opinions in this case are no credit to either of them.

Respondent (defendant) was convicted of drug offenses in state court. His appeal (apparently to the Kentucky Court of Criminal Appeals) was dismissed because his retained lawyer failed to file the Statement of Appeal required by Kentucky law. Apparently this is a procedural requirement that resulted in dismissal even though counsel had filed a timely brief and otherwise had complied with Kentucky procedure. The Kentucky Constitution, by an Amendment in 1974, confers the right of appeal from a criminal conviction.

In this Federal Habeas Corpus proceeding the DC found a due process violation of the Federal Constitution where the appeal was denied because of the "ineffective assistance of counsel". The DC conditioned granting of the Writ on Kentucky now allowing appeal or retrying the defendant.

The Court of Appeals (CA 6) affirmed, quoting from and agreeing with the DC's decision. We granted cert apparently

sense between an equal protection and a due process violation. Petitioner responds that the Griffin line of cases all turned on discrimination against indigents, a factor absent in this case as defendant had retained counsel and does not base his claim on indigency.

If I had represented the defendant, I would have based my argument primarily on the fact that the Kentucky constitution confers a right to appeal and that effective assistance of counsel is necessary to enjoy that right. Yet respondent does not argue the case that way. Rather, he seems to say that whatever may be the law in the states, the federal constitution requires effective assistance of counsel on state appeal.

I have not read the federal cases, even those by our Court. Respondent's brief sites an array of cases that are said to support his position (see Appendix to Brief), and claims that there is not a single case to the contrary. The case is an interesting one, and I will be interested in my Clerk's views.

LFP

Preliminary Review 9/2. Tully

Ky case in which retained counsel, on the first appeal from a felony conviction, failed to comply with the Ky Rules. The failures (#2) were technical requirements unrelated to substance. Ky Court of Appeals dismissed the appeal, & advised State Bar Committee of counsel's failure.

dro 08/24/84

Resp. instituted this fed H/C, claiming a D/P Const. right to effective assistance of counsel on appeal.

no denial of E/P claimed

The State says since there is no Const. right to appeal there is no right to effective assistance - i.e. no right to counsel even where the Ky. Constitution provides for a right to appeal.

Resp. argues that since Ky. has provided a right, it must be exercised by an "effective" counsel.

Dan's views: Both parties err in their arguments. The right to effective assistance - if it exists - does not rest on a "right to appeal". Rather, it rests on the "right to counsel" recognized in Douglas v. Calif that found a Const right to counsel on the first state appeal. (But Douglas is E/P case

Parties do not address whether in fact the failure to comply with the Rules was "ineffective assistance" Resp'd in this case.

BENCH MEMORANDUM

No. 83-1378 CA6

Kavanaugh v. Lucey

August 24, 1984

In Wainwright v Torna, 455 U.S. at 587-88, the Court noted that Ross v. Moffett held that a criminal defendant has no right to counsel on a discretionary state appeal.

Question Presented

Whether the Constitution guarantees a right to effective assistance of counsel on appeal.

Thus, Torna held that since there was no right to counsel there was no denial of Constitutional rights where counsel was ineffective. Here, a first appeal was involved & Douglas required counsel, & this means effective assistance.

I. Facts and Decisions Below.

Resp was found guilty by a jury in the Madison (Ky.) Circuit Court of trafficking in LSD and cocaine. The court entered final judgment on March 29, 1977 and retained counsel filed a timely notice of appeal. In addition, counsel prepared the record and filed a brief with the Ky. Ct. App. on time. In the brief, he argued that the admission of certain photographs, the jury charge, and the prosecutor's comments during summation each constituted reversible error.

The Commonwealth filed a motion to dismiss the appeal on the ground that resp had failed to comply with Ky. R. App. P. 1.095(a)(1). This rule requires that the Ky. Ct. App. pleadings contain "[t]he same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.090." Ky. R. App. P. 1.090, in turn, requires various information such as the names of the parties, the names and addresses of counsel, the name and address of the trial judge, the date of judgment and of the notice of appeal, and various procedural information. All of this information appears to have been contained in the other documents petr submitted for the appeal.

formal matters of no substance

The Ky. Ct. App. dismissed the appeal because "the appellant ... failed to supply the information required by RAP 1.095(a)(1)." App. 37a. It also denied resp's motion for reconsideration and the Ky. S.Ct. later refused review, thereby affirming the dismissal.

Resp filed for habeas in E.D.Ky. (Moynahan, J.). The DC adopted the magistrate's report and recommendation, which found

that resp "was denied the effective assistance of counsel on appeal when his retained attorney failed to file a Statement of Appeal, thereby resulting in ... dismissal ...," App. 60a, and the DC then granted habeas relief. Its judgment stayed the writ for 120 days in order to give the State an opportunity to reinstate resp's direct appeal or initiate proceedings to retry him. It also referred the conduct of resp's counsel (the same as his counsel on habeas) to the Board of Governors of the Ky. State Bar Assoc.

On first appeal, the CA6 refused to pass on the ineffective assistance claim. Instead, it remanded the case for determination of whether the dismissal violated equal protection since no such action appeared to have been taken in any other case under similar facts. Judge Jones dissented, simply stating that "[a]ppellate counsel's failure to comply with Kentucky's Rule of Appellate Procedure 1.095(a)(1), causing dismissal of the appeal without a consideration of the merits, is ineffective assistance of counsel violative of due process." Lucey v. Seabold, 645 F.2d 547, 548 (1981) (original emphasis).

On remand, both parties agreed that an evidentiary hearing was unnecessary. They stipulated that no equal protection issue existed in the action. Resp then asked the DC to reissue the writ previously granted. The DC agreed to but stayed the writ for the same period as before. Its memorandum opinion, more thorough than before, relied exclusively on CA6 precedent recognizing a right to effective assistance of counsel on appeal.

On second appeal, the CA6 rejected Ky's argument that "since there is 'no constitutional due process entitlement to state-court appeal[] and assistance of counsel (it exists only at trial) ... it is clear that [resp] suffered no constitutional deprivation when his state appeal was lawfully dismissed.'" App. 65a. Although the CA6 recognized that due process does not create a right to appeal, see McKane v. Durston, 153 U.S. 684 (1894), it held that once a state creates an appellate system that system must comport with due process. Following its own precedent, the CA6 held that counsel's failure to file all the necessary appellate papers violated resp's right to effective appellate counsel. It accordingly affirmed the DC judgment.

II. Discussion.

Both parties misunderstand the case. The State argues that a right to effective assistance of appellate counsel can stem only from the right to an appeal. And this Court, it correctly points out, has held that the Constitution does not guarantee such a right. McKane v. Durston, supra. In its view, since appeal is permissive, (but not in Ky), the State can condition it on any procedural requirements it wishes. Any other regime, it adds, would make state appellate rules virtually unenforceable since a defendant could "cure" any default by claiming ineffective assistance.

Resp, on the other hand, points out that the Ky. Constitution grants a right to a direct appeal, Ky. Const., §115, and argues that this right is meaningless unless accompanied by a

Ky grants ~~grants~~ right to appeal

right to effective assistance of counsel. He also correctly notes that the state and lower federal courts have uniformly held that such a right exists. The State, in turn, argues that these cases all rest on equal protection grounds, which, it was stipulated, is not an issue here. Resp disagrees.

The major problem with both sides' arguments is that they mistake the source of the right to effective assistance. Both wrongly assume that it must spring from a right to appeal. They disagree only about where this right to appeal must be located: the State insisting that it must be located in the federal Constitution, while resp argues that the state constitution or perhaps a statute will do. There are of course many other legal problems in the roads they travel, but because their initial assumptions are so mistaken there is not much point in developing and evaluating their subsequent arguments. Once the source of the right to effective assistance is properly located, most of the difficulties in the case disappear.

Right to effective assistance does not come from a right to appeal.

The source of the right

In Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam) (summary affirmance), this Court identified the source of this right. In that case, a state prisoner's retained counsel failed to file a cert petn with the Fla. S.Ct. on time and the Fla. S.Ct. dismissed the application. The prisoner then filed for habeas in DC contending that his retained counsel's failure to file on time violated his right to effective assistance. The DC denied the writ because it believed that his counsel's failure did not render the proceedings fundamentally unfair. In reaching

J.O.T.

this conclusion, it thought significant the fact that Fla. S.Ct. review was discretionary.

The CA5 reversed on the basis of two cases. One, a prior CA5 case, held that appointed counsel's failure to file timely for cert in state court constituted ineffective assistance. The other, Cuyler v. Sullivan, 446 U.S. 335 (1980), held that defendants who retain counsel and those who have counsel appointed for them enjoy the same right to effective assistance. Of course Together, the CA5 held, these two cases implied a right to effective assistance of retained counsel on discretionary review.

In Wainwright v Torna This Court reversed summarily and in the process demonstrated how to analyze this type of claim. In Ross v. Moffitt, 417 U.S. 600 (1974), the Court noted, it had held that a criminal defendant does not have a constitutional right to counsel while pursuing discretionary state appeals or applying for review in this Court. The Court believed Ross controlled, because "[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." Wainwright v. Torna, 455 U.S., at 587-588 (footnote omitted). In other words, the Court found the source of the right to effective assistance not in the "right to an appeal" but rather in the "right to counsel". Thus, one's right to effective assistance at a particular appellate level depends not on one's statutory or constitutional right to that level of appeal but rather on an indigent's constitutional right to have counsel appointed at that particular level. (Does this make a difference if there is a right to a first appeal?)

Applying the Torna analysis to the present case is straight-forward. In Douglas v. California, 372 U.S. 353 (1963), the Court held that the Constitution guaranteed the right to counsel on first appeal. It based this right on both due process and equal protection grounds. See Ross v. Moffitt, 417 U.S., at 609. In the present case, since it was his first appeal that his counsel failed to perfect, resp did have a right to effective assistance. The only interesting question is whether this right was violated. Unfortunately, neither party addresses this issue. Both just assume that counsel violated such a right if it exists. Because the briefs offer no guidance as to standards of effective assistance on appeal, the rest of my discussion is necessarily tentative.

Resp did have a rt. to effective assistance on first appeal. The Q is whether right was violated

Last Term in Strickland v. Washington, 104 S.Ct. 2052 (1984), this Court determined the standards for ineffective assistance of trial counsel. The test has two prongs. In order to obtain a new trial, the defendant must show both (i) that his counsel's behavior was professionally unreasonable, id. at 2065-2066, and (ii) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, id. at 2068. The Court also recognized, however, that in some limited circumstances, such as actual or constructive denial of assistance of counsel, prejudice can be presumed because it "is so likely that case by case inquiry into prejudice is not worth the cost." Id. at 2067.

dealt with trial counsel

To decide this case, it is probably unwise and unnecessary for the Court to adopt any general rule such as the

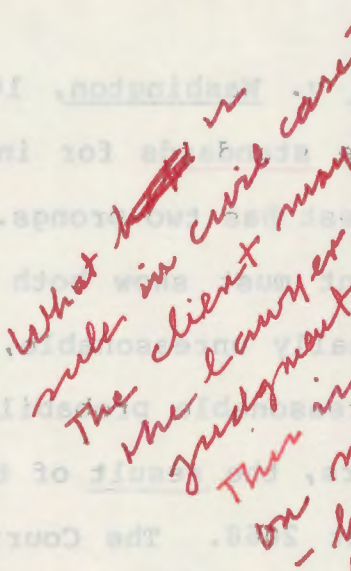
what about letting time lapse - e.g. J.O.T.

Strickland standard. Further reflection in the lower courts on the type of standards best applied to appellate claims would be helpful, especially since the briefs do not speak to this issue at all. Furthermore, a procedural error like the one here would probably amount to a per se violation under almost any standard. A court would most likely presume prejudice from any procedural error that cuts off the right to an appeal entirely. Spending time analyzing prejudice in such a situation would serve little function. In most cases, it would lead only to an inefficient duplication of effort. In effect, the court deciding the ineffective assistance claim would have to decide the merits of the underlying appeal. In other words, it would have to decide the appeal in order to decide whether the state appeals court should decide it.

In practical terms, this is a much different inquiry than that involved in Strickland. There, the appellate court, looking at a well-developed trial record, has to determine only whether a particular trial error would have made a difference given the overall context of the case. It must decide only whether a particular error could reasonably be thought to have shifted the weight of the rest of the case from one verdict to the other. A court looking at an initial appellate procedural error, however, is working in a vacuum. Although it has a trial record, since the procedural error cut off the appeal entirely, the court has no appellate context to work from. To judge whether an appeal would have made a difference, it would, in effect, have to decide the appeal itself. Of course, a per se rule

Yes - here only fault was failure to follow rules

Yes


what is
rule in civil case?
The client may sue
the lawyer; & the
judgment stands.
This is enough
on most clients.
- but Rules must
be enforced

should not extend to all appellate ineffective assistance claims. Such a rule would be most inappropriate when the charge is that counsel failed to make an argument well or perhaps at all. In such situations, something like the two-pronged Strickland test should apply.

Applying a per se rule here, moreover, would pose no special danger to a state's enforcement of its appellate rules. The State argues that such rules would be meaningless if a defendant could "cure" any default by claiming ineffective assistance. For one thing, however, a per se rule would remove only one (albeit a powerful) incentive for following the State's appellate procedures. Although a defendant who defaults and claims ineffective assistance may get a second crack at appeal, his counsel runs the risk of bar proceedings and damage to his professional reputation. In this case, in fact, the DJ reported counsel to the Ky. Bar Committee. The threat of these sanctions would most likely keep a lawyer from abusing ineffective assistance claims. For another thing, there is little gain to be gotten from a procedural default. A lawyer is unlikely to fail to follow a state's procedural rules in order to try to obtain some strategic advantage.

Finally, there is no merit to the State's claim that a right to effective appellate counsel poses some special danger to state court procedures. The truth is that it poses no greater danger than does the right to effective assistance at trial. Both "cure" any procedural default by granting a new hearing or trial. In the trial context, the courts have recognized that the

If a failure to follow a Rule is not viewed as ineffective assistance (e.g. — J.O.T.), the client suffers just as much as if failure was deliberate

state's interest in procedural regularity and the defendant's interest in a fair trial must both be accomodated. A similar accomodation is no more dangerous--or less necessary--on appeal.

III. Summary.

Under this Court's decision in Torna, the right to effective assistance of appellate counsel depends on an indigent's right to appointed counsel at that particular level of appeal. In Douglas v. California, this Court held that the Constitution guarantees a right to counsel on first appeal. Thus, unless the Court wishes to overrule either Torna (a summary reversal) or Douglas, it must find that resp had a right to effective assistance of counsel on his direct appeal in this case.

Right to the first appeal was granted in California

(E/P case)

IV. Recommendation.

Affirm but w/o stating a test

I would recommend affirming the CA6 without laying down any general appellate effective assistance standards. Not only have the parties failed completely to brief this issue, but also Strickland's recentness means that the state and lower federal courts have not had time to consider whether and how it might apply to appeals. Furthermore, an appellate procedural default, like this one, that cuts off completely the right to appeal would appear to be a per se violation under almost any test the Court might devise. Thus, affirming the CA6 without laying down a general test would answer the narrow question presented--whether a right to effective appellate counsel exists--, dispose of it

If a failure to follow a Rule is not viewed as ineffective assistance (e.g. — J.O.T.), the client suffers just as much as if failure was deliberate

state's interest in procedural regularity and the defendant's interest in a fair trial must both be accomodated. A similar accomodation is no more dangerous--or less necessary--on appeal.

There is a right to ~~counsel~~ counsel

III. Summary.

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fairly, and leave for another day the question of what violates that right.

Discuss with Dan

lfp/ss 10/08/84 KAVA SALLY-POW

83-1378 Kavanaugh v. Lucey (CA6 on Federal Habeas)

The following are miscellaneous notes possibly relevant to consideration of the above case. See Dan's bench memo, and my preliminary memo to file.

Ross v. Moffitt, 417 U.S. 600, held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals.

In Wainwright v. Torna, 455 U.S. ~~3[illegible]~~ 587 (a PC decision reversing CA5), the Florida Supreme Court had dismissed an appeal on the ground that the application was not filed timely. The convicted felon filed a §2254 petition for habeas, contending that he had been denied his right to effective assistance of counsel by the failure of his retained counsel to comply with the appellate court's rules. In Florida at that time an appeal was purely discretionary, and therefore under Ross v. Moffitt the criminal defendant had no constitutional right to counsel to pursue an appeal. In Wainwright we therefore ~~hold~~ held:

Fla

> "Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by retained counsel's failure to file the application timely."

And in footnote in the PC opinion, we said:

> "Respondent was not denied due process of law by the fact that counsel deprived him of his right to petition the Florida Supreme Court for review. Such deprivation - even if implicating a due process interest - was caused by his counsel, and not by the state. The action of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law." 455 U.S., at 588, n. 4.

* * *

In this case, where Kentucky provided a right of appeal, apparently there ~~was~~ would have been a constitutional right to counsel derived from the Equal Protection Clause ~~(does~~ it ~~make any different that~~ (in this case it is stipulated that there was no denial of equal protection?) Respondent's appeal was dismissed by the Kentukcy Court of Appeals because retained counsel failed in his petition to include certain formal information required by Kentucky Rules. The Court of Appeals held this was a per se failure to provide effective assistance, and therefore that respondent was entitled either (1) for the appeal to be reinstated or (2) he be given a new trial.

This case is troublesome. On the one hand, it ~~is~~ certainly unfair when an appeal of right exists, if that right is frustrated by an error of counsel. A right

to sue counsel often would be unproductive, and the defendant would have lost an opportunity to reverse his conviction. On the other hand, a state has a substantial interest in enforcing its own appeallate rules, and the penalty on the state of reinstating the appeal or granting a new trial is not an insubstantial one.

Of course, as Dan's memo points out, there has been no finding in this case of ineffective assistance. Yet, counsel surely is ineffective if he fails to comply with the Rules, and apparently excuses are not acceptable because of the possible injustice to the convicted client. We know here how frequently requests for extensions of time are filed because of illness, demands of other work, presence of a new counsel, etc. If extensions were not granted, ineffective

In tems of fairness, a convicted defendant who has only a discretionary right to appeal may well be injured as seriously by failure of counsel to perfect the appeal as the defendant who loses a right to appeal because of counsel's negligence. Yet, as the footnote in Torna states, where the appeal is discretionary ~~only~~ there is no constitutional right to counsel (Ross v. Moffitt). The deprivation is "caused by counsel and not by the state". I must say that this is a good deal less than a

satisfactory reasons for such an important difference: in one case the convicted defendant gets a new trial and in the other case he does not. In a rational system of justice, one would think there should not be this disparate result. Possibly the distinction between a discretionary and an absolute right of appeal is an unsound one, and that Ross v. Moffitt should be reconsidered.

Docketed but not read!

Full

lfp/ss 10/10/84 LUCEY SALLY-POW

83-1378 Kavanaugh v. Lucey

Rights on Appeal:

Griffin v. Illinois, 351 U.S. 12. The Equal Protection Clause requires that where an indigent defendant has a right of appeal he be given a transcript of the trial record.

Douglas v. California, 372 U.S. 353. Involves the right of an indigent to appointed counsel on a first appeal where the state grants the right to such an appeal. The first appeal in California was to a District Court of Appeal, and Douglas' request for counsel was denied. Following Griffin, and on equal protection grounds, this Court held that where the "first appeal, granted as a matter of right to rich and poor alike, an indigent must be provided counsel."

Ross v. Moffitt, 417 U.S. 600. We held that there is no constitutional right to an appeal, and therefore when an appeal is discretionary only there is no right to appointed counsel or to the effective assistance of counsel. My understanding of Moffitt is that it

applies to any discretionary appeal - whether a first or second appeal.

Wainwright v. Torna, 455 U.S. 586. In a Per Curiam by John Stevens, where retained counsel had failed to file appeal on time we held there was no denial of a constitutional right as appeal was only discretionary. The deprivation resulted from private action (the neglect of counsel); not from deprivation of a constitutional right.

83-1378 KAVANAUGH v. LUCEY

Argued 10/10/84

Henry (Ant AG – Ky)

The right to effective assistance depends on an indigent's right to appeal

Resp. is ~~no longer in custody~~ has recently been released from penal. But not moot because ~~of~~ of collateral consequently. * State is ordered by CA6 in to grant an appeal.

(But B.R.W. said if we find case moot, we would vacate the order of CA6)

Answering JPS, counsel ~~argued~~ said appointed counsel is provided on appeal in Ky, & the ~~result~~ position of Ky S/Ct on the Question before us would be raised whether counsel is appointed or retained.

Distinguishes Douglas & Griffin because in this case it is ~~be~~ stipulated that there is no E/P denial. ~~Where~~ Where there is no discrimination there is no denial of D/P

?

His provider might LO appeal the civil case
civil case - state procedures at
counsel req'd
denial of D/P ?

Radigan (Resp)

Even tho. Δ is no longer under ~~and~~ any restraint by State, case is not moot.

Unless conviction is expunged, this conviction could be introduced vs Resp in any ~~futt~~ future prosecution. Also relevant under "habitual criminal" enhancement if subsequently convicted on another crime.

WHR's Question: If counsel failed to file notice of appeal w/in prescribed 30 days. Radigan answered this would be ineffective assistance & would entitle Δ to an appeal anyway.

SOC noted the Q as to ~~his~~ WHRs quest. ~~is~~ is whether there ~~is~~ was a const. rt. to counsel.

Rodigan advises us that more recently Ky S/Ct allowed a delayed appeal when counsel does not comply with Rules.

Affm 7-2

No. 83-1378, Kavanaugh v. Lucey Conf. 10/12/84

The Chief Justice ~~Affm~~ Rev.
Not moot.
If ineffective assistance claim is allowed, would affect the entire system adversely. May be deterrent of claim were E/P rather than D/P.
Douglas not controlling

Justice Brennan ~~Rev.~~ Affm
If there is a right to appeal, counsel must meet standard of Strickland.
Any number of procedures are available to protect the system.

Justice White ~~Rev tentative~~ Affm tentative

Justice Marshall Aff'm

Justice Blackmun Aff'm tentatively
Troublesome.
Not moot.

Justice Powell Aff'm. ~~[illegible]~~
~~[illegible]~~ The Q is whether there is a Const. right to effective assistance of counsel on appeal in Ky. This depends on whether State grants right to appeal.
As Ky does grant right to appeal, the criminal Δ ~~[illegible]~~ also has a right to counsel — including effective assistance.
Appellate Court should have flexibility as to remedy — possible to inquire as to harmless error.

Criminal ~~[illegible]~~ filing here - if late - are not jurisdictional. If only a fine (no imprisonment) there is no right to counsel

Justice Rehnquist Rev

No const. right to appeal. This is clear.

Mere fact that ~~~~ appeal is provided in Ky, doesn't change situation

6th Amend. doesn't apply to appeal.

Consequences can be severe.

Justice Stevens Aff'm

Had this problem in CA7

Some disagreement as to whether D/P or E/P grounds apply. Agree with Harlan that that D/P is applicable.

Agree ~~~~ there is no Const. right to appeal but almost all states (except Va) confer right to appeal

Most Cts have managed this problem w/o difficulty.

Write narrowly. Client must show he wanted an appeal

Justice O'Connor Aff'm

Analyze under D/P

Where there is appeal as of right, ~~~~ there is a ~~~~ right to effective assistance.

State must provide a delayed appeal or its equivalent.

Where only a ~~~~ fine (not imprisonment) there is no right to counsel

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 12, 1984

No. 83-1378

Kavanaugh v. Lucey

Dear Chief,

I'll try my hand at an opinion for the Court in the above case.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 15, 1984

Re: No. 83-1378 Kavanaugh v. Lucey

Dear Chief,

I would be happy to take on the dissent in this case.

Sincerely,

The Chief Justice

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

October 25, 1984

MEMORANDUM TO THE CONFERENCE

Re: Paul Kavanaugh, Superintendent,
Blackburn Correctional Complex and
David L. Armstrong v. Keith E. Lucey
No. 83-1378

When the above case was argued before you on October 10, 1984, counsel for respondent Lucey was requested to submit a letter indicating whether his client wished to continue with his case.

Attached is a copy of the letter which I received from counsel for Mr. Lucey.

Respectfully submitted,

Alexander L. Stevas
Clerk

Attachment

WALKER & RADIGAN
ATTORNEYS AT LAW
SUITE 303, LEGAL ARTS BUILDING
200 SOUTH SEVENTH STREET, LOUISVILLE, KY. 40202

WILLIAM M. RADIGAN
PATRICIA G. WALKER

(502) 583-7713

October 22, 1984

Mr. Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: Kavanaugh and Armstrong v. Lucey, No. 83-1378

Dear Mr. Stevas:

During the oral argument in the above-captioned case on October 10, 1984, Chief Justice Burger raised the issue of mootness inasmuch as Mr. Lucey had been released from parole and had had his civil rights restored. The Chief Justice specifically requested that I contact Mr. Lucey to find out whether he still wishes to continue his case.

I wrote to Mr. Lucey upon my return to Louisville on Thursday, October 11, 1984. Today I finally received Mr. Lucey's response.

Mr. Lucey unequivocally wishes to continue with his case. He believes that he has valid claims on his appeal of his conviction, and wishes, as he has since 1978, to have his direct appeal to the Court of Appeals of Kentucky reinstated, if possible. Consequently, Mr. Lucey would like to complete his present case before this Court.

I hope that this will prove to be sufficient. If there are any questions on this matter, please feel free to contact me.

Sincerely,

William M. Radigan

WMR:klm

cc: Mr. Gerald Henry

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 29, 1984

Re: 83-1378 - Kavanaugh v. Lucey

Dear Bill:

Please join me.

Respectfully,

JPS

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 29, 1984

Re: No.83-1378 Kavanaugh v. Lucey

Dear Bill,

In due course I will circulate a dissent in this case.

Sincerely,

WHR/gb

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 29, 1984

Re: No. 83-1378 Kavanaugh v. Lucey

Dear Bill:

I am generally content with the analysis of your draft opinion and I agree with its conclusion. I do, however, have two concerns with the draft as currently written. First, the second complete sentence on page 8, if taken out of context, might suggest a right to effective assistance of counsel in judicial proceedings in general. I am troubled by such a suggestion, and I would prefer that the sentence be deleted.

My second, and more general, concern is that part I. C. of the draft gives too little attention to the distinction drawn by Ross v. Moffit, 417 U.S. 600 (1974), between appeals as of right and discretionary appeals. It would be desirable, in my view, to acknowledge our holding in Wainwright v. Torna, 455 U.S. 586 (1982) (per curiam), that there is no right to counsel, and therefore no right to effective assistance of counsel, for discretionary appeals. Some discussion on this point would, I believe, fit logically into the analysis of the right to effective assistance for a first appeal as of right that appears at pages 8 and 9 of the draft.

If you could accommodate my concerns in this regard, I would be happy to join your opinion.

Sincerely

Sandra

Justice Brennan

Copies to the Conference

dro 11/30/84

Joined by TM, JPS
WHR will dissent
#3

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: JUSTICE BRENNAN'S opinion in Kavanaugh v. Lucey, No. 83-1378.

JUSTICE BRENNAN'S opinion is very well reasoned and well written. I have only a few comments. First, I agree with JUSTICE O'CONNOR'S two suggestions: (i) dropping the second complete sentence on page 8 or at least making it clear that the term "judicial proceedings" is used in a quite limited sense and (ii) tying together some of the analysis through Wainwright v. Torna. Second, if I remember correctly, you were troubled by finding ineffective assistance in the context of a jurisdictional bar to appeal. JUSTICE BRENNAN'S present opinion makes clear that the default here is non-jurisdictional, but nothing in the reasoning of the opinion limits the holding to this situation. Thus, lower courts will probably apply the holding to jurisdictional defaults too. I am still not convinced that ineffective assistance should be analyzed differently in the context of jurisdictional defaults. But if you still feel strongly that it should be, you could ask JUSTICE BRENNAN to make clear that the holding extends

only to non-jurisdictional defaults. Such a course would leave the case of jurisdictional defaults to another day.

p. 8, 9, 10

50'C
has joined

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: DEC 4 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1378

PAUL KAVANAUGH, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS *v.* KEITH E. LUCEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

Douglas v. *California*, 372 U. S. 353 (1963), held that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal as of right. In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such an appeal.

I

On March 21, 1976, a Kentucky jury found respondent guilty of trafficking in controlled substances. His retained counsel filed a timely notice of appeal to the Court of Appeals of Kentucky, the state intermediate appellate court. Kentucky Rule of Appellate Procedure 1.095(a)(1) requires appellants to serve on the appellate court the record on appeal and a "Statement of Appeal" that is to contain the names of appellants and appellees, counsel, and the trial judge, the date of judgment, the date of notice of appeal, and additional information.[1] See *England* v. *Spalding*, 460 S. W. 2d 4, 6

[1] Kentucky Rule of Appellate Procedure 1.090 provided:
"In all cases the appellant shall file with the record on appeal a statement setting forth: (a) The name of each appellant and each appellee . . . (b) The name and address of counsel for each appellant and each appellee. (c) The

This draft incorporates Justice O'Connor's suggestions and adds a minor cite. No substantive changes were made.
-Dan

(Ky. 1970) (rule "is designed to assist this court in processing records and is not jurisdictional"). Respondent's counsel failed to file a Statement of Appeal when he filed his brief and the record on appeal on September 12, 1977.[2]

When the State filed its brief, it included a motion to dismiss the appeal for failure to file a Statement of Appeal. The Court of Appeals granted this motion because "appellant has failed to supply the information required by RAP 1.095(a)(1)." J. A. 37a. Respondent moved for reconsideration, arguing that all of the information necessary for a statement of appeal was in fact included in his brief, albeit in a somewhat different format. At the same time, respondent tendered a Statement of Appeal that formally complied with the State rules. The Court of Appeals summarily denied the motion for reconsideration. Petitioner sought discretionary review in the Supreme Court of Kentucky, but the judgment of the Court of Appeals was affirmed in a one-sentence order. In a final effort to gain State appellate review of his conviction, respondent moved the trial court to vacate the judg-

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name and address of the trial judge. (d) The date the judgment appealed from was entered, and the page of the record on appeal on which it may be found. . . . (e) The date the notice of appeal was filed and the page of the record on appeal on which it may be found. (f) Such of the following facts, if any, as are true: (1) a notice of cross appeal has been filed; (2) a supersedeas bond has been executed; (3) any reason the appeal should be advanced; (4) this is a suit involving multiple claims and judgment has been made final . . .; (5) there is another appeal pending in a case which involves the same transaction or occurrence, or a common question of law or fact, with which this appeal should be consolidated, giving the style of the other case; (6) the appellant is free on bond."

[2] The argument headings on the appellate brief were: "I. Was it error to admit photographs of the appellant into evidence which lacked any probative value and served only to mislead and to arouse the passion and prejudice of the jury? II. Did the charge to the jury meet the requirements of the due process of law? III. Was the appellant denied his constitutional right to a fair trial by improper conduct during the trial and by prejudicial comments made by the prosecutor during his summation?" Joint Appendix, at 7a–8a. The merits of none of these claims are before us.

ment or to grant a belated appeal. The trial court denied the motion.

Respondent then sought federal habeas corpus relief in the United States District Court for the Eastern District of Kentucky. He challenged the constitutionality of the State's dismissal of his appeal because of his lawyer's failure to file the Statement of Appeal, on the ground that the dismissal deprived him of his right to effective assistance of counsel on appeal guaranteed by the Fourteenth Amendment. The District Court granted respondent a conditional writ of habeas corpus ordering his release unless the State either reinstated his appeal or retried him.[3] The State appealed to the Court of Appeals for the Sixth Circuit, which reached no decision on the merits but instead remanded the case to the District Court for determination whether respondent had a claim under the Equal Protection Clause.

On remand, counsel for both parties stipulated that there was no equal protection issue in the case, the only issue being whether the State's action in dismissing respondent's appeal violated the Due Process Clause. The District Court thereupon reissued the conditional writ of habeas corpus. On January 12, 1984, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. We granted the State's petition for certiorari. —— U. S. —— (1984). We affirm.[4]

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[3] The district court also referred petitioner's counsel to the Board of Governors of the Kentucky State Bar Association for disciplinary proceedings for "attacking his own work product." See J. A. 44a. Petitioner is not represented by the same counsel before this Court.

[4] The State informed this Court five days prior to oral argument that respondent had been finally released from custody and his civil rights, including suffrage and the right to hold public office, restored as of May 10, 1983. However, respondent has not been pardoned and some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other

II

Respondent has for the past seven years unsuccessfully pursued every avenue open to him in an effort to obtain a decision on the merits of his appeal and to prove that his conviction was unlawful. The Kentucky appellate courts' refusal to hear him on the merits of his claim does not stem from any view of those merits, and respondent does not argue in this Court that the State was constitutionally required to render judgment on the appeal in his favor. Rather the issue we must decide is whether the State's dismissal of the appeal, despite the ineffective assistance of respondent's counsel on appeal, violates the Due Process Clause of the Fourteenth Amendment.

Before analyzing the merits of respondent's contention, it is appropriate to emphasize two limits on the scope of the question presented. First, there is no challenge to the District Court's finding that respondent indeed received ineffective assistance of counsel on appeal. Respondent alleges—and the State does not deny in this Court—that his counsel's failure to obey a simple court rule that could have such drastic consequences required this finding. We therefore need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. Cf. *Strickland* v. *Washington*, —— U. S. —— (1984); *United States* v. *Cronic*, —— U. S. —— (1984). Second, the stipulation in the District Court on remand limits our inquiry solely to the validity of the State's action under the Due Process Clause of the Fourteenth Amendment.[5]

Respondent's claim arises at the intersection of two lines of cases. In one line, we have held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first

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felony charges in the future. This case is thus not moot. See *Carafas* v. *LaVallee*, 391 U. S. 234, 238 (1968); *Sibron* v. *United States*, 392 U. S. 40, 55–57 (1968).

[5] Seemingly, respondent entered the stipulation because his attorney on appeal had been retained, not appointed.

appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective," see *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956); among those safeguards are the right to counsel, see *Douglas* v. *California*, 372 U. S. 353 (1961). In the second line, we have held that the trial-level right to counsel, created by the Sixth Amendment and applied to the states through the Fourteenth Amendment, see *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963), comprehends the right to effective assistance of counsel. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). The question presented in this case is whether the appellate-level right to counsel also comprehends the right to effective assistance of counsel.

A

Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane* v. *Durston*, 153 U. S. 684 (1894). Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956) (plurality opinion), the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. In *Griffin* itself, a transcript of the trial court proceedings was a prerequisite to a decision on the merits of an appeal. See *id.*, at 13–14. We held that the State must provide such a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an "adequate and effective" appeal. *Id.*, at 20; see also *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214, 215 (1958) *(per curiam)* (invalidating state rule giving free transcripts only to defendants who could convince trial judge that "justice will thereby be promoted"); *Burns* v. *Ohio*, 360 U. S. 252 (1959) (invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction);

Lane v. *Brown*, 372 U. S. 477 (1963) (invalidating procedure whereby meaningful appeal was possible only if public defender requested a transcript); *Draper* v. *Washington*, 372 U. S. 487 (1963) (invalidating state procedure providing for free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivolous).

Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. See *Griffin*, 351 U. S., at 20. Therefore, *Douglas* v. *California*, *supra*, recognized that the principles of *Griffin* required a State that afforded a right of appeal to make that appeal more than a "meaningless ritual" by supplying an indigent appellant in a criminal case with an attorney. 372 U. S., at 358. This right to counsel is limited to the first appeal as of right, see *Ross* v. *Moffitt*, 417 U. S. 600 (1974), and the attorney need not advance *every* argument, regardless of merit, urged by the appellant, see *Jones* v. *Barnes*, —— U. S. —— (1983). But the attorney must be available to assist in preparing and submitting a brief to the appellate court, *Swenson* v. *Bosler*, 386 U. S. 258 (1967) *(per curiam)* and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. See *Anders* v. *California*, 386 U. S. 738 (1967); see also *Entsminger* v. *Iowa*, 386 U. S. 748 (1967).

B

Gideon v. *Wainwright*, 372 U. S. 335 (1963), held that the Sixth Amendment right to counsel was "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Id.*, at 340, quoting *Betts* v. *Brady*, 316 U. S. 455, 465 (1942); see also *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). *Gideon* rested on the "obvious truth" that lawyers are "necessities, not luxu-

ries" in our adversarial system of criminal justice. *Id.*, at 344. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). The defendant's liberty depends on his ability to present his case in the face of "the intricacies of the law and the advocacy of the prosecutor," *United States* v. *Ash*, 413 U. S. 300, 309 (1973); a criminal trial is thus not conducted in accord with due process of law unless the defendant has counsel to represent him.[6]

As we have made clear, the guarantee of counsel "cannot be satisfied by mere formal appointment," *Avery* v. *Alabama*, 308 U. S. 444 (1940). "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland* v. *Washington*, —— U. S. ——, —— (1984); see also *McMann* v. *Richardson*, 397 U. S. 759, 771 n. 14 (1970) ("It has long been recognized that the right to counsel is the right to the effective as-

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[6] Our cases dealing with the right to counsel—whether at trial or on appeal—have often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353, 358 (1963) (noting the benefit of "counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behald"). Such cases emphasize the defendant's need for counsel in order to obtain a *favorable* decision. The facts of this case emphasize a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case. In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all. Cf. *Anders* v. *California*, 386 U. S. 738 (1967); *Entsminger* v. *Iowa*, 386 U. S. 748 (1967).

sistance of counsel."); *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). Last Term, we emphasized this point while clarifying the standards to be used in assessing claims that trial counsel failed to provide effective representation. See *United States* v. *Cronic*, —— U. S. —— (1984); *Strickland* v. *Washington*, *supra*. Because the right to counsel is so fundamental to a fair trial, the Constitution can not tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.

As the quotation from *Strickland*, *supra*, makes clear, the constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed. See *Cuyler* v. *Sullivan*, *supra*, at 342–345. The Constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." *Cuyler* v. *Sullivan*, *supra*, at 343 (citations omitted).

C

The two lines of cases mentioned—the cases recognizing the right to counsel on a first appeal as of right and the cases recognizing that the right to counsel at trial includes a right to effective assistance of counsel—are dispositive of respondent's claim. In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, and the consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an un-

represented defendant at trial—is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.[7] This result is hardly novel. The petitioners in both *Anders* v. *California*, 386 U. S. 738 (1967), and *Entsminger* v. *Iowa*, 386 U. S. 748 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that counsel's failure in *Anders* to submit a brief on appeal and counsel's waiver in *Entsminger* of the petitioner's right to a full transcript rendered the subsequent judgments against the petitioners unconstitutional.[8] In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant

[7] As *Ross* v. *Moffitt*, 417 U. S. 600 (1974), held, the considerations governing a discretionary appeal are somewhat different. See *infra* p. ——. Of course, the right to effective assistance of counsel is dependent on the right to counsel itself. See *Wainwright* v. *Torna*, 455 U. S. 586, 587–588 (1982) *(per curiam)* ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the appeal timely.") (footnote omitted).

[8] Moreover, *Jones* v. *Barnes*, —— U. S. —— (1983), adjudicated a similar claim "of ineffective assistance by appellate counsel." *Id.*, at ——. In *Jones*, the appellate attorney had failed to raise every issue requested by the criminal defendant. This Court rejected the claim, not because there was no right to effective assistance of appellate counsel, but because counsel's conduct in fact served the goal of "vigorous and effective advocacy." *Id.*, at ——. The Court's reasoning would have been entirely superfluous if there were no right to effective assistance of counsel in the first place.

has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel.

Recognition of the right to effective assistance of counsel on appeal requires that we affirm the Sixth Circuit's decision in this case. The State objects that this holding will disable state courts from enforcing a wide range of vital procedural rules governing appeals. Counsel may, according to the State, disobey such rules with impunity if the state courts are precluded from enforcing them by dismissing the appeal.

The State's concerns are exaggerated. The lower federal courts—and many state courts—overwhelmingly have recognized a right to effective assistance of counsel on appeal.[9]

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[9] See, *e. g.*, *Francois* v. *Wainwright*, 741 F. 2d 1275, 1284–1285 (CA11 1984); *Tsirizotakis* v. *Lefevre*, 736 F. 2d 57, 65 (CA2), *cert. denied*, —— U. S. —— (1984); *Branch* v. *Cupp*, 736 F. 2d 533, 537–538 (CA9 1984); *Alvord* v. *Wainwright*, 725 F. 2d 1282, 1291 (CA11), *cert. denied*, —— U. S. —— (1984); *Cunningham* v. *Henderson*, 725 F. 2d 32 (CA2 1984); *Doyle* v. *United States*, 721 F. 2d 1195 (CA9 1983); *Gilbert* v. *Sowders*, 646 F. 2d 1146 (CA6 1981) *(per curiam)* (dismissal of appeal because retained counsel ran afoul of "highly technical procedural rule" violated due process); *Perez* v. *Wainwright*, 640 F. 2d 596, 598 n. 3 (CA5 1981) (citing cases), *cert. denied*, 456 U. S. 910 (1982); *Robinson* v. *Wyrick*, 635 F. 2d 757 (CA8 1981); *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010 (CA6), *cert. denied sub nom. Sowders* v. *Cleaver*, 451 U. S. 1008 (1981); *Miller* v. *McCarthy*, 607 F. 2d 854, 857–858 (CA9 1979); *Passmore* v. *Estelle*, 594 F. 2d 115 (CA5 1979), *cert. denied*, 446 U. S. 937 (1980); *Cantrell* v. *State*, 546 F. 2d 652, 653 (CA5), *cert. denied*, 431 U. S. 959 (1977); *Walters* v. *Harris*, 460 F. 2d 988, 990 (CA4 1972), *cert. denied sub nom. Wren* v. *United States*, 409 U. S. 1129 (1973); *Macon* v. *Lash*, 458 F. 2d 942, 949–950 (CA7 1972); *Hill* v. *Page*, 454 F. 2d 679 (CA10 1971) (performance of retained counsel on appeal to be judged by standards of *Anders* and *Entsminger*); *Blanchard* v. *Brewer*, 429 F. 2d 89 (CA8 1970) (dismissal of appeal when retained counsel failed to serve papers properly held violation of due process); see also *Harkness* v. *State*, 264 Ark. 561, 572 S. W. 2d 835 (1978) *(per curiam)*; *People* v. *Barton*, 21 Cal. 3d 513, 579 P. 2d 1043 (1978); *Erb* v. *State*, 332 A. 2d 137 (Del. 1974); *Hines* v. *United States*, 237 A. 2d 827 (D. C. App. 1968); *Barclay* v. *Wainwright*, 444 So. 2d 956 (Fla. 1984); *McAuliffe* v. *Rutledge*, 231 Ga. 745, 204 S. E. 2d 141 (1974); *State* v. *Er-*

These decisions do not seem to have had dire consequences for the States' ability to conduct appeals in accordance with reasonable procedural rules. Nor for that matter has the longstanding recognition of a right to effective assistance of counsel at trial—including the recognition in *Cuyler* v. *Sullivan, supra*, that this right extended to retained as well as appointed counsel—rendered ineffectual the perhaps more complex procedural rules governing the conduct of trials. See also *United States* v. *Cronic, supra*; *Strickland* v. *Washington, supra*.

To the extent that a State believes its procedural rules are in jeopardy, numerous courses remain open. For example, a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction. If instead a State chooses to dismiss an appeal when an incompetent attorney has violated local rules, it may do so if such action does not intrude upon the client's due process rights. For instance the State of Kentucky itself in other contexts has permitted a postconviction attack on the trial judgment as "the appropriate remedy for frustrated right of appeal," *Hammershoy* v. *Commonwealth*, 398 S. W. 2d 883 (Ky. 1966); this is but one of several solutions

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win, 57 Ha. 268, 554 P. 2d 236 (1976); *People* v. *Brown*, 39 Ill. 2d 307, 235 N. E. 2d 562 (1968); *Burton* v. *State*, —— Ind. ——, 455 N. E. 2d 938 (1983); *Wilson* v. *State*, 284 Md. 664, 669–671, 399 A. 2d 256, 258–260 (1979); *Irving* v. *State*, 441 So. 2d 846, 856 (Miss. 1983); *People* v. *Gonzalez*, 47 N. Y. 2d 606, 393 N. E. 2d 987 (1979); *Shipman* v. *Gladden*, 253 Or. 192, 453 P. 2d 921 (1969); *Commonwealth* v. *Wilkerson*, 490 Pa. 296, 416 A. 2d 477 (1980); *Grooms* v. *State*, 320 N. W. 2d 149 (SD 1982); *In re Savo*, 139 Vt. 527, 431 A. 2d 482 (1981); *Rhodes* v. *Leverette*, 160 W. Va. 781, 239 S. E. 2d 136 (1977). These cases diverge widely in the standards used to judge ineffectiveness, the remedy ordered, and the rationale used. We express no opinion as to the merits of any of these decisions.

that state and federal courts have permitted in similar cases.[10] A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant—the right to effective assistance of counsel—has been violated.

III

The State urges that our reasoning rests on faulty premises. First, the State argues that because the State need not establish a system of appeals as of right in the first instance, the State is immune from all constitutional scrutiny when it chooses to have such a system. Second, the State denies that respondent had the right to counsel on his appeal to the Kentucky Court of Appeals because such an appeal was a "conditional appeal," rather than an appeal as of right. Third, the State argues that, even if its actions here are subject to constitutional scrutiny and even if the appeal sought here was an appeal as of right, the Due Process Clause—upon which respondent's claimed right to effective assistance of counsel is based—has no bearing on the State's actions in this case. We take up each of these three arguments in turn.

A

In support of its first argument, the State initially relies on *McKane* v. *Durston*, *supra*, which held that a State need not provide a system of appellate review as of right at all. See also *Ross* v. *Moffitt*, *supra*, at ——; *Jones* v. *Barnes*, *supra*,

[10] In *Stahl* v. *Commonwealth*, 613 S. W. 2d 617 (Ky. 1981), the Kentucky Supreme Court noted that, if on post-conviction motion the defendant could prove that counsel was ineffective on appeal, "the proper procedure is for the trial court to vacate the judgment and enter a new one, whereupon an appeal may be taken from the new judgment." *Id.*, at 618. See also *Rodriquez* v. *United States*, 395 U. S. 327, 332 (1969) (ordering similar remedy for denial of appeal in federal prosecution); *United States* v. *Winterhalder*, 724 F. 2d 109 (10th Cir. 1983) *(per curiam)* (discussing remedies).

at ——. The State derives from this proposition the much broader principle that "whatever a state does or does not do on appeal—whether or not to have an appeal and if so, how to operate it—is of no due process concern to the Constitution . . . ." Brief for Petitioner, at 23. It would follow that the State's action in cutting off respondent's appeal because of his attorney's incompetence would be permissible under the Due Process Clause.

This argument need not detain us long. The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. See *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970). Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. See *Morrisey* v. *Brewer*, 408 U. S. 471, 481–484 (1972). See also *Graham* v. *Richardson*, 403 U. S. 365, 374 (1971); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971); *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 165–166 (1951) (Frankfurter, J., concurring). In short, when a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.

B

The State's second argument relies on the holding of *Ross* v. *Moffitt*, *supra*, that a criminal defendant has a right to counsel only on appeals as of right, not on discretionary state appeals. According to the State, the Kentucky courts permit criminal appeals only on condition that the appellant follow the State rules and statutes governing such appeals. See *Brown* v. *Commonwealth*, 551 S. W. 2d 557, 559 (1977).

Therefore, the system does not establish an appeal as of right, but only a "conditional appeal" subject to dismissal if the state rules are violated. The State concludes that if respondent has no appeal as of right, he has no right to counsel—or to effective assistance of counsel—on his "conditional appeal."

Under any reasonable interpretation of the line drawn in *Ross* between discretionary appeals and appeals as of right, a criminal defendant's appeal of a conviction to the Kentucky Court of Appeals is an appeal as of right. Section 115 of the Kentucky Constitution provides that "[i]n all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court." Unlike the appellant in the discretionary appeal in *Ross*, a criminal appellant in the Kentucky Court of Appeals typically has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion. See *Ross*, *supra*, at 615. In addition, the State fails to point to any source of Kentucky law indicating that a decision on the merits in an appeal like that of respondent—unlike the discretionary appeal in *Ross*—is contingent on a discretionary finding by the Court of Appeals that the case involves significant public or jurisprudential issues; the purpose of a first appeal in the Kentucky court system appears to be precisely to determine whether the individual defendant has been lawfully convicted. In short, a criminal defendant bringing an appeal to the Kentucky Court of Appeals has not previously had "an adequate opportunity to present his claims fairly in the context of the State's appellate process." See *id.*, at 616. It follows that for purposes of analysis under the Due Process Clause, respondent's appeal was an appeal as of right, thus triggering the right to counsel recognized in *Douglas* v. *California*, 372 U. S. 353 (1963).

C

Finally, the State argues that even if the Due Process Clause does apply to the manner in which a State conducts its

system of appeals and even if the appeal denied to respondent was an appeal as of right, the Due Process Clause nonetheless is not offended by the State's refusal to decide respondent's appeal on the merits, because that Clause has no role to play in granting a criminal appellant the right to counsel—or *a fortiori* to the effective assistance of counsel—on appeal. Although it may seem that *Douglas* and its progeny defeat this argument, the State attempts to distinguish these cases by exploiting a seeming ambiguity in our previous decisions.

According to the State, the constitutional requirements recognized in *Griffin*, *Douglas*, and the cases that followed had their source in the Equal Protection Clause, and not the Due Process Clause, of the Fourteenth Amendment. In support of this contention, the State points out that all of the cases in the *Griffin* line have involved claims by indigent defendants that they have the same right to a decision on the merits of their appeal as do wealthier defendants who are able to afford lawyers, transcripts, or the other prerequisites of a fair adjudication on the merits. As such, the State claims, the cases all should be understood as equal protection cases challenging the constitutional validity of the distinction made between rich and poor criminal defendants. The State concludes that if the Due Process Clause permits criminal appeals as of right to be forfeited because the appellant has no transcript or no attorney, it surely permits such appeals to be forfeited when the appellant has an attorney who is unable to assist in prosecuting the appeal.

The State's argument rests on a misunderstanding of the diverse sources of our holdings in this area. In *Ross* v. *Moffitt*, *supra*, at 608–609, we held that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment." Accord *Bearden* v. *Georgia*, —— U. S. ——, —— (1983) ("Due proc-

ess and equal protection principles converge in the Court's analysis in these cases.") See also Note, The Supreme Court, 1962 Term, 77 Harv. L. Rev. 62, 107, n. 13 (1963) (citing cases). This rather clear statement in *Ross* that the Due Process Clause played a significant role in prior decisions is well supported by the cases themselves.

In *Griffin*, for instance, the State had in effect dismissed petitioner's appeal because he could not afford a transcript. In establishing a system of appeal as of right, the State had implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with law. But having decided that this determination was so important—having made the appeal the final step in the adjudication of guilt or innocence of the individual, see *Griffin*, *supra*, at 18—the State could not in effect make it available only to the wealthy. Such a disposition violated equal protection principles because it distinguished between poor and rich with respect to such a vital right. But it also violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved. In *Griffin*, we noted that a court dispensing "justice" at the trial level by charging the defendant for the privilege of pleading not guilty "would make the constitutional promise of a fair trial a worthless thing." *Id.*, at 17. Deciding an appeal on the same basis would have the same obvious—and constitutionally fatal—defect. See also *Douglas*, *supra*, at 357 (procedure whereby indigent defendant must demonstrate merit of case before obtaining counsel on appeal "does not comport with fair procedure"); *Anders* v. *California*, 386 U. S. 738, 744 (1967) ("constitutional requirement of substantial equality *and fair process* can only be attained where counsel acts in the role of an active advocate") (emphasis added).

Our decisions in *Anders*, *Entsminger* v. *Iowa*, *supra*, and *Jones* v. *Barnes*, *supra*, are all inconsistent with the State's interpretation. As noted above, all of these cases dealt with the responsibilities of an attorney representing an indigent criminal defendant on appeal.[11] Although the Court reached a different result in *Jones* from that reached in *Anders* and *Entsminger*, all of these cases rest on the premise that the State must supply indigent criminal appellants with attorneys who can provide specified types of assistance—that is, that such appellants have a right to effective assistance of counsel. The State claims that all such rights enjoyed by criminal appellants have their source in the Equal Protection Clause, and that such rights are all measured by the rights of nonindigent appellants. But if the State's argument in the instant case is correct, nonindigent appellants themselves have no right to effective assistance of counsel. It would follow that indigent appellants also have no right to effective assistance of counsel, and all three of these cases erred in reaching the contrary conclusion.

The lesson of our cases, as we pointed out in *Ross*, *supra*, at 609, is that each Clause triggers a distinct inquiry: "'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal Protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[12] In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but

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[11] See *supra* p. ——.

[12] See also *Bearden* v. *Georgia*, —— U. S. ——, —— (1983). We went on in *Ross* to analyze the issue presented there—the right to counsel on discretionary appeals—primarily in terms of the Equal Protection Clause. See *id.*, at 611. However, neither *Ross* nor any of the other cases in the *Griffin* line ever rejected the proposition that the Due Process Clause exerted a significant influence on our analysis in this area.

had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the *Griffin* and *Douglas* cases and both Clauses supported the decisions reached by this Court.

Affirmed.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 4, 1984

83-1378 - Kavanaugh v. Lucey

Dear Bill,

I shall await Bill Rehnquist's dissent.

Sincerely yours,

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 4, 1984

No. 83-1378 Kavanaugh v. Lucey

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

December 7, 1984

83-1378 KAVANAUGH v. LUCEY

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

Copies to the Conference

LFP/vde

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 1984

Re: No. 83-1378, Evitts, Superintendent v. Lucey

Dear Bill:

Please join me.

I think the petitioner has been replaced by a successor named Evitts. At least, the Clerk's Office so advised us by a circulation on October 11. Should the title therefore be corrected accordingly?

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 7, 1985

MEMORANDUM TO THE CONFERENCE

No. 83-1378

Evitts v. Lucey

I do not plan to make any changes in the circulated opinion in response to Bill's dissent.

Sincerely,

Bill

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 9, 1985

Re: 83-1378 - Evitts v. Lucey

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

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

January 16, 1985

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 83-1378 - Evitts, Superintendent v. Lucey

Dear Bill,

I will add this brief "snapper."

"Few things have plagued the administration of criminal justice, or contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials and the lack of finality.

"Today, the Court, as Justice Rehnquist cogently points out, adds another barrier to finality and one that offers no real contribution to fairer justice. I join Justice Rehnquist in dissenting."

Regards,

WEB

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

January 17, 1985

No. 83-1378

Evitts v. Lucey

Dear Chief,

Thank you very much for your note of January 16. I don't intend to make any response. I assume, therefore, that the case can come down on Monday next by which time I assume your "snapper" will have been printed.

Sincerely,

Bill

The Chief Justice

Copies to the Conference

83-1378 Kavanaugh v. Lucey (Dan)

WJB for the Court 10/12/84
1st draft 11/29/84
2nd draft 12//84
3rd draft 12/17/84
4th draft 1/8/85
Joined by TM 11/29/84
JPS 11/29/84
SOC 12/4/84
LFP 12/7/84
HAB 12/10/84
BRW 1/9/85

WHR dissenting
1st draft 1/2/85
2nd draft 1/11/85

WHR will dissent 11/29/84

BRW awaiting dissent 12/4/84
WEB joins WHR dissent 1/16/85