Journal of Criminal Law and Criminology

Volume 74
Issue 4 *Fall*

Article 10

Fall 1983

Sixth and Fourteenth Amendments--Appointed Counsel Has No Constitutional Duty to Argue All Nonfrivolous Issues on Appeal

David J. Gross

0091-4169/83/7404-1353
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 74, No. 4

Printed in U.S.A.

SIXTH AND FOURTEENTH AMENDMENTS—APPOINTED COUNSEL HAS NO CONSTITUTIONAL DUTY TO ARGUE ALL NONFRIVOLOUS ISSUES ON APPEAL

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

I. INTRODUCTION

In *Jones v. Barnes*,[1] the Supreme Court held that attorneys appointed to appeal criminal convictions have no constitutional duty to raise every nonfrivolous issue that defendants request them to argue.[2] The Supreme Court previously had held that, under the fourteenth amendment, an indigent defendant is entitled to the assistance of counsel on a first appeal.[3] Once appointed, counsel must meet a minimum standard of effectiveness[4] and act as an advocate for the defendant rather than as a friend of the court.[5] Aside from these general propositions, however, the Court had not clearly articulated the specific constitutional duties that appointed counsel owe their clients. In *Barnes*, the Supreme Court examined these duties and held that counsel can provide a constitutionally adequate defense while refusing to raise nonfrivo-

---

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

[2] The Second Circuit noted that appellate counsel is not required to raise frivolous issues on appeal even at the client's request. When counsel, in good faith, determines that the defendant's case is wholly frivolous, he may "advise the court and request permission to withdraw." Anders v. California, 386 U.S. 738, 744 (1967); *see also* Ellis v. United States, 356 U.S. 674, 675 (1958) (per curiam). When the defendant asks counsel to argue both frivolous and nonfrivolous issues on appeal, counsel is permitted to raise only the colorable points and omit frivolous issues. *See, e.g.*, State *ex rel.* Henderson v. Boone Circuit Court, 246 Ind. 207, 204 N.E.2d 346 (1965); Bennett v. State, 161 Me. 489, 214 A.2d 667 (1965). According to ABA STANDARDS FOR CRIMINAL JUSTICE, Criminal Appeals § 3.2 commentary d, at 79 (1970), appellate counsel may raise frivolous issues at the defendant's request, but counsel has no duty to pursue them vigorously. *See* Johnson v. United States, 360 F.2d 844, 847 (D.C. Cir. 1966) (Burger, C.J., concurring); Wallace v. State, 247 Ind. 405, 215 N.E.2d 354 (1966).

[3] *See* Entsminger v. Iowa, 386 U.S. 748 (1967); Douglas v. California, 372 U.S. 353 (1963).

[4] *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).

[5] *See, e.g.*, Ellis v. United States, 356 U.S. 674 (1958)(per curiam).

lous issues that defendants request be argued on appeal.[6] Attorneys can fulfill the constitutional requirement of supporting the client's appeal to the best of their ability[7] by arguing only those points which, in their professional judgment, appear strongest. Although the dissent objected that the decision was inconsistent with fundamental conceptions of equality, individual autonomy, and professional responsibility,[8] pressing practical concerns motivated the Court to allow and even advise appointed counsel to make fewer arguments on appeal than defendants might wish.

This Note will examine the practical considerations that motivated the Court's decision to grant considerable discretion to the attorney in determining which nonfrivolous issues to raise on appeal. It will also discuss and evaluate the dissent's objections to this decision.

II. FACTS AND PROCEDURAL HISTORY

In 1976, a jury convicted David "Froggy" Barnes of first and second degree robbery and second degree assault.[9] The Appellate Division of the Supreme Court of New York assigned Michael Melinger to represent Barnes on appeal. Barnes sent Melinger a letter listing the arguments he would like raised on appeal.[10] In response, Melinger

---

[6] The majority assumed that Barnes had insisted that his appellate counsel raise issues, and that his counsel refused to do so. *Barnes*, 103 S. Ct. at 3312 n.4. Justice Brennan, in dissent, stated that this crucial issue was left in doubt by the lower court and argued that the case should be remanded on this point. *Id.* at 3319 (Brennan, J., dissenting).

[7] *Anders*, 386 U.S. at 744 (holding that counsel have a duty under the sixth amendment to prosecute a nonfrivolous appeal to the best of their professional ability).

[8] *Barnes*, 103 S. Ct. at 3315-19 (Brennan, J., dissenting).

[9] A housing authority detective arrested Barnes for robbing and beating Richard Butts at knifepoint. *Id.* at 3310. The prosecution's case relied primarily upon Butts' testimony and his identification of Barnes. *Id.* Butts claimed that Barnes grabbed him from behind while other men stole his watch and money. Barnes v. Jones, 665 F.2d 427, 429 (2d Cir. 1981), *rev'd*, 103 S. Ct. 3308 (1983). The identification rested on Butts' previous familiarity with Barnes, which was crucial because the trial court held that Butts' bedside identification of Barnes after the mugging, although admissible, was "the worst possible way of having a showing made." *Id.*

Several occurrences at trial later became the basis for Barnes' appeal. During cross-examination, the trial court instructed Butts not to answer whether he had undergone psychiatric treatment. Defense counsel sought to impeach Butts' credibility by introducing a psychiatric medical report which suggested that Butts had a history of "blacking out." Defense counsel, however, did not establish the relevancy of the "blacking out" to Butts' ability to identify Barnes. *Id.* Barnes testified that he was home with his father at the time of the alleged mugging, but trial counsel did not call Barnes' father as a witness nor did he allude to Barnes' alibi in the final summation. Finally, at the close of trial the judge declined to instruct the jury on accessorial liability as requested by the defense. *Id.* at 430.

[10] Barnes suggested that the trial court erred in admitting Barnes' identification testimony, that the judge improperly excluded psychiatric evidence, and that the trial counsel was ineffective. *Barnes*, 103 S. Ct. at 3310.

incorporated some but rejected most of the claims.[11] Melinger then drafted seven potential arguments that he was considering raising in his brief, and invited Barnes' "reflections and suggestions" with regard to those issues.[12] The record did not indicate a response to Melinger's proposal.[13]

In his brief, Melinger raised only three of the seven points proposed earlier.[14] Barnes subsequently filed two *pro se* briefs raising three more issues.[15] At oral argument, Melinger argued the points raised in his brief but not the arguments raised in Barnes' brief. The Appellate Division affirmed Barnes' conviction by summary order,[16] and the New York Court of Appeals denied his leave to appeal.[17]

Barnes then commenced a five-year sojourn through the state and federal courts in an attempt to reverse his conviction.[18] The District Court for the Eastern District of New York found his claims without merit and dismissed his petition for a writ of habeas corpus.[19] The Second Circuit affirmed,[20] and the Supreme Court denied a petition for a

---

[11] *Id.* Melinger wrote Barnes that he would not argue that trial counsel was ineffective. Melinger was under the mistaken belief that a claim for ineffective counsel "was not cognizable on appeal." *Barnes*, 665 F.2d at 430. He also declined to argue that the bedside identification was unconstitutional. *Id.*

[12] 103 S. Ct. at 3310. The seven potential claims of error included arguments that the facts relating to Butts' prior acquaintance did not substantiate the court's determination of an "independent identification," *see supra* note 9; that the trial court incorrectly barred introduction of psychiatric evidence; that the prosecution summary was prejudicial; and that the court erred in examining Barnes and in refusing defense counsel's request for a jury instruction on accessorial liability. *Barnes*, 665 F.2d at 430.

[13] *See supra* note 6.

[14] The issues that Melinger raised were: "[1] improper exclusion of psychiatric evidence, [2] failure to suppress Butts' identification testimony, and [3] improper cross-examination of [Barnes by the trial court]." *Barnes*, 103 S. Ct. at 3311. During cross-examination, Barnes stated that he left his house to pick up a welfare check. "The trial judge then interrupted:
THE COURT: You mean you're collecting welfare?
THE WITNESS: Yes
THE COURT: While you're working off the books?
THE WITNESS: Yes.
THE COURT: Go ahead. Do you have any more questions Mr. Silverman [the Assistant District Attorney]?" *Barnes*, 665 F.2d at 431 n.3.

[15] These *pro se* briefs supplemented Barnes' original *pro se* brief which the defendant sent to Melinger in his earlier correspondence, *see supra* text accompanying note 10, and which counsel filed with his own appellate brief. *Barnes*, 103 S. Ct. at 3311.

[16] New York v. Barnes, 63 A.D.2d 865, 405 N.Y.S.2d 621 (1978).

[17] New York v. Barnes, 45 N.Y.2d 786, 381 N.E.2d 179, 409 N.Y.S.2d 1044 (1978).

[18] The Court noted that 26 state and federal judges had considered Barnes' claims that he was unjustly convicted. 103 S. Ct. at 3311 n.3. Barnes first attempted to overturn his conviction through a *pro se* petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. Barnes alleged ineffective assistance of trial counsel in addition to four other claims of error. *Barnes*, 103 S. Ct. at 3311.

[19] United States *ex rel.* Barnes v. Jones, No. 78-C-1717, slip op. (E.D.N.Y. Nov. 27, 1978).

[20] 607 F.2d 994 (2d Cir. 1979).

writ of certiorari.[21] In 1980, Barnes filed a petition asking that the New York Court of Appeals reconsider its denial of leave to appeal.[22] In that petition, Barnes claimed for the first time that his appellate counsel, Michael Melinger, provided ineffective assistance. The Court denied the petition.[23] Barnes then returned to the district court with a petition for a writ of habeas corpus based on ineffective assistance of appellate counsel.[24] The district court dismissed the petition, holding that the record did not support the claim of ineffective assistance by appellate counsel under any reasonable standard.[25] The district court concluded that "it is [counsel's] professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach."[26]

The Second Circuit reversed, holding that "where an appellant urges his counsel to make a non-frivolous argument,[27] '[a]ppointed counsel . . . has a duty under *Anders* not only to raise such a non-frivolous argument, but to advocate it conscientiously on appeal.' "[28] The Supreme Court held in *Anders v. California*[29] that counsel must prosecute a nonfrivolous appeal to meet the constitutional standard of adequate representation.[30] In *Anders*, defense counsel reviewed the record, found

---

21 444 U.S. 853 (1979).

22 On March 4, 1980, Barnes also "filed a motion in the trial court for collateral review of his sentence." *Barnes*, 103 S. Ct. at 3311. The motion was denied on April 28, 1980. *Id.*

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

24 Both the district court and the Second Circuit held that Barnes had exhausted his state remedies because the claim of ineffective appellate counsel was made and rejected by the highest court in New York. *Barnes*, 665 F.2d at 432.

25 *Barnes*, 103 S. Ct. at 3311 (citing No. 80-C-2447, slip op. (E.D.N.Y. Jan. 30, 1981), *reprinted in* app. to petition for cert. 28a (U.S. 81-1794) (Mar. 25, 1982)). The district court held that Melinger's performance was adequate under the "farce and mockery" standard used by the Second Circuit and the more lenient "reasonable competence" standard upheld by six other circuits. *Barnes*, 665 F.2d at 431.

26 *Barnes*, 103 S. Ct. at 3311 (quoting No. 80-C-2447, slip op. (E.D.N.Y. Jan. 30, 1981), *reprinted in* app. to petition for cert. 28a-29a (U.S. 81-1794) (Mar. 25, 1982)).

27 The Second Circuit held that Barnes' claims that trial counsel was constitutionally inadequate and that the trial judge erred in refusing to charge accessorial liability were nonfrivolous and should have been argued by Melinger. *Barnes*, 665 F.2d at 435.

28 *Id.* at 433 (quoting High v. Rhay, 519 F.2d 109, 112 (9th Cir. 1975)). In *High*, appointed counsel filed a four-page brief in which he did not make "even minimal statement of the facts which were relevant to the appeal." *Id.* at 111. "The single 'Assignment of Error' was that the trial court erred in finding the defendant guilty" and the three-sentence argument simply invited the court to review the transcript. *Id.* The court found this "worthless" brief a violation of counsel's duty under *Anders* to raise nonfrivolous arguments conscientiously on appeal. *Id.* at 112-13. At the very least, counsel should have advised the court of anything in the record that might arguably have supported the appeal. *Id.* (citing *Anders*, 386 U.S. at 744-45).

29 386 U.S. 738 (1967).

30 *Id.* at 744-45. Because there was no "finding of frivolity by either of the California courts," *id.* at 743, counsel had a constitutional duty to prosecute the appeal. Thus, the Court held that appointed counsel must either prosecute the appeal or file an *"Anders* brief" which raises any issue that might arguably support the appeal. *See infra* note 35.

no merit to the appeal, and informed the district court that he would not file a brief.[31] The district court examined the record and affirmed Anders' conviction without the aid of argument or brief by defense counsel.[32] The Supreme Court decided that California's procedure violated the constitutional requirement of substantial equality and fair process because it did not provide the defendant with counsel that acted as an advocate,[33] "nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity."[34] Appointed counsel, in the role of advocate, has a constitutional duty to "support his client's appeal to the best of his ability."[35]

The Second Circuit reasoned, "[b]y extension," that because attorneys have a constitutional duty to prosecute a nonfrivolous appeal, they also have a duty to prosecute to the full extent of their professional ability all nonfrivolous issues requested by the defendant in that appeal.[36] Because Melinger refused to raise nonfrivolous issues requested by Barnes, he failed to prosecute the appeal to the best of his ability. The Court of Appeals thus declared Barnes' appellate representation constitutionally inadequate under the *Anders* standard, and ordered the district court to grant the writ of habeas corpus.[37] In doing so, the Second Circuit promulgated a *per se* rule, under which appointed counsel's failure to argue on appeal colorable issues requested by defendant would always constitute reversible error.[38] The Supreme Court granted certiorari,[39] and reversed.[40]

---

31 *Id.* at 742.

32 *Id.* Counsel did give the court a letter that stated merely that the appeal lacked merit.

33 *Id.* at 743.

34 *Id.* The Court stated that counsel's "no merit" letter "affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate." *Id.* at 745.

35 *Id.* at 744. The *Anders* standard does not require counsel to prosecute a wholly frivolous appeal. In such a case, counsel can request permission to withdraw. "That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Id.* at 744. The Court reasoned that this requirement would afford the client "that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." *Id.* at 745.

36 *Barnes*, 665 F.2d at 433. The Ninth Circuit made the same extension in High v. Rhay, 519 F.2d 109 (9th Cir. 1975); *see supra* note 28.

37 *Barnes*, 665 F.2d at 436. The court of appeals also held that Melinger's error in failing to raise colorable issues on appeal was not cured by the defendant's submission of *pro se* briefs. *Id.* at 434; *see supra* note 15. The court noted that Barnes' briefs "spoke only in generalities . . . without reference to the specific facts in this case . . . ." *Id.* at 434. The Second Circuit further held that Barnes "need not demonstrate a likelihood of success on the merits of those claims" Melinger failed to raise. *Id.*

38 *Id.* at 435. The actual term *"per se* rule" was used in the dissenting opinion. *Id.* at 437 (Meskill, J., dissenting).

39 102 S. Ct. 2902 (1982).

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

III. THE SUPREME COURT DECISION

By a vote of 6-1-2,[41] the Supreme Court reversed the Second Circuit and held that a court-appointed defense counsel has no constitutional duty to raise every nonfrivolous issue requested by the defendant on appeal.[42] Through Chief Justice Burger, the Court stated that the Second Circuit's *per se* rule would require judges to second-guess reasonable professional judgments of counsel and "disserve the very goals of vigorous and effective advocacy . . . ."[43] The Court argued that Melinger utilized the most effective method of appellate advocacy in arguing only the most promising issues on appeal.[44] It concluded that Melinger represented Barnes to the best of his ability, thereby satisfying the constitutional standard of adequacy established in *Anders*.[45]

The Court's decison was based upon pragmatic considerations. Chief Justice Burger first defined adequate and effective representation in terms of practicalities. The majority expounded upon 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."[46] The Court cited Justice Jackson,[47] Robert Stern,[48] Judge Davis,[49] and John Godbold[50] for the proposition that appellate advocacy is best promoted through a few strong arguments because meritorious arguments can be buried or diluted when accompanied by several weaker points. The Chief Justice further stressed the importance of having appellate advocates press only the strongest issues "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."[51] Thus, attorneys sim-

---

41 Chief Justice Burger's majority opinion was joined by Justices White, Powell, Stevens, Rehnquist, and O'Connor. Justice Blackmun concurred in the result, and Justice Brennan, along with Justice Marshall, dissented.

42 *Barnes*, 103 S. Ct. at 3314.

43 *Id.*

44 *Id.* at 3312-13.

45 *Id.* at 3314.

46 *Id.* at 3312.

47 *Id.* at 3313. In Jackson, *Advocacy Before the Supreme Court*, 25 TEMP. L.Q. 115, 119 (1951), Justice Jackson noted that "experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one."

48 *Barnes*, 103 S. Ct. at 3313. In R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 266 (1981), Robert Stern stated that, "if you cannot win on a few major points, the others are not likely to help . . . . The effect of adding weak arguments will be to dilute the force of the stronger ones."

49 *Barnes*, 103 S. Ct. at 3313; *see* Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940).

50 *Barnes*, 103 S. Ct. at 3313; *see* Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801 (1976).

51 *Barnes*, 103 S. Ct. at 3313.

ply do not have the time or space to argue more than a few issues effectively.

The Court decided to define adequate representation in terms of practicalities in order to protect defendants and strengthen the appellate process. The majority was concerned that defendants would rob themselves of good representation if counsel were bound to their whims and wishes. Chief Justice Burger implied that appellate judges may not recognize a valid argument amongst a whole array of weaker points,[52] and suggested that effective advocacy is essential in assuring that judges consider the most promising issues.[53] The majority apparently feared that unsophisticated or stubborn defendants would unintentionally and unnecessarily weaken their appeals if they could compel appointed counsel to raise every colorable issue. This result would frustrate the appellate courts in their pursuit of justice.

The Court was also reluctant to allow appellate judges the opportunity to "second-guess" counsel's reasonable professional judgments.[54] Under this decision, counsel is given full authority to make strategic decisions as to which arguments will be raised on appeal. The judge's proper role is to evaluate the argument raised, not to inquire into the advocate's reasons for refusing to press one particular point or another. The Court apparently believed that the appellate process would be strengthened by protecting this division of labor whereby the judge and the advocate each perform their specialized function.

The Court then applied its standard to Melinger's conduct and concluded that he met the constitutional requirement of adequate representation established in *Anders*.[55] The majority stated that the Second Circuit had misinterpreted *Anders* and the extent to which it controlled *Barnes*. The majority distinguished *Anders* on the grounds that a duty to argue a nonfrivolous appeal differs from a duty to argue a nonfrivolous issue requested by defendant on appeal.[56] Furthermore, the Court added that none of its other decisions had suggested that an "indigent defendant has a constitutional right to compel appointed counsel to

---

52 *Id.*

53 *Id.* at 3313-14.

54 *Id.* at 3314.

55 *Id.*

56 The Court implicitly agreed with Judge Meskill's dissent, which stated that the Second Circuit had overextended *Anders* in reaching its *"per se* rule." *Barnes*, 665 F.2d at 437 (Meskill, J., dissenting); 103 S. Ct. at 3312. Judge Meskill believed that *Barnes* was distinguishable from *Anders*

> where appellate counsel's complete refusal to brief and argue claims left the defendant totally without the aid of counsel in pressing his appeal. Here petitioner Barnes complains that his lawyer argued some issues before the appellate court, but declined to argue every nonfrivolous claim that Barnes had requested him to present.

Barnes, 665 F.2d at 437 (Meskill, J., dissenting).

press nonfrivolous points . . . if counsel, as a matter of professional judgment, decides not to present those points."[57]

Justice Blackmun concurred in the result because he believed that Barnes received adequate representation. While he agreed with the dissent that "as an *ethical* matter, an attorney should argue on appeal all nonfrivolous claims upon which his client insists,"[58] Justice Blackmun felt that Barnes' claim failed to rise to constitutional status. Justice Blackmun stated that lawyers should offer their opinions as to the best way to proceed, but then, "acquiesce in the client's choice of which nonfrivolous claims to pursue."[59] In Justice Blackmun's view, however, the ethical considerations concerning the division of decisionmaking authority between attorney and client fail to assume constitutional status when counsel's performance is " 'within the range of competence demanded of attorneys in criminal cases,' "[60] and " 'assure[s] the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.' "[61] Justice Blackmun concluded that both of

---

[57] *Barnes*, 103 S. Ct. at 3312. The Court distinguished Griffin v. Illinois, 351 U.S. 12 (1955) and Douglas v. California, 372 U.S. 353 (1963). Those cases held that "if an appeal is open to those who can pay for it, an appeal must be provided for an indigent." *Barnes*, 103 S. Ct. at 3312. The Court did not find these cases controlling because the effect upon representation in this case was not as significant. *See supra* text accompanying note 45. In *Griffin* and *Douglas*, the defendants were effectively denied the opportunity to appeal. *See infra* note 111. In *Barnes*, the defendant received adequate representation. He just did not receive complete control over technical aspects of his representation. *See infra* notes 108-15 and accompanying text.

The Court also cited Chief Justice Burger's concurring opinion in Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977)(Burger, C.J., concurring), which stated 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." *Barnes*, 103 S. Ct. at 3312. The Court apparently believed that fundamental decisions about the defendant's appeal were not at issue in *Barnes*. This case concerned technical and strategic decisions about the appeal, not the decision whether to pursue an appeal at all. This fundamental decision remains reserved for the defendant.

The Court also acknowledged Faretta v. California, 422 U.S. 806 (1975), which held that "with some limitations, a defendant may elect to act as his or her own advocate." *Barnes*, 103 S. Ct. at 3312. In this case there was no evidence that the defendant wished to waive the right to representation by counsel. Rather, Barnes wished to retain counsel yet make decisions concerning which issues to raise on appeal. *See infra* text accompanying note 116.

[58] *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring) (emphasis in original). Blackmun agreed with the American Bar Association's conception of a lawyer's proper role:

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

ABA STANDARDS FOR CRIMINAL JUSTICE, Criminal Appeals, 3.2 comment, at 21-42 (2d ed. 1980).

[59] *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring).

[60] *Id.* (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[61] *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).

these requirements were met in *Barnes*, and concurred in the judgment to affirm the conviction.[62]

Justice Brennan, in a virulent dissent, wrote that the majority had disregarded fundamental precepts of equality and individual autonomy.[63] He argued that the Court misinterpreted cases in which the Court previously had articulated appointed counsel's duty to the defendant.[64] Justice Brennan also was not persuaded by the practical concern exhibited in the Court's opinion. He disagreed with the majority's claim that counsel's strategic decisions strongly affect the outcome of appeals.[65] Furthermore, the dissent claimed that the decision constituted bad policy because it would enhance mistrust between counsel and indigent defendants.[66]

The dissent found itself in fundamental disagreement with the Court's characterization of the proper role of appointed counsel in appealing an indigent defendant's conviction. Justice Brennan insisted that counsel's duty extends only to assisting the defendant "in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant."[67] Justice Brennan stated that wise clients will defer to their lawyer's judgment, but noted that "[t]he Constitution . . . does not require clients to be wise . . . ."[68] The dissent was clearly concerned that this ruling will place ultimate decisionmaking authority with counsel rather than the defendant, upon whom the consequences of the deci-

---

62 *Id.* Though the Court elected not to rule on the matter, *Barnes*, 103 S. Ct. at 3314 n.7, Justice Blackmun noted that a client can obtain review of nonfrivolous claims not raised by counsel through a writ of habeas corpus. He further stated that Melinger's conduct constituted " 'cause and prejudice' for any resulting procedural default under state law." *Id.* at 3314 (Blackmun, J., concurring)(citing Wainwright v. Sykes, 433 U.S. 72 (1977)). Under *Wainwright*, defendants can obtain writs of habeas corpus even though they failed to raise the claim in the state proceeding if they can show that the failure was the result of "cause and prejudice." In *Wainwright*, a prisoner petitioned for habeas corpus on the grounds that an inculpatory statement was admitted against him without showing that he understood his *Miranda* rights. Petitioner offered no explanation for not objecting at trial as required by the state "contemporaneous objection" rule. Furthermore, there was other damaging evidence presented at trial that diminished any actual prejudice possibly resulting from the admission of the confession. Thus, the Court held that petitioner's failure to make a timely objection under the state rule barred federal habeas corpus review of the *Miranda* claim. *Id.* at 91. Justice Blackmun believed that Barnes' failure to raise claims due to counsel's refusal to argue them on appeal would constitute cause and prejudice. Thus, Barnes would be able to raise these claims on habeas corpus even if a state procedure required him to raise the claims at a state proceeding. 103 S. Ct. at 3314 (Blackmun, J., concurring).

63 103 S. Ct. at 3318 (Brennan, J., dissenting).

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

65 *Id.* at 3318 (Brennan, J., dissenting).

66 *Id.*

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

68 *Id.* at 3317-18 (Brennan, J., dissenting).

sion ultimately fall.[69]

According to Justice Brennan, the Court's ruling is philosophically objectionable for two reasons. First, this result "denigrates the value of individual autonomy and dignity central to many constitutional rights. . . ."[70] The dissent criticized the ruling for unduly restricting individual autonomy and dignity without serving any requisite state interest.[71] A lawyer should be "the instrument and defender of the client's autonomy and dignity"[72] and not, as the majority apparently believed, the engineer of an appeal in which counsel need do nothing beyond what the State considers most important.[73]

Second, the dissent explained that the majority's holding violates principles of comparable representation. Justice Brennan noted that indigent defendants will be affected by this ruling to a far greater degree than defendants who retain private counsel.[74] A paying defendant can simply discharge counsel who refuses to raise certain issues on appeal. Thus, Justice Brennan implicitly asserted that the Court discriminated against indigent defendants because only that class of clients will be forced to acquiesce in the professional judgment of counsel.[75]

Justice Brennan declared that his concern finds support in previous Supreme Court decisions that discuss the appropriate role of appointed counsel.[76] He agreed that the Court had never decided the specific issue upon which certiorari was granted in *Barnes*,[77] but argued that *"Anders* and *Faretta* describe the right to counsel in terms inconsistent with today's holding."[78] According to the dissent, *Faretta* and *Anders* were

---

[69] *Id.* at 3316 (Brennan, J., dissenting). Justice Brennan cited *Faretta*, which stated that

> [t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1969)(Brennan, J., concurring)).

[70] *Barnes*, 103 S. Ct. at 3318 (Brennan, J., dissenting).

[71] The State could legitimately infringe upon individual autonomy and dignity in the interests of a speedy and effective prosecution. *Id.* The Court might contend that such interests are served in its ruling because the *per se* rule would hamper efforts to achieve an effective prosecution. *See infra* text accompanying notes 91-97.

[72] *Barnes*, 103 S. Ct. at 3319 (Brennan, J., dissenting).

[73] *Id.* Justice Brennan stated that, under the Court's ruling, "having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system." *Id.*

[74] *Barnes*, 103 S. Ct. at 3315 (Brennan, J., dissenting).

[75] *Id.* at 3315-16 (Brennan, J., dissenting).

[76] *Id.* at 3316-17 (Brennan, J., dissenting).

[77] *Id.* at 3317 (Brennan, J., dissenting).

[78] *Id.* In Faretta v. California, 422 U.S. 806 (1975), the Court held that a defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to

"predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial,"[79] and thus provide more than the mere opportunity "to have one's case presented competently and effectively."[80] Justice Brennan found evidence for this assertion in the Court's decision to impose a duty upon appointed counsel to file an *"Anders* brief" when counsel finds the appeal wholly frivolous.[81] The dissent argued that the Court's decision forces an indigent defendant to "choose between foregoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure . . . ."[82] Justice Brennan contended that this result violated the intent of *Anders* and *Faretta*, which sought to protect the defendant's right to free choice and grant the defendant a certain measure of equal representation.[83]

In addition to these conceptual objections, the dissent disagreed with the Court over the practical effects of the Second Circuit's rule. Justice Brennan did "not share the Court's implicit pessimism about appellate judges' ability to recognize a meritorious argument, even if it is made less elegantly or in fewer pages than the lawyer would have liked, and even if less meritorious arguments accompany it."[84] In Justice Brennan's view, skillful appellate advocacy makes a difference in only a handful of cases, and "for the most part good claims will be vindicated and bad claims rejected . . . ."[85] Thus, Justice Brennan does not

---

do so. Months before trial, Faretta requested that he be allowed to represent himself. After questioning Faretta about legal procedure, the trial court ruled that Faretta had not intelligently waived his right to assistance of counsel and appointed a public defender to represent him. The Supreme Court held that Faretta did make an intelligent waiver and that Faretta had a constitutional right to defend himself. The Court reasoned that the sixth amendment right to assistance of counsel "implicitly embodies a 'correlative right to dispense with a lawyer's help.'" *Id.* at 814 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)). For a discussion of *Anders*, see *supra* notes 29-35 and accompanying text.

Justice Brennan asserted that the "right to 'the assistance of counsel' carries with it a right, personal to the defendant" to decide which nonfrivolous issues should be raised on appeal. *Id.* at 3316 (Brennan, J., dissenting). *Faretta* established a similar personal right to defend oneself without the aid of counsel. *Id.*; *see supra* note 69.

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

80 *Id.*

81 *Id.*; *see supra* note 35. The *Anders* brief is given to the defendant as well as the court in order to give the defendant the opportunity to raise and argue further any of the points in the brief. *Anders*, 386 U.S. at 744. Brennan believed that this procedure evidenced a respect for the dignity and autonomy of the indigent defendant that was lacking in *Barnes*. 103 S. Ct. at 3316 (Brennan, J., dissenting).

82 *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting). The Court had recognized that the defendant retains the right to decide the most basic aspects of the defense, such as "how to plead, whether to present a defense [and] whether to appeal." *Id.* at 3312; *see supra* note 57.

83 *Barnes*, 103 S. Ct. at 3316-17 (Brennan, J., dissenting).

84 *Id.* at 3318 (Brennan, J., dissenting).

85 *Id.*

believe that clients will be denied good representation if they pursue many issues on appeal against the advice of counsel.

The dissent did insist, however, that the practical effect of the Court's rule would be a deepening of the mistrust between indigent defendants and court-appointed counsel.[86] Justice Brennan asserted that the Court's decision would heighten mistrust that indigents feel for their appointed lawyers because it "encourages lawyers to disregard their clients' wishes without compelling need," and therefore, could "only exacerbate the clients' suspicion of their lawyers."[87] Justice Brennan contended that the decision could only lead defendants to believe that the law conspires against them and result in a decreased effectiveness of the indigent's overall representation.[88]

Although the dissent strongly objected to the Court's ruling, it would not affirm the Second Circuit's judgment because the district court did not address the factual question of whether Barnes "actually insisted in a timely fashion that his lawyer brief the nonfrivolous issues identified by the Court of Appeals."[89] The dissent would remand for a determination of the issue. If Barnes did not insist, or if he was satisfied with filing *pro se* briefs, "then there would be no deprivation of the right to the assistance of counsel."[90]

IV. ANALYSIS

Many of the Burger Court's values, priorities, and sensitivities were subtly expressed in *Jones v. Barnes*. The decision revealed the Court's willingness to sacrifice abstract conceptions of equality, individuality, and professional responsibility to practical procedural concerns. In the Court's view, legitimate moral concerns about equal representation for indigent defendants pale before the spectre of endless appeals, harrassed attorneys, and overcrowded court dockets.

In *Barnes*, the Court decided that appointed counsel can disregard the demands of the defendant, argue only one or two of the strongest issues on appeal, and still satisfy the constitutional requirement of adequate and effective representation. The Court paid passing attention to constitutional issues, but focused primarily on strong practical consider-

---

86 *Id.* "Criminal defendants often believe that their [appointed] attorneys lie to them and betray them to their official adversaries." Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1036 (1981). Brennan notes that mistrust can be engendered by conflicting interests, one of which may be that an appointed lawyer, working for a smaller fee than normal, "has an obvious financial incentive to conclude cases on his criminal docket swiftly." *Barnes*, 103 S. Ct. at 3318 (Brennan, J., dissenting).

87 103 S. Ct. at 3318 (Brennan, J., dissenting).

88 *Id.* (citing *Faretta*, 422 U.S. at 834).

89 *Id.* at 3319 (Brennan, J., dissenting); *see supra* note 6.

90 *Id.* at 3319 (Brennan, J., dissenting).

ations in giving preference to the professional judgment of counsel. Attention to practical considerations was warranted, because the Second Circuit's *per se* rule could encourage some indigent defendants to insist that thirty or fifty issues be argued on appeal.[91] Appointed counsel would have to sift through these claims and decide which were colorable.[92] If the appellate court affirmed the conviction, and appointed counsel had failed to advance every claim requested, the defendant could petition for a writ of habeas corpus, charging ineffective assistance of appellate counsel. The federal district court would be forced to consider each one of the claims and second-guess the professional judgment of appointed counsel. If the district court found one nonfrivolous issue among those that the attorney neglected to prosecute, it would be compelled to grant the writ of habeas corpus unless the State assigned new counsel and granted the defendant leave to appeal the conviction in the state appellate courts.[93]

The Burger majority was determined to avoid this scenario. The Court clearly expressed concern, if not dismay, at the number of judges who had considered Barnes' appeals.[94] Chief Justice Burger had previously stated his concern about the lack of finality in the American judicial process.[95] The Chief Justice had also expressed deep concern over

---

91 The tendency of some prisoners to abuse the judicial process is well-documented. For example, Clovis Green filed between 600 and 700 complaints in state and federal courts over a period of ten years. *In re* Green, 669 F.2d 779, 781 (D.C. Cir. 1981). The Court of Appeals for the District of Columbia affirmed a screening procedure against Green after he filed 38 complaints with the District of Columbia District Court, 18 of which were filed in 1980. *Id.* at 783.

Defendants also tend to abuse the claim of ineffective assistance of trial counsel. Some prosecutors have stated that "offenders may deliberately use an inexperienced attorney in the hopes of building a trial record which later will be the basis for an appellate court to vacate or reverse the conviction." Tybor, *Trial and Error: The Issue of Incompetent Legal Counsel*, Chicago Tribune, Sept. 25, 1983, § 4, at 1, col. 1.

92 An attorney who is unwilling to raise 50 issues in a single brief could raise all the nonfrivolous issues in the appellate brief and submit the "frivolous" issues to the court in an *"Anders* brief." *See supra* note 35. In the *Anders* brief, counsel would have to explain why each of these issues is unsupportable. *See* Anders v. California, 386 U.S. 738, 744 (1967). Counsel would also have to state anything in the record that would arguably support those contentions. *Id.*

93 *See* Barnes v. Jones, 665 F.2d 427 (2d Cir. 1981); High v. Rhay, 519 F.2d 109 (9th Cir. 1975).

94 The Court noted that, at the time of the Second Circuit appeal, "at least 26 state and federal judges had considered 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." *Barnes*, 103 S. Ct. 3308, 3311 n.3 (1983).

95 Chief Justice Burger wrote:

> The deterrent function of the criminal justice system has not been realized. That system must restore at least some degree of deterrence. The message we have failed to send—the message society must send—is that the consequences of criminal conduct are swift and certain. No such message is getting through today. The criminal process should not

the increasing workload of judges and their resultant inability to dispense justice adequately.[96] The Second Circuit's *per se* rule would have provided litigious prisoners with another opportunity to prolong the appellate process and frustrate society's desire for swift and certain determination of criminal charges.[97]

The *per se* rule could also result in a significant drain upon the resources of that judicial system. Defense attorneys would have to spend precious time sifting through a mountain of claims to make sure that every single nonfrivolous issue was raised. State appellate judges might frequently have to consider seven or ten issues in a twenty-page brief rather than one or two well-formulated arguments.[98] Appellate judges would have to research and consider issues that counsel did not have the time or space to fully elaborate. Finally, district court judges could be flooded with habeas corpus petitions from clever prisoners insisting that counsel raise a large number of issues on appeal.[99] The courts would

---

extend over a span of three, five, or seven years, with repeated appeals and repeated collateral attacks on convictions. At some point there must be finality. Without finality, deterrence is a myth.

Burger, *Annual Report on the State of the Judiciary—1980*, 66 A.B.A. J. 295, 299 (1980).

[96] According to Chief Justice Burger,

> Our litigation explosion during this generation is suggested by a few figures. From 1940 to 1981 annual federal district court civil case filings increased from about 35,000 to 180,000. This almost doubled the yearly caseload per judgeship from 190 to 350 cases. . . . [F]ederal civil cases increased almost six times as fast as our population. . . . A similar trend took place in the state courts from 1967 to 1976, where appellate filings increased eight times as fast as the population. . . . It appears that people tend to be less satisfied with one round of litigation and are demanding a "second bite at the apple" far more than in earlier times.

Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). Even more recently, Burger wrote:

> [When] the workings of many courts are falling into disrepair in spite of many improvements, we must reexamine the mind-set that brought us where we are today. We have reached the point where our systems of justice—both state and federal—may literally break down before the end of the century.

Burger, *Today's Challenge: Improving the Administration of Justice*, 55 N.Y. ST. B.J., Feb. 1983, at 7, 12.

[97] *Barnes* does not block a prisoner from filing a writ of habeas corpus on the grounds of ineffective assistance of appellate counsel. The rule announced in this case will, however, significantly affect the disposition of such writs. Under the Second Circuit rule, a petitioner would only need to convince the district court that appellate counsel failed to raise one nonfrivolous issue. Under the Court's ruling, petitioner also has to prove that the neglected claim was meritorious. A meritorious claim is one that would likely succeed if raised in court; a nonfrivolous claim is merely one that has some legitimate support. Thus, it would be easier for a prisoner to obtain a new appeal in state courts under the Second Circuit's rule because that standard for reversal on habeas corpus was much lower.

[98] Appellate courts might have been forced to expand the maximum length of briefs in order to give defense counsel enough space to argue all the nonfrivolous claims thoroughly.

[99] The courts would receive more petitions because the Second Circuit rule would make it more likely that prisoners would prevail and win a new appeal in the state courts. *See supra* note 97. Furthermore, the prisoner's petitions now represent one-sixth of the federal district court docket. Burger, *Chief Justice Burger Issues Yearend Report*, 62 A.B.A. J. 189, 190 (1976).

have to scrutinize each claim to determine whether counsel made a reversible error by failing to raise a nonfrivolous issue. It is likely that the Supreme Court considered these bleak but realistic consequences of the Second Circuit's *per se* rule.

The Court, however, should not decide constitutional issues solely upon practical considerations. The Court therefore concluded that Melinger's representation satisfied the constitutional standard established in *Anders*.[100] In the Court's view, Melinger provided adequate representation by arguing only the strongest issues on appeal, the most effective method of appellate advocacy.

The dissent argued that this interpretation of *Anders* was too narrow because it ignored the egalitarian principles underlying that decision.[101] The dissent is correct to a certain degree. The *Anders* Court was attempting to rectify violations of fair procedure and equality prohibited by the fourteenth amendment[102] when it imposed a duty on counsel to "support his client's appeal to the best of his ability."[103] However, the Court's desire to achieve equality of representation between rich and poor was qualified. In the concluding paragraphs of *Anders*, the Court stated that its new procedure[104] "will assure penniless defendants the same rights and opportunities on *appeal—as nearly as is practicable*—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel."[105] In *Barnes*, the Court stated that the Second Circuit's rule was "contrary to all experience and logic."[106] The Court therefore apparently considered the rule wholly impractical. Thus, the ruling does not violate the spirit of *Anders* to the extent charged by the dissent.

The dissent's assertion that *Barnes* unduly restricts the individual autonomy and dignity of the defendant is similarly flawed. Justice Brennan correctly perceived that the Court held the professional judgment of counsel in higher regard than the defendant's own perception of self-interest. However, the dissent exaggerates the extent to which that philosophy contradicts the principles of *Faretta*. In *Faretta*, the Court

---

Chief Justice Burger has expressed the view that too many petitions are being filed: "Federal judges should not be dealing with prisoner's complaints which, although important to a prisoner, are so minor that any well-run institution should be able to resolve them fairly without resort to federal judges." *Id.*

100 *Barnes*, 103 S. Ct. at 3314.

101 *Id.* at 3316-17 (Brennan, J., dissenting). Justice Brennan also argued that *Anders* reflected a respect for the dignity and autonomy of indigent defendants that is lacking in the majority's interpretation. *Id.*

102 *Anders*, 386 U.S. at 741.

103 *Id.* at 744.

104 *See supra* note 35.

105 *Anders*, 386 U.S. at 745 (emphasis added).

106 *Barnes*, 103 S. Ct. at 3313.

acknowledged the principles of informed free choice and the right of defendants to take full responsibility for decisions concerning the conduct of their defense. The Court also stated, however, that

> when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent at the outset, to accept counsel, as his representative.[107]

Thus, the Court was not unfaithful to *Faretta*, which allows the defendant to make strategic decisions about the appeal if he chooses to defend himself, and is not controlling when the defendant acquiesces to appointed counsel's representation.

The dissent is unpersuasive because it considered issues in a purely abstract conceptual manner. Justice Brennan asserted that *Barnes* is unfair to indigent defendants because they are the only type of defendants who will ever experience this kind of conflict with counsel. As the dissent notes, a paying defendant can simply dismiss any attorney who refuses to comply with the defendant's demands.[108] It is true that indigent defendants are not as free as paying defendants to dispense with their attorneys.[109] This discrepancy, however, does not necessarily violate the fourteenth amendment. Distinctions between the legal treatment of rich and poor are unconstitutional only when they reach the level of an "invidious discrimination."[110] The fact that a paying defendant may have

---

107 Faretta v. California, 422 U.S. 806, 820-21 (1975)(citations omitted).

108 *Id.* at 3315 (Brennan, J., dissenting).

109 An indigent defendant must go through elaborate procedures to get another lawyer appointed to the case. In Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973), the California Supreme Court held that constitutional guarantees are not violated by the appointment of an attorney other than the one requested by the defendant. Furthermore, the court held that

> [t]he appointment of counsel to represent an indigent rests, as always, in the sound discretion of the trial court, and there can be no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense.

Id. at 934-35, 506 P.2d at 1010, 106 Cal. Rptr. at 634. A paying defendant, in contrast, does not need any court's permission to fire counsel.

This view was upheld by the federal courts in United States v. Davis, 604 F.2d 474 (7th Cir. 1979). The Seventh Circuit ruled that the decision concerning an indigent's request for a particular attorney "is a matter committed to the discretion of the judicial officer making the appointment." *Id.* at 479. The court further stated that reappointment of counsel was not necessary because "[t]he defendant has suggested little more than personality conflicts and disagreements over trial strategy between himself and the attorneys appointed to represent him." *Id.* The Court of Appeals reasoned that "[t]he need for the rational assignment of counsel for criminal defendants is a systematic one, not amenable to particular justification in each individual case." *Id.* This suggests that Barnes would not have been able to secure a new attorney even if he had requested one.

110 The Supreme Court has never held that representation received by indigents must be equal to that received by a paying defendant. In Douglas v. California, 372 U.S. 353 (1963),

more control over some aspects of the appeal than an indigent defendant fails to create an invidious discrimination on the basis of wealth.[111] The indigent is still provided with counsel who must represent the defendant to the best of his or her ability.[112] The Court is not depriving an indigent of adequate representation because of the defendant's poverty. The Court simply held, as it had held in the past,[113] that defendants do not have complete control over strategic aspects of their defense.[114] As Justice Blackmun indicated,[115] the dissent failed to explain why this division of labor rises to the status of a constitutional violation. The Court reasonably concluded that professional counsel can best make these decisions both for the benefit of the client and the judicial system as a whole.

Furthermore, Justice Brennan's concerns will have little effect upon most defendants. Indigents should rarely seek to preempt the good faith advice of counsel. Few defendants will insist on arguing many nonfrivolous issues when counsel emphatically asserts that such a strategy will

---

the Court wrote: "[A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' " *Id.* at 356 (citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489 (1955)). In *Douglas*, the Court invalidated a state procedure in which the appellate court reviewed the merits of an indigent's claims in determining whether to grant a request for appointed counsel. The Court considered this procedure "invidious discrimination" because paying defendants always could have counsel argue the merits of their cases while indigent defendants could only have the representation of counsel at the discretion of the appellate court. *Id.* at 358. The Court also invalidated a state procedure in Griffin v. Illinois, 351 U.S. 12 (1956), in which indigents were required to purchase the trial record to prepare their appeals. The Court concluded that this practice constituted an invidious discrimination because indigents unable to afford the cost of transcribing the record were effectively precluded from an appeal available to wealthier defendants. *Id.* at 19.

111 The precise meaning of invidious discrimination is difficult to ascertain. However, in *Griffin* and *Douglas*, defendants were effectively denied an opportunity to appeal their convictions. *See supra* note 110. In contrast, Barnes had an opportunity to appeal and to air his strongest claims. He was only denied the opportunity to argue claims that his attorney believed were weak. This is significantly different from the cases where indigents were denied access to the courts or placed at a serious disadvantage because of their poverty.

112 Attorneys are still required to use their best professional judgment. If they do not do so, the indigent can prevail on a claim of ineffective assistance of counsel.

113 The Court has held that defendants can be bound by the consequences of strategic decisions of counsel. Henry v. Mississippi, 379 U.S. 443 (1965). In *Henry*, the defendant's counsel delayed objecting to evidence, hoping to invite error and thus lay the foundation for a subsequent reversal. The Court held that "counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here." *Id.* at 451.

114 The dissent implied that choosing claims to be argued on appeal is a basic facet of the defense and not simply a strategic decision. *Barnes*, 103 S. Ct. at 3316 (Brennan, J., dissenting). The Court maintained that deciding which of the many nonfrivolous issues to raise is strategic because counsel has a limited amount of time and space to make the argument. *Id.* at 3313.

115 *Barnes*, 103 S. Ct. at 3314 (Blackmun, J., concurring).

seriously jeopardize the chances of prevailing on appeal. Those predatory "jailhouse lawyers" who would insist on raising every conceivable issue will be frustrated by the Court's rule. The cost of granting some indigents less control over technical aspects of the appeal is clearly outweighed by the benefits of a well-functioning appellate process.[116]

Justice Brennan's conception of the proper role of appointed counsel is not supported by constitutional caselaw, but it is supported by the Code of Professional Responsibility.[117] He invokes the Code to support his position that a lawyer should acquiesce in the client's wishes after counsel offers professional advice.[118] The Court paid little attention to this argument and justifiably so.[119] The Code represents the bar's best effort to regulate the moral conduct of its members. However, the Code, as noble as it may be, does not establish constitutional rights,[120] and is not the final authority in determining an attorney's duty to an indigent

---

116 *See* United States v. Davis, 604 F.2d 474, 478 (7th Cir. 1979); *see also supra* note 109.

117 Ethical Canon 7-7 of the Code states:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer . . . . [I]t is for the client to decide . . . what plea should be entered and whether an appeal should be taken.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980). Brennan also cites Ethical Canon 7-8, which reads: "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." 103 S. Ct. at 3317 n.4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

118 *Barnes*, 103 S. Ct. at 3317 n.4.

119 The Court acknowledged the dissent's argument, but cited another American Bar Association publication that states that "strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client." *Barnes*, 103 S. Ct. at 3313 n.6 (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2 (2d ed. 1980)). The dissent argued that the Court's support refers to standards of conduct at trial rather than appeal. *Barnes*, 103 S. Ct. at 3317 (Brennan, J., dissenting). Brennan contended that decisions on appeal are made more deliberately; thus, counsel can and should consult with the client to a greater degree. *Id.*

The dissent drew an artificial distinction between decisions made at trial and on appeal. Many strategic decisions made at trial (*e.g.* content of the opening and closing statements, the number and type of witnesses called to testify) are the result of thoughtful deliberation. The dissent made no effort to distinguish these kinds of strategic decisions from ones that must be made at a moment's notice. Courts grant attorneys power to make strategic decisions to avoid the chaos of conflicting representation. In the end, someone must make the strategic decisions and it does not matter whether these decisions are made instantly at trial or after a month of deliberation. There must be one person who assumes ultimate responsibility for all the strategic decisions whether they are made at trial or on appeal. The attorney makes these decisions every day and the Court considers it counsel's position to make these decisions in the best interest of the client.

120 The Court states that "[i]n 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." *Barnes*, 103 S. Ct. at 3313 n.6.

defendant. This duty can only be derived through interpreting the sixth amendment in light of the Court's past decisions. The Court remained faithful to its previous decisions and accounted for practical concerns that plague today's judicial system. The Court was right to protect the integrity and effectiveness of the appellate process in spite of idealistic notions of counsel's duty to indigent defendants.

V. CONCLUSION

The Court's decision in *Barnes v. Jones* was sensible and legitimate in light of the practical problems that would result if it adopted the Second Circuit's *per se* rule. The Court correctly decided not to embrace the dissent's concerns about equality, individual autonomy, and professional responsibility to avoid the spectre of endless appeals and increasingly overcrowded court dockets. *Barnes* will not adversely affect representation of indigents. Defendants retain the right to adequate representation because the Court will continue to expect appointed counsel to argue the strongest issues on appeal. If counsel fails to do so, indigent defendants may bring an action alleging ineffective assistance of appellate counsel. The Court has preserved the fundamental rights of the indigent and protected the judicial system from further abuse by predatory "jailhouse lawyers."

DAVID J. GROSS