OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1794

TITLE EVERETT W. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL.,
Petitioners

v.

DAVID BARNES

PLACE Washington, D. C.

DATE February 22, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners

v.

DAVID BARNES

No. 81-1794

Washington, D.C.

Tuesday, February 22, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:22 p.m.

APPEARANCES

MISS BARBARA D. UNDERWOOD, ESQ., Assistant District Attorney, Brooklyn, New York; on behalf of the Petitioners.

MRS. SHEILA GINSBERG RIESEL, ESQ., New York, N. Y.; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Miss Underwood, you may proceed whenever you are ready.

ORAL ARGUMENT OF MISS BARBARA D. UNDERWOOD, ESQ.

ON BEHALF OF THE PETITIONERS

MISS UNDERWOOD: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether a state criminal defendant is entitled to federal habeas corpus relief on the grounds that his assigned appellate counsel failed to raise every non-frivolous issue requested by the Defendant.

The Court of Appeals for the Second Circuit held that he is and created a pro se rule that appellant counsel is automatically ineffective if he fails to raise an issue that meets two tests. One, it has some possible merit, however slight; and, two, it was requested by the Defendant on a very generous construction of the term "request."

That decision is wrong for several reasons. It upsets state convictions without any showing of prejudice to the Defendant. It is not required by any principle or constitutional law or sound judicial administration. It undermines rather than promoting effective assistance of appellate counsel, and it is an unmanageable, unworkable rule that requires courts to probe the attorney-client relationship after the fact and distinguish requests that would trigger the rule from suggestions

or discussions or things mentioned in passing that would not.

QUESTION: May I ask a preliminary question? The question presented in the cert petition is whether the 6th and 14th Amendments require assigned defense counsel to raise every non-frivolous issue requested by the Defendant.

What I would like to ask is whether the questions, whether the Respondent, in fact, asked his lawyer to raise the issues and whether they were non-frivolous are questions before us? The briefs talk about them a lot but it was hard for me to understand that those questions were properly here.

MISS UNDERWOOD: Well, the question -- whether a particular question is non-frivolous, being a question of law, it seems to me, is necessarily before this Court and the predicate for determining whether the rule stated by the Second Circuit is -- was appropriately announced in this case.

The question of whether a request was made is in part a factual question and while that matter is discussed at some length in the brief, it is unnecessary for this Court to explore the intricacies of the attorney-client relationship and decide whether a request was made in the ordinary sense of that term.

QUESTION: Should we just assume that requests were made and get on with the other issues?

MISS UNDERWOOD: Yes, except for this point. The Second Circuit gave a particular meaning to request, and it would be misleading to understand the Second Circuit rule as

applying only to that case in which there was a square conflict between attorney and client in which an explicit request was made and that request was refused.

The Second Circuit's definition of request for purposes of its rule encompasses much more.

QUESTION: But, nevertheless, they predicated their bottom line on the grounds that in their understanding there had been a request?

MISS UNDERWOOD: Well, they found --

QUESTION: As a matter of fact, an insistence.

MISS UNDERWOOD: Well, they characterized what had happened as a request and as an insistence, that is correct. They also recite what they imply that from. It must at least be said that what they found was an implied request and implied insistence.

QUESTION: Well, since so much seems to turn on this, Miss Underwood, could you briefly summarize what, in fact, did happen?

MISS UNDERWOOD: Yes. What the record shows is that before appellate counsel was appointed, the Defendant drafted a pro se brief which included a number of issues. After his appellate counsel was appointed, he sent that brief to counsel. There was some correspondence between Defendant and counsel in the course of which a number of issues were discussed.

The record includes a letter from counsel to the

Defendant which says, I have considered these various issues, and I believe that none of them are supported by the record; however, here are seven more issues which I am thinking about raising.

And ultimately counsel filed a brief which included three issues from counsel's list of seven.

He also filed Defendant's original pro se brief. Defendant drafted another pro se brief which included some more of the issues from counsel's list and those too were before the Appellate Division.

So, there was much discussion between attorney and client about issues. That is what the Second Circuit found to constitute a request.

I should say that the record is sufficient to show that the Defendant -- That counsel's performance satisfied both the farce and mockery standard for effective assistance of counsel and the more demanding standard of reasonable professional competence.

The District Court, the Second Circuit, and this Court have before it all these various briefs, which are in the Joint Appendix and that excerpt from the attorney-client correspondence that I have described, all of that is sufficient to show that counsel painstakingly reviewed the issues and made a reasonable selection of them, giving attention to Defendant's concerns.

If this Court were to find some possible merit in the

Second Circuit's pro se request rule, it should, nevertheless, reverse rather than remand in this case because of the extraordinarily broad notion of requests that satisfied the Second Circuit.

A hearing in the District Court would be necessary, which is what this discussion about the record suggests, only if this Court were to adopt the extraordinary rule that the omission by counsel of any issue mentioned in communication between attorney and client raised a rebuttable presumption of ineffective assistance and then a hearing would be necessary to permit the state an opportunity to rebut the presumption and inquire into the nature of communications between attorney and client and discover why particular issues were or were not raised. But, since it is our position that that rule in not what the Constitution requires, no further exploration of the facts is necessary.

The Second Circuit's rule requires counsel to suppress professional judgment and simply transmit arguments to the court instead of submitting a brief that counsel believes would be most effective.

The Second Circuit suggested that this was a natural extension of Anders, this Court's decision in Anders, but, in fact, this decision -- and this situation is totally different from the situation in Anders -- that governs the situation where counsel finds no meritorious issues and his professional

judgment would lead him to withdraw the appeal. In that case, this Court held that counsel must set forth the possible issues any way even though he regards them as lacking in merit.

The Anders defendant doesn't lose the benefit of professional judgment because counsel's professional judgment would be of no benefit to him.

By contrast, in a case like this one, where counsel has a strategy for effective presentation of the appeal, then the Second Circuit rule would suppress that strategy and require counsel to replace it with a laundry-list brief, with a brief simply listing what may well be a large number of issues which, in counsel's judgment, would render the brief less effective rather than more.

Such a list of issues which Anders, in fact, requires may be better than nothing which is what the Anders defendant would otherwise get, but it was not better or more effective than a carefully constructed presentation based on reasonable, professional judgment.

The selection of issues for appeal is plainly a strategic judgment, the sort of strategic judgment appropriately assigned to counsel, and not one of the small number of decisions that are appropriately reserved for the Defendant personally.

The number of colorable issues that could be found in combing a record is potentially infinite. It is counsel's

job. It is quintessentially the job of counsel to shape that raw material into a form that is easily digested by the appellate court.

QUESTION: Miss Underwood, can I ask you a question? I understand your reasons for objecting to the Second Circuit rule. Suppose you had a case in which there was a clear request and a clear refusal by the lawyer for tactical reasons. Is there any limit in your view on the right of the lawyer to substitute his own judgment? Does the client have any kind of issue on which he could insist that there be an argument made or an argument not made either way?

MISS UNDERWOOD: Yes, I think there might well be. I would say that the omission of a particular issue might well constitute ineffective assistance of appellate counsel either because that issue was itself so strong that any reasonable lawyer would raise it or because the client's particular reasons for wanting that particular issue raised were so compelling that they ought to overcome whatever strategic judgment the lawyer might otherwise make.

My objection rather is to this pro se rule that makes a request despositive of the issue of ineffective assistance of counsel without the sort of case-by-case inquiry that seems to me most appropriate for adjudicating claims of ineffective assistance by counsel.

QUESTION: Do you think if a lawyer refuses to appeal

on an issue that the client insists on would ever be a ground for complaining against him on ethical grounds, not on competency grounds, just on the basis that the client should be in control of such decisions rather than the lawyer?

MISS UNDERWOOD: It might well be. There is, in fact, a division of professional opinion about the allocation of control between lawyer and client. There has been some discussion in the briefs and in the opinion below about the ABA Code of Professional Responsibility, the Proposed Rules of Professional Conduct. Neither of those documents squarely address the issue of the selection of issues for appeal. They recognize the distinction between strategic decisions properly made by counsel and certain fundamental decisions that must be made by the client.

And, even the ABA Criminal Justice Standards are uclear. They say explicitly that the decision whether to appeal or not is for the client and that is like the decision whether to plead guilty or not, the decision whether to testify or not, certain basic decisions.

The ABA standards go beyond the Code of Professional Responsibility and the Rules of Professional Conduct to say -- to discuss the question of selection of issues. What the standard says is that in the selection of issues counsel should try to persuade the client to abandon --

QUESTION: Right, right, right.

MISS UNDERWOOD: The don't say who should make the final decision.

QUESTION: It is the client who says -- What does the Code say?

MISS UNDERWOOD: The Code doesn't specifically describe the situation of selection of issues. It specifically says that strategic decisions are for the client -- for the lawyer -- and fundamental decisions are for the client. The Code says, for instance -- the disciplinary rule says that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means. It also says, where permissible, a lawyer may exercise his professional judgment to waive or fail to assert a right or position of that client.

It seems pretty clear, in short, that there is some concern about just how to resolve this question as a matter of ethics, as a matter of professional responsbility and particularly in light of that ambiguity. It seems that the Constitution can hardly be expected to resolve that difference of professional opinion which is to say, Justice White, that even if it were to be determined that there might be an ethical violation here, that would not dispose of the constitutional question.

QUESTION: Did you cite the standards of the ABA on the defense counsel's functions in your brief? I don't recall.

MISS UNDERWOOD: I believe they are cited in a footnote

about those standards and -- They are not quoted.

QUESTION: There is very little left to the client as compared to the lawyer under those standards, is that not so? The defendant decides whether -- alone decides whether he would plead guilty or not guilty, and he alone can decide whether he will or will not testify and that is about it, isn't it?

MISS UNDERWOOD: Whether he will or will not appeal.

QUESTION: No, I am talking about the trial.

MISS UNDERWOOD: Yes, that is correct.

They are cited at page 16 of our brief in Footnote 14, all these several standards.

QUESTION: Thank you.

QUESTION: Miss Underwood, what would the effect be in your view if we were to agree with your view in the event the convicted defendant thereafter filed a habeas petition under one of these theories that his lawyer refused to raise on appeal, and we were faced with the issue of whether there was a waiver under Wainwright against Sykes? Would that be a ground for not applying the waiver principle then in your view?

MISS UNDERWOOD: Well, I would say that in the ordinary case that would constitute a waiver; that is that reasonable strategic judgments of a lawyer do, in fact, bind the client and they bind him not only on the direct appeal but also for the purposes of making the procedural waiver. However, the fact, if it were a fact, that there was this kind of

difference of opinion, might well constitute cause for avoiding that waiver principle in a particular case. That, it seems to me, would require precisely the kind of factual inquiry into the nature of the way which the decision was made would be inappropriate on direct appeal but that might be appropriate on collateral attack.

QUESTION: But, even if the waiver surmounted -- no waiver on your argument, the petitioner's habeas corpus would be dismissed. There was no constitutional violation.

MISS UNDERWOOD: In this case, there was no constitutional violation. I understood the question to be suppose the defendant were then to file a federal habeas corpus --

QUESTION: Yes.

MISS UNDERWOOD: -- petition raising one of the claims. But, in this particular case, none of the omitted claims was a constitutional claim.

QUESTION: Well, I know, but suppose it was and the lawyer didn't raise it and you say there would be no waiver, but you would say there would be no violation of constitutional right, wouldn't you?

MISS UNDERWOOD: I would say --

QUESTION: If the lawyer has -- If on direct appeal it is ruled that the lawyer cannot be faulted for omitting the claim, do you think there is still recourse to federal habeas?

MISS UNDERWOOD: In the ordinary case, no. I would

say in the ordinary case there would be a procedural forfeiture that would bar --

QUESTION: Say there is no forfeiture, they reach the merits, and the question was is this conviction constitutionally invalid because a lawyer failed to raise a colorable constitutional claim that he chose for strategic purposes not to raise.

MISS UNDERWOOD: I would say there is no constitutional error.

QUESTION: There never would be, would there?

QUESTION: I don't think you understand Justice O'Connor's question, Justice White. I thought her question was --

QUESTION: I understand mine though.

(Laughter)

QUESTION: Well, yours is supposedly based on hers.

Will you answer this hypothetical which may not have been Justice O'Connor's and certainly was not Justice White's --

(Laughter)

QUESTION: I will try to understand this.

QUESTION: Supposing that the Defendant, after having lost the appeal in state court, comes into federal habeas court and while his first ground of relief has nothing to do with his representation on appeal, it is a 4th Amendment claim, and -- or let's say a 5th Amendment claim --

(Laughter)

QUESTION: And the argument is there has been a procedural default because it wasn't raised on appeal in the state court and the Defendant's answer is, well, I wanted it to be raised, but my lawyer wouldn't let it be raised.

MISS UNDERWOOD: Yes. That is what I understood Justice O'Connor's question to be.

QUESTION: That is the way I understood it too.

MISS UNDERWOOD: And my argument would be that in the ordinary case that ought to bar federal habeas relief because --

QUESTION: I understand your answer. Then I asked, well, how about the merits then?

QUESTION: You didn't put in in quite those words.

(Laughter)

QUESTION: Go ahead.

MISS UNDERWOOD: How about the merits of what?

QUESTION: You say ordinarily that would be a bar?

MISS UNDERWOOD: Ordinarily that would be a bar. It might be that that particular federal habeas petitioner could persuade a court that on the facts of the particular refusal in his case there was cause for avoiding that procedural bar.

QUESTION: And, if there was cause for avoiding the procedural bar --

MISS UNDERWOOD: Then the federal habeas court should reach the merits.

QUESTION: And rule on the merits of the constitutional

issue he is presenting?

MISS UNDERWOOD: Well, in that case it would probably be the case if there was no state exhaustion, if there was not exhaustion of state remedies. It would not -- The issue would not be forever lost because it wouldn't be procedurally barred, but it would have to be reached, the merits would have to be reached in that case.

The claim of ineffective assistance of appellate counsel, however, would, in our view, not be a valid claim. That would not be reached by the federal habeas court or by any other court if the omission was a reasonable, strategic judgment. Does that answer your question?

QUESTION: Sure.

(Laughter)

MISS UNDERWOOD: The Second Circuit justified its rule in part as unnecessary method of providing equality to indigent defendants. Indeed, that is ultimately the premise of Anders and of all the cases that concern themselves with -- in which this Court has concerned itself with the right of an indigent defendant to appointed counsel on appeal.

The rule is not an effective -- a necessary or effective way of providing equality to indigent defendants. First, the Constitution does not require the state to make the relationship between an indigent defendant and appointed counsel identical to the relationship between a paying client

and retained counsel and, in any event, that could not be done. There is, in the nature of a financial relationship, something that cannot be represented except by a financial relationship.

Paying clients have substantial financial constraints that indigents do not. It is expensive to change lawyers after one lawyer has already spent a great deal of time on the case, and it is expensive to ask one lawyer to research and write on a large number of insubstantial issues. Many paying clients lack the complete control over counsel that the Second Circuit seems to assume they have.

Indeed, in the wake of the Barnes decision, the Second Circuit decision in this case, our office has received habeas corpus petitions from paying clients who claimed that their retained counsel failed to raise certain issues that they requested and asking for the same right that indigents have under the Barnes decision below; that is to say that at least some paying clients lack the kind of control the Second Circuit rule would give to indigents. There obviously is a wide range of control. There is a wide range of paying clients, and the amount of money somebody has available to him is very likely to affect the kind of control he has over his client as well as the kind of -- over his counsel as well as the kind of counsel he gets.

And, in any event, the constitutional guarantee at stake here is a right to effective counsel, not a right to any

particular form of attorney-client relationship. The right is not meant to provide indigents with equal control or equal opportunity for self expression or any other of a variety of possible forms of equality that indigent defendants might like to have. It is to provide them with an equal chance for meaningful appellate review of their convictions.

A breakdown in the attorney-client relationship might operate to prevent meaningful, effective appellate review, but there is no suggestion that that happened here.

Where counsel has consulted with the client and paid attention to his concerns and ultimately made reasonable, strategic judgments about how to frame the appeal, the constitutional right to counsel on appeal is satisfied.

There is -- The Solicitor General has suggested that there may be a problem about state action in this case. I think it is clear that there is enough state action in holding a convicted defendant in custody to require that the procedures by which the conviction is obtained and upheld satisfy constitutional standards and that includes the requirement of effective assistance of counsel at trial and on appeal. But, again, that right, that constitutional right, is a right to meaningful counsel to effective appellate review. In fact, this Court has held that that applies -- that that may be limited only to the first mandatory appeal and not to subsequent discretionary appeals. But, in this first mandatory state

appeal, the requirement is of meaningful counsel and that requirement was satisfied here.

The omission of an issue then could well amount to ineffective assistance of counsel, but that judgment shouldn't depend on whether or not the defendant made a request. In fact, it would be peculiar to penalize the defendant too ignorant to make a request. It should depend on whether the issue was sufficiently substantial so that reasonable counsel would have necessarily raised it or on whether the particular request was sufficiently weighty that reasonable counsel would have acceded to it. Neither of those kinds of omissions is shown by this record.

On appeal the defendant is entitled to effective assistance of counsel. The proper standard is not the pro se rule set forth by the Second Circuit, but a flexible standard of reasonable, professional competence applied on a case-by-case basis. That standard was satisfied here.

The judgment below should be reversed and the petition dismissed.

I would like to reserve a little bit of time for rebuttal.

CHIEF JUSTICE BURGER: Mrs. Riesel?

ORAL ARGUMENT OF MRS. SHEILA GINSBERG RIESEL

ON BEHALF OF THE RESPONDENT

MRS. RIESEL: Mr. Chief Justice, and may it please

the Court:

The issue in this case is whether on direct appeal from a criminal conviction the constitutional right to access to the courts will insure an indigent's right to be heard through counsel on a non-frivolous issue he urged his lawyer to raise, Petitioners' argument notwithstanding. This is not a case of lawyer competence. The Second Circuit specifically rejected that analysis. Rather the issue is whether counsel can act as a barrier to a non-frivolous issue urged upon him by his client.

Respondent David Barnes maintains --

QUESTION: But, the consequence of that, you claim, and the Court of Appeals seems to have said, is that there is ineffective assistance.

MRS. RIESEL: No, Your Honor, that is not our claim.

QUESTION: Do you concede it was effective assistance?

MRS. RIESEL: There was no assistance, Your Honor, on the issues that Barnes urged upon his counsel. In other words, Barnes --

QUESTION: Well, don't you think we should be concerned with whether or not there is or is not a claim of effective assistance of counsel?

MRS. RIESEL: Not in this case, Your Honor.

QUESTION: Isn't that the ultimate issue, the ultimate question?

MRS. RIESEL: No, Your Honor, it is not. The question is whether counsel can act as a barricade to preclude his client from gaining access to the court.

QUESTION: To put it another way, the question is who is going to try the case, is that not perhaps a corollary statement of the issue?

MRS. RIESEL: Well, Your Honor, this case does not deal with trials. It deals with an appeal.

QUESTION: You are trying the case here.

MRS. RIESEL: Your Honor is correct that a question in this case is who is the master, if you will, of the proceeding. This case deals with a direct appeal, and we maintain that there is a substantial difference between the appellate process and the trial process.

Clearly once a state has established procedures for appellate review of a criminal conviction, it must provide equal and open access to those procedures. Access may be defined as the means by which an indigent defendant can present his claims to the court.

On direct appeal at a minimum the means to a fair hearing requires the right to counsel. It is only through counsel that the indigent lay person, uneducated in the law, can effectively and adequately present his claims to an appellate court.

QUESTION: Well, you are saying on direct appeal,

Counsel. You are not here on direct appeal or, in your terms, do you think you are here? Did this case come on direct appeal in those terms?

MRS. RIESEL: Your Honor, the issue in this case is whether a lawyer on direct appeal from a criminal conviction can decline to raise a non-frivolous issue urged by his client?

QUESTION: Do you think that you were required -- that you are required here to raise every non-frivolous issue that your client wants whether you think it makes any sense or not?

MRS. RIESEL: Do you mean in a collateral proceeding?

QUESTION: Here in this Court today in your brief.

MRS. RIESEL: I think the questions of access and the questions of right to counsel as decided by this Court may change the complextion. As a personal matter, I would feel obligated to raise a non-frivolous issue urged by my client.

QUESTION: Even if you thought it would weaken the ultimate -- the total presentation in the case to this Court?

MRS. RIESEL: My responsibility to my client, Your Honor, would be to explain that view to him and explain the reasons why I had reached that conclusion. But, ultimately, if he were to reject my analysis, I believe my obligation would be to present that issue.

QUESTION: You would put it in -- You would feel required to put it in the brief?

MRS. RIESEL: Yes, Your Honor.

QUESTION: Then when you came here to argue it as you have today, and your client says, now, I want you to be very sure you argue every one of these points, even the ones you didn't think make any sense, obligation on your part in these terms to orally argue those points?

MRS. RIESEL: Well, of course, the give and take of an oral argument sometimes precludes the best intentions of counsel, but I think advocating --

QUESTION: Touché.

MRS. RIESEL: -- the issue would certainly be my intention. Advocating it orally would certainly be my intention and my goal.

QUESTION: The most you could say if you were allowed to?

MRS. RIESEL: Yes, Your Honor.

(Laughter)

QUESTION: But, you might, you might in doing that neglect oral argument on points that you consider truly important and crucial, is that not so?

MRS. RIESEL: That is true, Your Honor, and that too I would explain to my client and I would urge him -- as I might add parenthetically Mr. Melinger did not urge Barnes here -- that we should relinguish that, but if understanding my arguments and the reasons for my conclusions he determined that he wanted -- that the issue was important to him and the issue were a

non-frivolous one, I would go forward with it.

QUESTION: How would you determine what is non-frivolous, by some objective standard or what counsel deems it to be as you suggested in your brief?

MRS. RIESEL: Well, Your Honor, this Court in Anders sat down a requirement for making -- for counsel initially making that determination and for the courts making the determination of what is non-frivolous.

QUESTION: Well, Anders didn't tell you how to go about it.

MRS. RIESEL: No, sir, it does not give you a handbook. But, lawyers and judges must make that decision every day.

When counsel on his own refuses to communicate to the court a legitimate claim requested by his client, counsel functions as a barricade to the hearing.

QUESTION: Now you have changed your terms from non-frivolous to legitimate.

MRS. RIESEL: I did not mean to change the sense of it, Your Honor. Non-frivolous will suffice.

QUESTION: If it is a legitimate claim, you shouldn't need to be -- The lawyer shouldn't need to be urged by the client to present them.

MRS. RIESEL: I meant to use the terms interchangeably, Your Honor. I did not mean to suggest the higher standard.

QUESTION: Mrs. Riesel, your client did have a brief

submitted on his behalf to the state appellate court, did he not?

MRS. RIESEL: By counsel, yes, he did, Your Honor.

QUESTION: So, are you claiming that counsel's performance on the written part of the appellate presentation of briefing fell short of constitutional standard?

MRS. RIESEL: No, Your Honor, we are not asserting that the brief that assigned counsel filed was an incompetent brief.

QUESTION: But, supposing there had been no oral argument, that the case had simply been submitted on the basis of your client's pro se brief and the counsel's brief. Would you think that the Second Circuit ought to reach the same result as it did in this case?

MRS. RIESEL: Absolutely, Your Honor.

QUESTION: Because the lawyer wouldn't sign his name to the brief prepared by your client?

MRS. RIESEL: No, it is not just the refusal to sign his name to the brief, Your Honor, but to assist the client, Mr. Barnes, in the presentation of the issues. Obviously, the skills of a trained advocate will exceed those of a layman in the presentation of the issues; so that Mr. Barnes would still have been denied access if counsel had had, in fact, signed the pro se brief, that that is not enough.

QUESTION: Counsel would have had to retool the pro se brief to meet these standards?

MRS. RIESEL: Exactly that.

QUESTION: Am I correct that the constitutional provision on which you have relied is not the 6th Amendment, not the Due Process Clause and not the Equal Protection Clause, but just the right of access cases?

MRS. RIESEL: Well, we rely on the right of access cases and those, in turn, Your Honor, I believe rely on the due process and equal protection.

QUESTION: But, in those cases, the prisoner access to the courts, for example, usually pro se submissions have been adequate. And here you did, in fact, get -- Your client's letter did go to the court.

MRS. RIESEL: Well, Your Honor, the access cases are not limited only to the prisoner cases. Of course, we believe that Griffin and Douglas were also access cases.

But, I think it is clear from this Court's holding and from logic that an indigent appellant's pro se presentation will not suffice and does not equate to the presentation of counsel and particularly in this regard --

QUESTION: If it doesn't equate, then it is an equal protection matter, but there is access --

MRS. RIESEL: No, Your Honor, I think that when the Petitioner must proceed pro se, his ability to frame his issues and to present them effectively and fairly to the court is so imputed as to infringe on his access right, particulary when

standing side by side with him is his lawyer, whose refusal to raise the issue communicates to the court --

QUESTION: But that goes to the presuasive character of the presentation. But it seems to me that the communication by the client is intelligible and his point is understandable by the court. And that, it seems to me, satisfies the access point.

MRS. RIESEL: No, Your Honor --

QUESTION: I do not know of any access case that said there had been a denial of access when the message gets through, even though it may be poorly written and pro se and all the rest. I understand the equal protection, due process, effective assistance of counsel, but I do not think your access case is really right on the button here.

MRS. RIESEL: Well, Your Honor, I beg to disagree. I think that the access cases make clear that the client must have the means for -- I think the words are -- adequate and effective way of presenting his issues.

QUESTION: Which case, do you think, is your strongest access case?

MRS. RIESEL: I think Bounds is very helpful to us, Your Honor.

QUESTION: Which case?

MRS. RIESEL: Bounds against Smith, which is a prisoner's case, Your Honor.

QUESTION: You use the term effective, although earlier

you disclaimed any thoughts of lack of effective assistance of counsel here. You said the client was entitled to have his pro se points presented effectively, and that his counsel having declined to help him present what the counsel considered improper points, therefore, there was not an effective presentation. So, is there not an undercurrent here of effective representation?

MRS. RIESEL: I do not think so, Your Honor. We are talking now about Barnes' ability to represent himself effectively as opposed to --

QUESTION: Well, but your point of your argument that you were making was that the counsel had an obligation to take this pro se brief and cast the pro se's points in terms that a lawyer would use with the skill of the advocate, I think you have said. So, doesn't that really draw in, even if in the Freudian sense, the effective assistance of counsel in this case?

MRS. RIESEL: I do not think so, Your Honor, because here counsel refused to do anything.

QUESTION: What if he thought one of them was a dishonorable, unethical point, do you think he had an obligation to raise it any way?

MRS. RIESEL: But that is not this case, Your Honor. In fact --

QUESTION: No, I said, what if, hypothetically?

MRS. RIESEL: If, for example, counsel were to determine if the issue were a frivolous one, the Second Circuit makes

clear that counsel does not have an obligation in that instance to raise the issue. And, I do not have any quarrell with it.

The significance of issue presentation cannot be lost on any appellate lawyer. The entire concept of appellate review is the consideration of issues properly raised in the briefs. It is beyond dispute that it is appellate counsel, and not the court, that must identify and advocate the issues presented by the case.

Today, as has already been noted, a failure to raise an issue on direct appeal may well result in a waiver of that claim. Given the critical importance of appellate issue selection --

QUESTION: May I back up minute to the 6th Amendment? You still say you do not want the 6th Amendment? You have got it in your brief.

MRS. RIESEL: Your Honor --

QUESTION: You are abandoning it?

MRS. RIESEL: No, I am not abandoning it. I am not relying on it as the Second Circuit did not. I think that there are aspects to the 6th Amendment right to counsel that --

QUESTION: Well, you say in your brief, you quote from Justice Shaefer, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects" -- you are relying now on the 6th Amendment, aren't you? You are talking about counsel.

MRS. RIESEL: We are relying on the need for counsel

to enable or protect the defendant's access to the court.

QUESTION: My only point is that you object to the counsel in this case abandoning a point, and you are abandoning a point here. Am I right?

MRS. RIESEL: Well, Your Honor, I did not mean, nor do I intend to abandon the point --

QUESTION: Of course, I suppose we must be curious to know whether your client wanted you to make that point.

(Laughter)

MRS. RIESEL: Given the critical importance of appellate issue selection, the client must have the right, should he choose to exercise it, to participate in the appellate process. An appeal -- nothing in the nature of an appellate proceeding militates against that participation. An appeal is a deliberative, contemplative, and collegial process. The appellate lawyer must review the transcript, analyze the applicable case law, consider the interplay of the issues presented, and draft his brief. An essential tool of the craft is the ability to consult with his colleagues. The exchange of ideas often gives rise to the primary issue on the appeal, and sometimes leads the way around a difficult legal problem.

The pivotal ingredient in this appellate process is time to reflect and to cogitate. And, if there is one thing that an appellate lawyer has it is time. For example, in the Second Circuit there is on the average of two months between

the filing of the notice of appeal and the appellate's brief.

It is my understanding that in the state court system there is more time and more flexibility to get extensions of time. In this regard, the appellate process is markedly distinct from the trial. The exigencies of time that are alien to the appellate process -- the exigencies of time that attend the trial decisions are alien to the appellate process. Therefore, the primary rationale for requiring a client to defer to the decisions of counsel simply do not pertain to the appeal.

QUESTION: Would you still be here if your client had not requested the inclusion of these issues on appeal. They are positive to have been non-frivolous or legitimate as you say. Would you say it is equally a denial of some federal constitutional right to omit any non-frivolous ground from the appeal wholly aside from whether the client requested it?

MRS. RIESEL: No, Your Honor, I would not.

QUESTION: Why wouldn't you?

MRS. RIESEL: Because I think that in the situation where -- and this is the most frequent situation in my experience-- where a client defers to his lawyer's judgment and --

QUESTION: Well, he defers by silence. He says, let's take the appeal. The lawyer says, we are taking the appeal. If you want to read a copy of the brief, here it is. The client would not have the faintest idea there was another issue maybe.

MRS. RIESEL: That may be true, Your Honor, but by his

conduct, he has communicated a confidence in his lawyer in his willingness to permit his lawyer to make these decisions.

In the Barnes case, the situation is quite different because Barnes made it clear from the outset that he wanted to participate in the process and wanted to ultimately control the issues that were presented to the appellate division.

QUESTION: Well, doesn't the lawyer, then, have a duty if he thinks of four or five non-frivolous issues that he thinks are not quite strong enough to raise, should he not tell the client about the non-frivolous issues he has decided not to raise so the client can make a meaningful decision as whether to let him go ahead that way?

MRS. RIESEL: The court below did not find that counsel had that duty. This case presents an entirely -- a different issue, namely the issue of whether a lawyer must acceed to his client's direction.

I think, in answer to your question, that it depends on the particular lawyer-client relationship. If the client expresses an interest and a determination to participate in the process, then the lawyer may in that situation have the obligation to apprise his lawyer -- his client, rather -- of the issues not to be raised.

Alternatively, when the client by affirmative statement or by silence indicates a willingness to allow his lawyer to control the process, the lawyer can do so.

QUESTION: In fact, didn't counsel here raise six points that were not covered or raised by the Defendant? In his letter to the Defendant, didn't he have six points, three of which he did later argue --

MRS. RIESEL: He raised a total, or the prospect of a total of seven, Justice Blackmun, and then ultimately raised three of the seven.

QUESTION: Now, referring back to my inquiries about whether you were or were not raising effective assistance of counsel, I note that while it is very flattering to Judge Bazelon and to Judge Kaufman and to me to have you cite our articles, you have devoted about four pages and they all deal with effective assistance of counsel.

MRS. RIESEL: Well, Your Honor, that was in response to the premise of the Petitioner's argument, namely, that the lawyer should be and must be in control of the proceedings because he is the only competent representative of the appellant. The power of response -- and I think it has to be the concern of this Court -- is that not only is it the client who has the fundamental interest in the outcome of these proceedings, but these proceedings are frequently flawed or marred by what the most eminent jurists in this country have found to be ineffective assistance of counsel. So, that the bottom line is that we are precluding the defendant from controlling his destiny, and his future, and perhaps his life, and putting that future

and that life in the hands of the hands of lawyers who may not be up to the task. After all, we have all seen that lawyers, like doctors, are fallible.

It is with that in mind, Justice Burger, that we cited to those Opinions.

As stated, the client's right to insist on the presentation of a non-frivolous issue flows from the reality that it is he and not his lawyer who will suffer the consequences if the conviction is affirmed.

More particularly, the client will suffer the loss, perhaps for all time, of the ability to present the requested claim to a reviewing court. This loss can be substantial. All practicing lawyers have seen that client input can be valuable. Indeed, the issue decided by this Court in Gideon v. Wainwright originated with the client.

Similarly --

QUESTION: In your view, Mrs. Riesel, should the clients rather than the lawyer make the decision on whether to cross-examine or not to cross-examine an adverse witness?

MRS. RIESEL: Your Honor, of course, that deals with a trial situation --

QUESTION: Well, it is important.

MRS. RIESEL: And, that as I have indicated, we believe is quite distinct from the appellate situation. I think that ultimately the client's interest --

QUESTION: You exchange it on appeal, at trial -- the trial counsel having been replaced on appeal -- the trial counsel declines to cross-examine a government witness explaining to his client that it would be disastrous to cross-examine in his professional judgment. Now, we have a new lawyer on appeal and the client wants counsel to raise that issue -- obligation to raise it, even though to the appellate counsel it does not make any sense?

MRS. RIESEL: I think in answer to your question, it depends on the exigencies of the trial situation. Obviously, while the client has the primary interest and consequently, we would argue, the ultimate control over the issues to be raised there, we must recognize that there are situations where that is unworkable.

And, perhaps the one that Your Honor poses is such a situation.

QUESTION: Could I ask you if the Second Circuit had arrived at this point it arrived at and said that counsel should have raised this on request, but then went on and said that this requires us to look at the ground, we find the ground, although non-frivolous, was a loser. Wouldn't have made a bit of difference. Would you have challenged that?

MRS. RIESEL: Your Honor, it is our view that the failure or the refusal to raise a non-frivolous issue is sufficient to grant relief, relief being a new appeal.

QUESTION: I know it is sufficient, but what if the Court of Appeals had went on and said, well this is a federal habeas proceeding. We want to know if there is any constitutional infirmity in this state conviction. We look at this ground. It had been a clear loser. There is no constitutional problem in it at all. Any competent counsel would have left it out any way. Non-frivolous, but nevertheless it was a loser, so we deny federal habeas.

MRS. RIESEL: Of course, the analysis at that juncture would not be whether the issues appellate counsel did not raise in the state court were of constitutional dimension. The federal court would be placing itself in the difficult situation of second-guessing what the state court would have done had the issue been presented.

QUESTION: Which they do all the time any way on the other side of the case. The Court of Appeals or the District Courts know something about state law.

MRS. RIESEL: Surely, Your Honor, but in simple answer to your question, we would be here because we think that would be the wrong standard.

QUESTION: So, the Chief Justice's question must still stand, then. Aren't you really -- isn't your case at bottom, then, a competency of counsel case?

MRS. RIESEL: No, Your Honor.

QUESTION: I do not understand what it is. If you

would still be here in my example, what is it then?

MRS. RIESEL: It is an access case because the question is whether the appellate lawyer denied his client access on direct appeal.

QUESTION: He did not deny anything. He said if you want to go argue it, argue it yourself.

QUESTION: And Faretta guarantees him that right.

MRS. RIESEL: But, he did not want to proceed pro se, Your Honor. He wanted to proceed with the assistance of counsel.

QUESTION: I know, but counsel said no. The question is was counsel -- was that a competent performance of counsel.

MRS. RIESEL: The answer --

QUESTION: Was it a constitutional performance?

MRS. RIESEL: No, it was an unconstitutional performance.

QUESTION: But, not because of competence?

MRS. RIESEL: No, because of a denial of access.

QUESTION: Competent but unconstitutional?

MRS. RIESEL: The question of competence does not pertain to this issue because counsel failed or refused to present the issue.

QUESTION: Sort of a malpractice claim?

MRS. RIESEL: Perhaps, but not providing sufficient relief to this defendant.

Contrary to Petitioner's concern, the Second Circuit rule encourages lawyers to exercise the responsibility that

Petitioners would thrust upon them, namely, to convince their client that it is not in their best interest to present an issue. Only when the lawyer fails in that mission that he must present the issue. The result of lawyers exercising that responsibility will surely be the dimunition of the number of issues.

When the lawyer fails to raise or fails to convince his client, both the client and the court will benefit from the professional presentation of the issue.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further Miss Underwood?

MISS UNDERWOOD: A few brief points, if I may.

First, there is no suggestion here that there was a failure of communication or a lack of participation by the client. The only question that this case is about has to do with ultimate control, not participation.

Second, every point that the Second Circuit said should have been presented, was, in fact, before the state appellate court in the form of a pro se brief. So, there is no denial -- no total denial of access here.

Third, though an attempt has been made to distinguish between strategy at trial and strategy on appeal, it is perfectly plain that there are important strategic judgments to be made on appeal as well as at trial. There was one particularly salient one here. The client was concerned about the fact that

a particular medical record, having to do with -- by which he wanted to impeach the complaining witness, did not get into evidence.

QUESTION: So, your position would be the same, though, wouldn't it, if the client himself had not filed a letter with the appellate court?

MISS UNDERWOOD: Yes it would.

QUESTION: That makes no difference to your argument?

MISS UNDERWOOD: That is correct.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 3:18 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
EVERETT W. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL., Petitioners v. DAVID BARNES #81-1794

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pirie Hammond

(REPORTER)