OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1378

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

PLACE Washington, D. C.

DATE October 10, 1984

PAGES 1 - 50

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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL KAVANAUGH, SUPERINTENDENT, :
BIACKBURN CORRECTIONAL COMPLEX :
AND DAVID L. ARMSTRONG, :
ATTORNEY GENERAL, :
Petitioners :
v. : No. 83-1378
KEITH E. LUCEY :

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Washington, D.C.

Wednesday, October 10, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

APPEARANCES:

J. GERALD HENRY, ESQ., Assistant Attorney General of Kentucky, Frankfort, Kentucky; on behalf of the Petitioners.

WILLIAM M. RADIGAN, ESQ., Louisville, Kentucky, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Henry, I think you may proceed when you are ready.

ORAL ARGUMENT OF J. GERALD HENRY, ESQ.

ON BEHALF OF THE PETITIONERS

MR. HENRY: Mr. Chief Justice, and may it please the Court:

This matter comes for review from the 6th Circuit Court of Appeals, and involves a state prisoner's habeas corpus claim of constitutional deprivation on state appeal. The question presented for resolution today is whether there is any constitutional impediment to dismissal of a state appeal for failure of retained appellate counsel to follow the rules of procedure, and a specific portion of that question is whether under the Constitution there is any entitlement to effective assistance of appellate counsel on state appeal.

The holding of the Sixth Circuit was that indeed there is a right to effective assistance of appellate counsel on state appeal.

Before we list the facts, we would submit to the Court that we in arguing this matter will address the Sixth Amendment as to the possible right of effective assistance on state appeal, and as to the due

process implications, we will look at two lines of cases of this Court, the McKane line and the Griffin-Douglas line, and we would suggest harmonizing of those lines, apparent in cases like Ross v. Moffitt.

QUESTION: You have just informed the Court by letter a day or so ago that this man has now been placed on parole, and you call the Court's attention to it.

But you will address the question at some point as to whether or not this renders this moot.

MR. HENRY: I learned about it, Your Honor, I learned of this last week for the first time and submitted authority with my letter.

Our position is that the question may be considered by the Court, that it is not moot even though Mr. Lucey, the Respondent, has been finally discharged from parole, and indeed, his civil rights have been restored. The reason for that is -- there are several reasons. When this action started in the District Court, when his petition for habeas corpus was filed, he in fact at that time was in custody.

There exists the possibility of some collateral consequences as long as this conviction remains. If he were to go to trial, there's the possibility of impeachment from that conviction, could be considered at sentencing, and in terms of Kentucky

procedure, if the trial were there, under our persistent felony offender statute, any sentence he might receive could be enhanced.

In addition, the Commonwealth is under orders which are stayed in this matter to either grant Mr. Lucey a new trial or to somehow reinstate his appeal. And as we read the cases submitted, Strickland especially, and the ones following, it appears that there almost exists perhaps a presumption that under these circumstances collateral legal consequences will occur, not that they definitely will, but a presumption perhaps.

We think --

QUESTION: Would it make any difference in your answer if he were to get up today and say my client's no longer interested in the habeas petition?

MR. HENRY: It would make a difference from --

QUESTION: Or perhaps so far as I'm concerned I'm not going to press it.

MR. HENRY: -- the way you, the way you look at it from his point of view, but I think a what happens should be uniquely within the knowledge of Mr. Lucey, and if he were going to go down and say that today, hopefully that position would have been taken long ago rather than having him come in today.

QUESTION: Well, now, as I understand it, as you said that he has been restored to his civil rights and finished his sentence, and he's been discharged, hasn't he?

MR. HENRY: Yes, Your Honor.

QUESTION: Well, in that circumstance, he might have no further interest in this habeas petition, might he not?

I should perhaps be asking him.

MR. HENRY: The possibility --

QUESTION: But I just wondered if he were to do that, whether your answer to us would be any different.

MR. HENRY: It would not from our point of view, Your Honor, particularly because we are under orders to do a definite act, and particularly because at this stage of the proceedings, the conviction is there if you've got one. I just think those are valid interests.

QUESTION: Well, the only thing that interfered with the state's interest in this case was the federal habeas corpus proceedings, right?

MR. HENRY: That was an intervening thing, and when that remand --

QUESTION: And if we held that the case was

moot, we would vacate the District Court's judgment, the Court of Appeals and direct the District Court's judgment to be vacated, in which event there would be no threat to the state.

QUESTION: The slate would be wiped clean.

MR. HENRY: Perhaps not in this particular case but this issue has, if I might be frank, been quite burdensome to us.

QUESTION: Well, that may be, but nevertheless, the precedential value of the Court of Appeals' judgment would be eliminated, certainly.

MR. HENRY: That may be the case, and it was that possibility, Your Honor, which prompted me to bring in --

QUESTION: Wiping the slate clean would also leave the Defendant subject to these collateral consequences.

MR. HENRY: It would indeed.

QUESTION: Which he is not subject to now unless we -- if we affirmed, he would not be subject to those collateral consequences.

MR. HENRY: Well --

QUESTION: Unless the state --

MR. HENRY: Depending on how the state did it, the possibility of an appeal could go forward and be

affirmed. At least there would --

QUESTION: But if the state didn't, he would be in effect discharged from those collateral consequences.

MR. HENRY: That is arguably what could happen, Your Honor. I could not deny that.

QUESTION: Yes, thank you.

MR. HENRY: The facts underlying the questions are straightforward. Mr. Lucey was tried before a jury in a Kentucky Circuit Court, and he was found guilty of trafficking in LSD and cocaine. He timely appealed to the Court of Appeals of Kentucky He filed a brief on appeal in that court in which he raised three claims of error in the trial court.

His retained appellate attorney, however, did not comply with the rule regarding statement of appeal, and because of that, the appeal ultimately was dismissed without making a decision on the claim Mr. Lucey raised. His attempts to combat that in the Kentucky courts were unavailing.

He then went into the District Court with his habeas corpus claim that he was deprived of effective assistance of counsel on appeal.

The Petitioners appealed to the Sixth Circuit Court, and the ultimate result of that is the holding of

that Court, which is that there is a due process right to effective assistance of appellate counsel on state appeal.

We disagree with that, as we have set out, and our argument will be based in two ways, examining what we see as the reality of the Sixth Amendment, and examining the two lines of cases that I mentioned earlier. But before doing that, if I may, I think it would be helpful to briefly examine Mr. Lucey's brief for what we consider some important agreements by him with some of our basic positions.

QUESTION: Mr. Henry, in the opposing brief is a citation of a case from the Kentucky Court of Appeals called England v. somebody, Spalding.

MR. HENRY: Dealing with the statement of appeal.

QUESTION: And it is not cited in either of your briefs.

Do you have anything to say about that case as you are discussing your opponent's brief?

MR. HENRY: Yes, Your Honor.

QUESTION: It seems to hold against you, and I wondered about your comments.

MR. HENRY: I would respond in two ways. The practice in Kentucky is that almost all, according to my

experience and observation, almost all orders of dismissal are brief, and they are not to be published, so there are in reality not many opinions in Kentucky discussing any particular aspect relating to that. There are some, but most of them are by unpublished order. And the facts in the case you referred to, Your Honor, seemed to be most unlike the facts here in that in England, almost all, substantially all of the information was required in the document -- or I'm sorry, almost all the information was placed in the document. There was one departure which the Court deemed insignificant to following the rule.

Here, no document at all was tendered, and none of this information was assembled in one document before the Court. Mr. Lucey has several times stated that nevertheless, the information could be found within his brief.

There are two difficulties with that, I would submit, and they are that no court has ever agreed with that contention, and I would submit that while some information is in the brief, other required information is not. And in any event, we would further submit that one of the main purposes of the rule which was not followed is to put in one document the required information for the purpose of effecting judicial

economy so they could quickly find out a number of things the Court thinks to be important.

The first is you have to put or you should put in the document when the judgment was entered and where in the record it can be found. In tandem with that is the notice of appeal. This very quickly let's the appellate court know if the appeal jurisdictionally is properly before the Court. Then it tells the Court if there are good reasons to advance, if there should be consolidation, and a number of other things.

We think that is a fair interest of the state.

QUESTION: As long as you're interrupted, Mr. Henry, and in somewhat the same vein, the Kentucky Supreme Court has suggested in the Stahl case that the proper remedy when an appeal is denied or dismissed because of counsel's error is for the trial court to have some new proceeding and allow a new appeal.

So it sounds as though the practice in Kentucky under these circumstances might reach the same end result as the Sixth Circuit did. in other words, normally allowing a new appeal when counsel has erred, as here.

Is that the practice in Kentucky or not?

MR. HENRY: Your Honor, the practice in

Kentucky I believe can best be characterized as in disarray because of this type of case. I would submit as my first evidence of that the face of the Stahl opinion itself. I believe examination of it will suggest three approaches to this, one in the collateral attack court or the trial court, the possibility of a belated appeal in appellate court. But after all that is said and done, the end of the case is the Kentucky Supreme Court wants the rules followed, and that unless the rules are followed, this cannot be done.

The genesis of this line of cases, if I may say so, I believe, is the Hammershoy case in Kentucky. That I submit is an equal protection case, and that marked a change in the Kentucky method of dealing with this. It is an equal protection case, and examination will show that the Supreme Court of Kentucky was trying to give fidelity to equal protection decisions of this Court and cited them and said, number one, we had always thought the procedure for handling this was different. Nevertheless, the Supreme Court suggests otherwise, and we will accommodate that. Then it said we are not really sure that we understand what the Supreme Court has said, but as best we can, we elect to give fidelity to that and do the best we can.

So I would submit that the Stahl question is a

valid one, but if you will read the three parts, on the face of it I believe you will get a good indication of the disarray which exists, and I would submit that it is because of this case which in the Sixth Circuit had its genesis in Cleaver and Gilbert.

QUESTION: Mr. Henry, let me go back to England v. Spalding, and this is the Kentucky Court of Appeals in 1970 which at that time was your state supreme court. You have changed the name since then, I think.

Am I not correct?

MR. HENRY: In 1970 our high court was called the Court of Appeals.

QUESTION: Court of Appeals.

MR. HENRY: After our judicial amendment in the mid-1970s, our high court is now called the Supreme Court, our immediate appellate court, which came into existence --

QUESTION: That is correct, and this is what I am reading, then, from your state's top court in 1970. We do not consider the failure of appellants to specify in their statement of appeal the supplemental judgment entered December 26, '67 as being fatal to the appeal.

Now, you do not cite this case, and I would like to know somewhere along the line, either by

supplemental letter, how you distinguish that language from the facts of this case.

MR. HENRY: The way I distinguish it, Your Honor -- and I will be pleased to submit a supplemental letter in addition -- is that in England v. Spalding the party did in fact file the required statement of appeal and did in fact, on the facts, put in all the information, as I read the case, with a minor exception which was that supplemental judgment. And because of that, as I analyzed the case, it was deemed to have been complied with.

I have read that case, and my notation in the brief is that they did file a statement. It was almost complete except for that one point. Here they did not file the statement, and none of that information was in the document.

I of course could misunderstand the case, but I have read it, and that is what I've indicated at page 10 of Mr. Lucey's brief as the way to distinguish it.

QUESTION: Of course, there's another sentence I didn't read, and that was that the section is designed to assist this Court in processing records, and compliance is not jurisdictional.

MR. HENRY: In the sense of trial jurisdiction and appellate jurisdiction, that is correct.

Nevertheless, Kentucky has a longstanding policy of strict enforcement of its rules of appellate procedure, and notwithstanding the fact that this particular instance is not jurisdictional, it's just the traditicnal policy cf Kentucky tc strictly enfcrce this rule, and that is what Kentucky has done insofar as it has been able tc. Abcve, I agree that it is not jurisdictional in the sense of whether the power rests in the trial or in the appellate court.

Whether the Kentucky policy and tradition, that is not a determination of exhaustion, strict exhausticn may not be jurisdictional, but it is to be strictly complied with in a different context, in further support of my answer.

QUESTION: I suppcse the best evidence cf a view of a Kentucky appellate ccurt cf hcw the failure on this appeal should be treated is the decisicn cf the Kentucky Court of Appeals in this case which dismissed ths appeal.

MR. HENRY: It did indeed, fcllowing the policy in --

QUESTION: And which is an intermediate appellate court now.

MR. HENRY: Yes, it is. It was when this Lucey questicn arose, and it still is. Mr. Lucey then

sought discretionary review in our Supreme Court, which is our court of last resort, and that court not only declined the invitation for discretionary review, but I think the record will indicate, Your Honor, that the action of the Court of Appeals in fact is affirmed, and this too would be an indicate that the Supreme Court wanted to see the rules strictly enforced.

QUESTION: Mr. Henry.

MR. HENRY: Yes.

QUESTION: May I ask you a question?

There was retained counsel in this case, was there not?

MR. HENRY: Yes, indeed, Your Honor.

QUESTION: And I got the impression from I think it was the Hammershoy case that perhaps if it had not been retained counsel but he'd been indigent, that maybe your state courts would have taken a different view of the matter.

Is that true, or do you think the same rule applies to both?

MR. HENRY: My understanding, Your Honor, is that our courts insofar as possible try to be in accord with the equal protection pronouncements of this Court. And I go back to Hammershoy. I do not try to avoid your question, but a reading of Hammershoy I would submit is

that there is some difficulty by ouir court of understanding the implicatiens of that. They try to grant all minimal access to the appellate process, to the indigents, that is --

QUESTION: What is your best -- what would be your best judgment under the Kentucky practice? If this had been an indigent appeal rather than retained counsel, do you think the result would have been the same? Or you just don't know?

MR. HENRY: Indigent in the sense that he had perhaps appointed public defender counsel?

QUESTION: Public defender, yes.

MR. HENRY: My observation and experience is appeals are dismissed regardless of whether counsel is retained or appointed so long as the rules simply are not followed. The rule is neutral, and the Court attempts to apply it neutrally, and indeed, they have dismissed appeals where representation was by appointed counsel, and they have dismissed appeal by retained counsel.

I think the result would have been the same regardless, absent some facts suggesting equal protection in one way or another.

QUESTION: Thank you.

MR. HENRY: Our Sixth Amendment analysis is

this, our analysis of the so-called right found by the Sixth Circuit to effective assistance of counsel on appeal.

Our best indication is that neither Mr. Lucey nor the courts below explained the source of the right that they asserted. It seems to us that any such right would arise out of the Sixth Amendment if it exists, and our reading of the Sixth Amendment in its most literal and explicit sense is that it applies in the trial, fundamental trial arena, rather than in the nonfundamental appellate arena, just based on the language of that amendment. It speaks of a criminal prosecution where there is an accused, where there is a public trial before the jury. It explicitly provides counsel to assist the defense of the -- the accused defense of the prosecution. Appeal is not mentioned.

QUESTION: Well, did the Court of Appeals say this right arose out of the Sixth Amendment?

MR. HENRY: No, Your Honor.

QUESTION: It didn't.

MR. HENRY: The Court of Appeals did not explain the source of the right. That is a difficulty, and we believe one which cannot reasonably be overlooked with the opinion of the Court of Appeals. There is no explanation.

We suggested in our brief that the only way to get the Sixth Amendment counsel right under the appellate setting is to somehow find that appeal and trial are the same, that appeal is somehow a critical stage.

We under our analysis, that cannot be done, under Ross v. Moffitt, for example, because trial and appeal are significantly different. Trial tries to convert a defendant, presumed innocent, into one found guilty beyond a reasonable doubt. On the other --

QUESTION: I guess the opinion isn't -- doesn't really go into it with much clarity, but did the Sixth Circuit opinion not say that it recognized the due process right to the effective assistance?

MR. HENRY: Yes, Your Honor, it does indeed, due process right to effective assistance.

QUESTION: Yes. I had rather assumed that was the basis, but it doesn't cite much authority, and it's a little unclear.

MR. HENRY: This Court didn't either. Neither does Mr. Lucey, and this has been litigated in terms of the Fourteenth Amendment, and if its the Fourteenth Amendment being used as a conduit to the states, if it isn't in the Sixth Amendment, I would submit that it just does not exist in the Constitution because

explicitly that amendment refers explicitly to counsel in the fundamental trial arena.

That is a grave difficulty with the opinion of the Sixth Circuit, and I would submit a failure of Mr. Lucey here on brief to directly address that troubling reality.

Our due process analysis in its more general sense relies on two lines of cases, the McKane, which comes right on up until the present day, and the Griffin-Douglas line of cases. The McKane case is saying there is no due process entitlement at all at the state court appeal, and the Griffin-Douglas line of cases using due process and equal protection language, and we would submit causing a good deal of trouble in understanding these lines of cases.

QUESTION: Well, what about -- I take it there is no claim of a denial of equal protection in this case.

Was that stipulated?

MR. HENRY: By stipulation of the parties, there is no equal protection issue here.

QUESTION: You were lucky.

MR. HENRY: In a sense, I was, but I would say of opposing counsel, for his benefit, I think he made the correct, factually correct decision and recognized

the reality of it, and I -- it's more than luck. I think it is a competent decision and judgment by Mr. Radigan --

QUESTION: Well, that may be, but still --

MR. HENRY: -- to be candid about it.

But yes, indeed, it does help me in the sense that I don't have to deny that it exists and attack the evidence.

The benefit we see to the Ross v. Moffitt case is we think it explains and harmonizes the differences, no due process in McKane, some due process, Griffin-Douglas, and it does it this way.

We believe that it finds that due process in the Griffin-Douglas line of cases exists in tandem only with equal protection, if equal protection exists. But steps, the way it does that, it starts and says that neither due process clause nor equal protection clause of the Fourteenth Amendment by itself satisfactorily explains the result of the Griffin-Douglas cases.

It goes on to define fairness in terms, traditional terms, and defines equal protection as to disparity. And we would submit to the Court that the key to this in harmonizing it, and later on we submit not to extending it, is this quotation from Ross. Unfairness results only if indigents are singled out by

the state and denied meaningful access to the appellate system because of their poverty. This question is more profitably considered under an equal protection analysis.

That just reiterates that due process as it is mentioned in the Griffin-Douglas lines of cases exists only in tandem with an actual existence of an equal protection violation or disparity.

So whereas here or in any case, if there is no equal protection in existence, then there is no existence of due process either because neither by itself supports the result reached; they must act in tandem. Thus, absent equal protection there is an absence of due process, and Ross v. Moffitt is nicely explained, and more importantly, harmonized, two important lines of cases, and I think along the way it suggested an unwillingness to extend Griffin and Douglas farther, and I tink definitely we should not add a whole new layer of appellate effective counsel claims.

If there is fundamental constitutional deprivation at state trial, raise that as always in the habeas corpus court directly and don't do it directly and eat up a lot of time and raise a lot of troubling new questions, was counsel's brief bad, should he have raised the brief, a question that he didn't, should he

have raised a petition for rehearing and all things like this.

It is a very, very disturbing area to get into, and it's potential.

Any time I have, Your Honor, Mr. Chief Justice, I would request for rebuttal.

Thank you.

CHIEF JUSTICE BURGER: Mr. Radigan?

ORAL ARGUMENT OF WILLIAM M. RADIGAN, ESQ.

ON BEHALF OF RESPONDENT

MR. RADIGAN: Mr. Chief Justice, Your Honors, let me, before I get into a discussion of the substantive issues that we have here in the case, let me take care of a few preliminary matters, if I may.

Mr. Chief Justice, in regard to the mootness question that you raised with Mr. Henry, the last time I talked to my client, which was about ten days ago, he was very much interested in continuing his case. Since 1977 he has wanted a direct appeal from his conviction in the Madison Circuit Court, and he still wants that appeal because he thinks he was unjustly convicted there and he does want to clear his name.

But that was ten days ago before I realized, from the benefit of Mr. Henry's letter to this Court, that his sentence has been eliminated, and he is no

longer under any type of restrictions from his conviction.

But I think that this Court has to also look and examine at the question of whether or not this case is capable of repetition.

Interestingly enough, Justice O'Connor, when you mentioned the Stahl --

QUESTION: Mr. Radican, I didn't follow you.

What do you mean his sentence has been eliminated?

MR. RADIGAN: He has served out his sentence. In Kentucky, he received a -- Mr. Lucey received a ten year sentence. At the time of their admission to prison, they are given a good time credit of one quarter of their sentence, so that reduces it to seven and a half years. With his credit for having served, he has not served that time from 1977. So this is -- he has served all his timed that he could have, either in prison or under the supervision of any type of parole.

QUESTION: Well, if he were indicted and went to trial on some other charge, could the conviction, the one now under discussion, be used to impeach his testimony?

MR. RADIGAN: Yes, Your Honor, it could under Kentucky law.

QUESTION: Then that is still quite a burden, isn't it?

MR. RADIGAN: It is quite a burden. Additionally, if he goes to trial under any other felony, he would then be subject to a persistent felony offender prosecution at the discretion of the prosecutor.

QUESTION: Well, isn't that enough to keep this case alive?

MR. RADIGAN: That's my position, Your Honor. I definitely think that this is an issue for Mr. Lucey that he has interest in, and I also think it is capable of repetition.

QUESTION: Well, it can't be with respect to him.

MR. RADIGAN: No, Your Honor, but as far as --

QUESTION: Well, that's the rule. That's the -- that it can't be just capable of repetition with respect to some other person.

MR. RADIGAN: I understand that, Your Honor, but the fact of the matter is that Justice O'Connor raised the question of does not the Stahl decision in 1981 eliminate this problem totally for Kentucky, and let me clarify that, if I may.

Now, on November 15 of this year I have an

argument before the Supreme Court of Kentucky on exactly the issue that is before the Court right now, whether or not there is effective assistance of counsel standard for counsel on appeal. The Stahl decision may seem to have cured that situation from its language, from its apparent language, but the Stahl decision was handed down by the Supreme Court of Kentucky solely because the Supreme -- excuse me, the Sixth Circuit in an earlier case of Cleaver v. Bordenkircher in 1980 directed the Supreme Court of Kentucky to do the same thing they did in Stahl in the Cleaver case.

This case has been -- this issue, excuse me, has been before the Sixth Circuit in cases arising out of Kentucky to my knowledge on five different occasions because I have been involved in those cases, as has my opponent, Mr. Henry.

We have a situation where Kentucky -- and Justice Blackmun, let me explain the significance of England v. Spalding because, interestingly enough, under the present procedures in Kentucky as they are implemented, if the same factual circumstances in Lucey occurred today, the case would not be dismissed, the Supreme Court of Kentucky or the Court of Appeals of Kentucky would issue what is called a deficiency statement, and because it is a nonjurisdictional matter,

would give counsel a limited amount of time to cure that error.

And that makes it all the more egregious the situation that Mr. Lucey finds himself in today, without ever having the opportunity to raise the challenges to his conviction, to be able, in the words of this Court, to have an attorney marshal arguments for him, to present and organize law, and to present the facts of his conviction to an appellate court for some sort of review.

QUESTION: Well, Mr. Radigan, supposing that Mr. Lucey's counsel's failure in this case had not been to file a statement attached to his brief, or whatever it is that was found defective, but supposing instead that the Kentucky statutes provided you are going to challenge a criminal conviction by appeal, you must file a notice of appeal within 30 days, and his counsel simply had not done that, do you say that he is then denied effective assistance of counsel?

MR. RADIGAN: Yes, Your Honor, I do.

QUESTION: In other words, a state may not have any system regulating the filing of appeals?

MR. RADIGAN: No, no, and please let me clarify this.

QUESTION: When you say no, does that mean you

are agreeing with me or you are not agreeing with me?

MR. RADIGAN: I am agreeing with you to the extent that there is a definite need in any type of case, Your Honor, to have, whether we are talking civil or criminal, whether we are talking trial or appeal, there is a necessity and indeed an absolute necessity to have some sort of rules of procedure for organizing and for documenting and for proceeding on any type of a case. And we concede that fact.

What we do have, though, is a question of when an individual is essentially punished because of actions that are not his fault but the fault totally and solely of his client -- of his attorney.

QUESTION: Well, now, then your response to my question about a 30 day time limit for filing a notice of appeal is that if the attorney didn't file that, the client ipso facto has been denied effective assistance of counsel, and so a rule requiring a timely filing of a notice of appeal in criminal cases, whether federal or state, is just not worth the paper it is written on.

MR. RADIGAN: No, Your Honor, I think there is a difference there because assuming -- let's assume under your factual scenario that the client has told his attorney yes, I want to appeal my conviction. In Kentucky, in a criminal case, it is ten days to file

that notice of appeal. Under those circumstances, as this Court said in Barnes v. Jones, the decision to appeal is the client's decision.

QUESTION: Well, but I really want an answer to my question. The client tells the attorney to appeal. The state statute says 30 days in which to file a notice of appeal. The attorney fails to file the notice of appeal. That's automatically ineffective assistance of counsel on appeal, so that in effect, no client who wants to appeal is ever to be barred by his attorney's failure to comply with time limits.

MR. RADIGAN: I agree with your conclusion, yes, Your Honor, that is very true. It is ineffective assistance of counsel because an attorney who has reasonable training and experience should be able to file in the Commonwealth of Kentucky after his client requests it a notice of appeal within ten days, and so under those circumstances and with those assumptions, that a reasonable attorney could do that, then indeed it would be ineffective assistance of counsel.

QUESTION: And so the client gets an appeal at a later date, notwithstanding his attorney's failure to comply with the state statute.

MR. RADIGAN: That is correct, Your Honor.

QUESTION: Well, then --

QUESTION: So I guess -- go ahead.

QUESTION: Go ahead.

QUESTION: I guess that saying it's ineffective assistance of counsel doesn't answer the inquiry because you then have to say does the Constitution, what does the Constitution require happen as a result of counsel's error, do you not?

MR. RADIGAN: I believe that's correct. You lack --

QUESTION: Now, could -- is it possible that as long as the state has some recognized procedure by virtue of another application after the dismissal of the appeal to get some review or relief or a delayed appeal, possibly, under those circumstances, is that enough to meet any due process requirement?

MR. RADIGAN: I think, Your Honor, if you look at the Kentucky cases on these, the Hammershoy case that was mentioned to you, and the Stahl case in Kentucky, both of them recognized exactly the scenario you just presented, and both of those decisions recognizes the fact that in Stahl, because of overloaded public defender case, and in Hammershoy, Justice Rehnquist, because the attorney failed to file the notice of appeal within ten days, that those situations constituted ineffective assistance of counsel, and therefore there

was a procedure to go back and to attempt to reinstate essentially that appeal in the trial court.

QUESTION: Yes, well, so -- well, that's my inquiry.

Now, if what we are looking at is a due process argument, can we say that a defendant has due process so long as the state has some reasonable procedure for instituting a delayed right of appeal in the event of circumstance such as this, and doesn't Kentucky have such a procedure?

MR. RADIGAN: Now it does. In 1977 and '78 the Kentuck Supreme Court in Cleaver v. Commonwealth had said that when a state appellate court dismisses an appeal, that there was no right to go back to the trial court to have that appeal reinstated even on grounds of ineffective assistance of counsel.

QUESTION: Well, do you agree that for a defendant under Mr. Lucey's circumstances today in Kentucky there wouldn't be a due process problem because of Kentucky's new procedure?

MR. RADIGAN: If the courts in Kentucky did implement and recognize the fact that an individual cannot be denied his right to an appeal, his right to present and marshal those arguments to an appellate court through the negligence and inaction or whatever of

his attorney and would reinstate that appeal, then indeed we have a situation that would indeed protect his rights.

QUESTION: Well, do you think that -- just, I don't want to pursue this unduly, but let's suppose the state added a feature to the effect that we will allow a delayed appeal if there appears to be some arguable basis for it, is that enough?

MR. RADIGAN: No, I don't think so, Your Honor, and I think that there are some problems in regard to that. If I may respond to that with some analysis as far as it goes, I think this Court -- and essentially, if I can rephrase your question somewhat, what you are saying is that if an appellate -- if a court says we will reinstate the appeal if there is some merit, I see some problems. Number one, it would be contrary to what this Court has said previously in Rodriguez v. United States and Lane v. Brown. The Court recognized in those cases that when an individual has lost his appellate rights through no fault of his own, then he should be considered and treated exactly like any other appellant once that appeal is reinstated or if that appeal is reinstated.

This Court specifically said there should not be any additional hurdles to be covered. But I think we

have to also keep in mind, Justice O'Connor, that what we are talking about when we discuss ineffective assistance of counsel on appeals such as this, we have a circumstance where the attorney has, because of an error on his part, with no fault of the defendant, has lost that individual's right to appeal. What the --

QUESTION: Well, are you saying that fundamental fairness under the due process clause carries with it a right to file a frivolous appeal?

MR. RADIGAN: No, Your Honor. There is not necessarily a right to a frivolous appeal, but that is a decision that can only be reached once that appeal reaches an appellate court, whether or not the issues are frivolous or not.

Consider for a moment what we have according -- and this has been recognized in various circuit courts of federal circuits around the country, specifically, the 8th, 9th and 11th Circuits have said that in circumstances where an individual loses his appeal because of an error of counsel, what we have is the same thing as if the individual had no attorney at all, and as this Court recognized in United States v. Cronic just this spring, what we have is the type of situation where prejudice has to be presumed and cannot be considered as far as a necessity because it is the

same thing as the individual never having an attorney. That's the end result of a circumstance like Mr. Lucey had.

The issues were never considered by the Court, they never considered the law in the matter. They never had, as this Court has said, the marshaling of arguments for the individual.

So what we have is the type of situation similar to what this Court recognized in U.S. v. Cronic, as a unique type of case wherein a person has either a total or a substantive lack of any type of attorney at all. In that case you don't have to show prejudice.

QUESTION: But in Cronic we were talking about performance at a trial --

MR. RADIGAN: That's correct, Your Honor.

QUESTION: -- which is clearly covered by the Sixth Amendment.

Now, you don't quarrel with McKane v. Durston, do you, saying that there is no constitutional right to an appeal?

MR. RADIGAN: I think, Your Honor, that this Court has been very clear as far as its holding on that. I think that there can be a very legitimate argument that could be made to the Court that there can be analogized a constitutional right to appeal, but I

recognize what this Court has said, as recently last year as Barnes v. Jones.

QUESTION: But you say notwithstanding the fact that there is no constitutional right to an appeal, there is some sort of due process right to the services of an attorney if a state grants you an appeal.

MR. RADIGAN: I think that there -- this Court recognized that, in my opinion, in Douglas v. California.

QUESTION: What about Ross v. Moffitt?

MR. RADIGAN: Ross v. Moffitt, of course, dealt with a second stage of discretionary appeal to the -- for instance, the Supreme Court.

QUESTION: Nevertheless, it said that a state didn't need to furnish counsel in connection with appeal.

MR. RADIGAN: With a second stage appeal, that is correct, Your Honor, but this is -- what we have in Mr. Lucey's case --

QUESTION: You're just looking at the facts of the case. That isn't what the language of the Court was, is it?

MR. RADIGAN: Yes, Your Honor, it most definitely was, with all due respect. Ross v. Moffitt dealt with a system in North Carolina similar to what we

have in Kentucky. In Ross v. Moffitt, the issue is whether or not after you complete the direct appeal --

QUESTION: I know what the issue was.

MR. RADIGAN: And the issue was whether or not the individual should be appointed a counsel on the second stage appeal, the discretionary review, or a petition for certiorary to this Court. And the conclusion was no.

But this Court distinguished that, and in its language specifically recognized that one of the reasons there was no right to a counsel on a discretionary review or petition for cert was because the individual had already had an attorney to present his arguments to the Court under the Douglas v. California analysis, and therefore, the secondary appellate court within the North Carolina system, similar to the Supreme Court of Kentucky here would not have to necessarily have the appointment of counsel.

But what we have, and I would submit to the Court, we have a situation that what we need to look at are and indeed consist of a necessary interrelationship of due process and equal protection within the confines of appellate attorney, of an attorney on appeal.

Let's consider for a moment what exactly the situation would be if my opponent is right, that there

is no due process right to have any standards at all for appellate attorneys, and let's look at three cases, if we can, Your Honors. In Swenson v. Bosler, 1967, the attorney filed a notice of appeal but did nothing else. This Court, based upon an equal protection, and I submit also a due process analysis, came to the conclusion that the advantage of counsel in presenting and marshalling arguments in a brief and a legal analysis cannot be denied to a criminal defendant because of his indigency. Anders v. California, also in '67, setting out the standards for appellate counsel, that it has to be more than an amicus for an indigent. And this Court said that what has to be done is that the indigent must be given the same benefits of someone who has the money to retain counsel.

QUESTION: But now both Swenson and Anders that you have referred to are cases that are talking about indigents, and they are saying that you can't treat them worse at the appellate stage than you do people who have money to hire a lawyer or pay fee. But there's no indication here, as I understand it, that the Kentucky Court of Appeals would have treated -- that the Kentucky Court of Appeals treated your client this way because he was indigent.

MR. RADIGAN: That is correct, and the

specific on the language in this Court in Anders, this Court said that an indigent must have the same, "the same rights and opportunity on appeal as are enjoyed by those persons who are able to afford the retention of private counsel.

And now I will get back to your question in just a moment, Justice Rehnquist, but let's look at what happens to that type of analysis if my opponent is correct that there are no standards for counsel, that what we have is a situation where this Court has said in Swenson, Anders, and also Entsminger, that when you are looking at an indigent, a person without money, that they have to have the same rights as a person standing here who has the power and the authority and the money to retain an attorney.

If we assume that there are no standards, which is the Attorney General's position here, there are no standards for a retained attorney -- and that is exactly what he is saying to the Court -- then what we have is that an indigent, according to decisions of this Court, has more rights than a person who has retained an attorney.

QUESTION: I don't think you read those cases correctly, though I recognize that there may be two respectable points of view on it. When the Court says

that you can't treat an indigent worse than someone with retained counsel or ability to pay the fees, they are not saying there is an absolute standard by which the rights of people who can pay is to be governed. They are simply saying you can't put additional hurdles in the way of someone who is indigent.

I don't think the Kentucky Court of Appeals put any hurdles in the way of your client here because he was indigent.

MR. RADIGAN: Well, no, and my client was no indigent. He had a retained attorney.

QUESTION: Well, you --

MR. RADIGAN: Yes, Justice.

QUESTION: You conceded apparently that there is no equal protection violation.

MR. RADIGAN: Right, that's correct.

QUESTION: So that --

MR. RADIGAN: Well, but the question therefore is does there exist a due process standard by which this Court or any court in Kentucky has to measure the performance of the appellate counsel. And what this Court did in Anders, in Entsminger, and in the Swenson case was to say indeed there is at least some sort of standard, because what they said was that there has to be the opportunity that a privately retained individual

would have the opportunity to present arguments to the Court in the form of legal presentations.

QUESTION: Mr. Radigan?

MR. RADIGAN: Yes, Justice Blackmun.

QUESTION: What about at the trial of the case where you have appointed counsel and he gives up in the middle of the case and goes home?

MR. RADIGAN: What we have there, Your Honor, in my opinion, is a violation both of equal protection and due process.

We have --

QUESTION: How?

What did the state due?

MR. RADIGAN: The state simple, as this Court has stated in Collier v. Sullivan, the mere involvement of the state in the conviction of any individual is sufficient to implicate due process implications for trial counsel.

QUESTION: But this is -- the lawyer just walked out of the courtroom.

MR. RADIGAN: That's correct, Your Honor.

QUESTION: Well, at that stage, what should the court do?

MR. RADIGAN: The court should stop the trial and declare a mistrial at that time, in my opinion.

QUESTION: Well, you --

MR. RADIGAN: Because an individual --

QUESTION: Well, suppose the individual walks out of the courtroom?

MR. RADIGAN: Well, that's a different circumstance, Justice.

QUESTION: And what is different?

MR. RADIGAN: What is different is the fact that the attorney has an obligation to represent the client during that trial proceedings, and unless and until the individual concedes and admits that the attorney, that he does not want an attorney --

QUESTION: Does the court have to enforce that right, or does the Bar Association enforce that right?

MR. RADIGAN: I think the court does, as well as the Bar Association. But we are talking two things t here. We are talking constitutional standards and ethical standards which are enforced by Bar Associations.

I think there is some sort of interrelationship between the two, and the Court has recognized that there are interrelationships between those two aspects.

QUESTION: I just don't know what -- the Court didn't know that this lawyer was not going to file.

MR. RADIGAN: You are talking about Mr. Lucey's case?

QUESTION: Yes.

MR. RADIGAN: Well, what -- the court --

QUESTION: Did the court know that?

MR. RADIGAN: No, the court, not before it happened.

QUESTION: What could the court have done to stop that?

MR. RADIGAN: What the court could have done in this --

QUESTION: To stop that.

MR. RADIGAN: To stop this from occurring to begin with?

QUESTION: Yes.

MR. RADIGAN: I don't think anything.

QUESTION: So the court is not responsible for anything.

MR. RADIGAN: Well, the court is responsible --

QUESTION: But now you are going to make the court do something for what they are not responsible for.

MR. RADIGAN: The court does not have the responsibility to take and anticipate what an attorney will or might do at some time in the future. I think

what the court does, has an opportunity to examine and evaluate the consequences afterwards of an action by an attorney.

For instance, if you will examine Mr. Lucey's --

QUESTION: Well, if I agree with you that he could do that and punish the attorney, I don't see what he could do about the case.

MR. RADIGAN: If we have an option that is granted to a court to enforce certain principles or to enforce certain positions or requirements by counsel, then what we have is a situation where the court has an option. They can take an action that would cure that situation without any prejudice to the individual client. For instance, in Mr., Lucey's case, if the Court of Appeals of Kentucky had said, wait a minute, we need for administrative purposes a statement of appeal, and Mr. Nixon, Appellant Counsel who is retained, you file that within five days or this appeal will be dismissed, then what we have had is the Court of Appeals taking a curative action without negative implications to the rights of Mr. Lucey.

But the Court of Appeals didn't do that. The Court of Appeals simply dismissedk this appeal without any consideration concerning Mr. Lucey's rights, and

indeed, when Mr. Nixon filed a motion for reconsideration with the Court as a response to their order and opinion, then he submitted and tendered to the Court a statement of appeal that complied. But the court did not feel that that was sufficiently curative, and they dismissed the appeal.

What we have is an end result --

QUESTION: How could the Court of Appeals of appeals enforce its ruling other than to enforce it?

MR. RADIGAN: Yes, Your Honor.

QUESTION: Well, how can they do other than that?

MR. RADIGAN: What they can do is several actions.

If you will erxamine Mr. Lucey's pleadings in Section 4 of the -- approximately page 27 through 29, there are a variety of appellate courts within the United States, state courts, generally, but also some federal courts, that have examined situations like this and have said specifically that the actions can be taken to cure the defects without prejudicing the client.

For instance, in Mr. Lucey's case, if the Court of Appeals of Kentucky felt that there was a, let's say it's a notice of appeal problem, to take it out of the statement of appeal, Justice Rehnquist, but

let's say it's a notice of appeal problem, that it wasn't timely, what the Courtl can do, and we have court decisions cited in Mr. Lucey's brief, that what they do is indeed dismiss the appeal. But they remand it in the same orderly --

QUESTION: But I don't -- your argument is that Kentucky must adopt the good rules of every other appellate court in the country.

MR. RADIGAN: I'm saying simply --

QUESTION: Well, I don't know what else you are arguing.

MR. RADIGAN: I'm saying that the Court of Appeals of Kentucky --

QUESTION: How does a court enforce this rule that you must file within ten days other than to not accept anything after ten days?

MR. RADIGAN: They can do that, Your Honor, but they can do it in a manner in which Mr. Lucey's rights and his personal decision to appeal his conviction would not be harmed in the end result.

QUESTION: Well, the rule is not being enforced.

MR. RADIGAN: The rules would be enforced.

QUESTION: How could -- well, how can you unring a bell?

MR. RADIGAN: What you do is while you are enforcing the rules, you remand it, as Justice O'Connor recognized, as Kentucky courts have recognized in Stahl v. Commonwealth as a possible solution, you remand it to the trial court and you say you start over, and you follow the rules this time. And you appoint, if necessary -- and other courts have done this -- you appoint if necessary --

QUESTION: So you want to make the rule retroactive.

MR. RADIGAN: No, Your Honor, no.

QUESTION: Well, what else are you saying?

MR. RADIGAN: I am saying that Mr. --

QUESTION: Don't you want the rule? If the rule is made retroactive, will you be satisfied?

MR. RADIGAN: If the rule is made retroactive? Which rule -- I'm not sure which rule you mean.

QUESTION: The rule which says you have five days to file that supplemental.

MR. RADIGAN: Oh, the deficiency notice that they are doing now.

QUESTION: Yes.

MR. RADIGAN: If that had been in existence at the time, we would have been fine, but it wasn't.

QUESTION: That wasn't my -- it wasn't my question.

If we say that, are you satisfied?

MR. RADIGAN: No, Your Honor. Mr. Lucey still wouldn't have an appeal.

QUESTION: Why?

MR. RADIGAN: He would still be denied his appeal.

QUESTION: Why? If they say he can file this five day thing?

MR. RADIGAN: Because that is not what happened in this circumstance.

QUESTION: Well, well, what do you want us to do, to say he ipsy dixie gets an appeal?

MR. RADIGAN: I want this Court to say that Mr. Lucey has the right to effective assistance of counsel on appeal, that when he is denied that due process right, that indeed, what should occur is that there should be an appeal granted him anew, that he begin again and have the right to have his appeal, his conviction reviewed by an appellate court.

QUESTION: May I ask a question?

MR. RADIGAN: Certainly, Justice Stevens.

QUESTION: From your colloquy, I gather this problem has arisen more than once in Kentucky.

MR. RADIGAN: Unfortunately, Justice Stevens --

QUESTION: And which suggests there may be either some clever lawyers or some incompetent lawyers in Kentucky, and I am wondering if the revision in procedures includes some procedure for disciplining counsel who are found to have been so incompetent as to be unable to file a notice of appeal.

MR. RADIGAN: Well, Your Honor, I hate to do this, but if I can refer you to a case called In Re Radigan, which is cited in Mr. Lucey's brief, the Supreme Court of Kentucky used me as an example of that. At that time I was working at the Public Defender Office in Frankfort as an appellate attorney where I had worked for about nine years, and the Supreme Court of Kentucky directed me to file a brief within a specified period of time. I said to the Supreme Court of Kentucky in a hearing in front of them, I can't, I have too many cases. And they said, I'm sorry, Mr. Radigan, you are in contempt of court, and but because you are a fine attorney who we have known for a long time, we will withhold the rendition of that fine over you.

So yes, the Supreme Court of Kentucky, as I well know, has the right to go ahead and have enforcement of its rules through chastising its

attorneys.

QUESTION: Mr. Radigan, your time is about up.

May I get back because I didn't understand when we were talking about the mootness question.

MR. RADIGAN: Yes, Your Honor.

QUESTION: You mentioned that you had consulted with your client about ten days ago.

MR. RADIGAN: That is correct, Your Honor.

QUESTION: Are you telling us today that he wants you to, as of today, not as of ten days ago, continue with the defense of the judgment of the Court of Appeals?

MR. RADIGAN: I can't say as of today, Your Honor. I can say as of ten days ago.

QUESTION: Well, that would make a difference to me on the mootness question.

MR. RADIGAN: If the Court wishes, I will supplement this --

QUESTION: Well, at least for my benefit, I wish you would find out.

MR. RADIGAN: Certainly, Justice Brennan.

QUESTION: I would like to know whether he wants you to persist in this.

MR. RADIGAN: Certainly.

QUESTION: You will advise the Court by letter, with a copy to your friend, of course.

MR. RADIGAN: I would be more than glad to, Your Honor.

I think that the situation is essentially what we have had in the past, what this Court in Douglas v. California said, was that an appeal without an attorney is a meaningless ritual.

I would submit to the Court --

CHIEF JUSTICE BURGER: You are out of time, counsel.

MR. RADIGAN: Oh, my apologies, Your Honor.

CHIEF JUSTICE BURGER: Do you have anything further?

MR. HENRY: I waive.

CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock.

(Whereupon, at 12:00 o'clock noon, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1378 - PAUL KAVANAUGH, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX, AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, Petitioners v. KEITH E. LUCEY

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

BY Paul A. Richardson

(REPORTER)