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Frivolous Appeals and the Minimum Standards Project: Solution or Surrender?

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FRIVOLOUS APPEALS AND THE MINIMUM STANDARDS PROJECT: SOLUTION OR SURRENDER?

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No evidence exists that the defendants who press these appeals do so with the knowledge that their claim is frivolous.[1]

There is no good reason why, in these circumstances, indigent persons should not choose to litigate indefinitely and some have shown themselves prone to do just that.[2]

I intend to appeal, of course. What else have I got to do for the rest of my life?[3]

I. INTRODUCTION—THE MINIMUM STANDARDS PROJECT

In 1964, the American Bar Association established a fifteen-member Special Committee on Minimum Standards for the Administration of Criminal Justice. The work of drafting the Standards was delegated to Advisory Committees which covered seven functional areas.[4] Each of the Advisory Committees has prepared or is preparing reports on several topics within its functional area.

In March, 1969, the Advisory Committee on Sentencing and Review released the Tentative Draft of Standards Relating to Criminal Appeals. It might be expected that such a document would place primary emphasis on a search for creative ideas that would be effective to reverse the tide of groundless criminal matters that threatens to inundate the appellate courts.[5] This comment undertakes a critical

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1. ABA, SPECIAL COMM. ON MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 2. (Tentative Draft, March, 1969). (Hereinafter cited as APPEAL STANDARDS).

2. G. Hazard, Jr., *After the Trial Court—The Realities of Appellate Review*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965).

3. Miami Herald, May 28, 1969, § A, at 14, col. 4 (Gary Steven Krist commenting on his life sentence in the "coffin kidnapping" of Barbara Jane Mackle).

4. Police Function, Pretrial Proceedings, Prosecution and Defense Functions, Criminal Trial, Sentencing and Review, Fair Trial and Free Press, and Judge's Function.

5. Statistical data on the magnitude of this problem may be found in the Annual Reports of the Director of the Administrative Office of United States Courts. *See also* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

examination of the proposed Standards against that expectation, and discusses some alternatives not reported by the Committee. Portions of the proposed Standards that have no substantial direct effect on the frivolous appeal problem (*e.g.*, appeals by the prosecution) are not considered here.

Though the draft makes it clear[6] that it represents only the views of the Advisory Committee at this stage, the influence of the version finally adopted may be far-reaching: the Chairman of the Special Committee on Minimum Standards was Warren E. Burger, now Chief Justice of the Supreme Court of the United States.

II. Scope and Function of the Appellate Process—The "Remarkable Doctrine"

The first questions considered by the Standards are the basic ones of what the role of appellate review should be, and what decisions should be reviewable. "The possibility of appellate review," state the Standards, "should exist for every criminal conviction," but "[a]n appeal is not a necessary and integral part of every conviction."[7] The Committee considered, but rejected, the possibility that appeal in every case should be automatic. It was noted that the elimination of obstacles to appellate review by indigents,[8] and the rising rate of appeals resulting therefrom, is lessening the effective distinction between automatic and elective appeals.[9]

Does the Standard mean that every convicted defendant should have the right to an appeal? From its wording, one could conclude that a discretionary appeal would provide the "possibility of appellate review," but elsewhere the Standards provide that "the decision whether to appeal . . . must be the defendant's own choice,"[10] and that requirements for preliminary screening by the trial court or leave to appeal from the appeal court serve no useful purpose.[11] Thus it appears that it should be within the defendant's sole discretion to institute an appeal.[12] The commentary notes that appellate review in its present form is a rather recent development in our law, and that the Supreme Court has often assumed, but never decided, that such review is not a federal

6. Appeal Standards at iv.

7. *Id.* at 15.

8. *See, e.g.*, Lane v. Brown, 372 U.S. 477 (1963) (trial transcript); Douglas v. California, 372 U.S. 353 (1963) (counsel); Burns v. Ohio, 360 U.S. 252 (1959) (filing fees); Griffin v. Illinois, 351 U.S. 12 (1956) (trial transcript).

9. In the District of Columbia, the rate of appeals from convictions has risen from 18.3% in 1950 to 92.6% in 1966. Appeal Standards at 20.

10. Appeal Standards at 47.

11. *Id.* at 60.

12. The Standards adopt the usual rule that appeals may be taken only from final judgments, and recommend that appeals from pleas of guilty or nolo contendere be allowed. Appeal Standards at 28. *Cf.* Ramey v. State, 199 So.2d 104 (Fla. 2d Dist. 1967), *noted in* 22 U. Miami L. Rev. 187 (1967).

constitutional requirement;[13] but it is asserted that "there is no disagreement today on the wisdom of providing a system of appeals in criminal cases."[14] That such a system should exist would hardly be doubted, but there is not such unanimity on the question whether its scope should be as broad as it is today, or as the Committee suggests it should be. A layman who has examined the subject with some care has spoken of the right of appeal existing in most jurisdictions today as "the remarkable doctrine that every . . . convicted defendant is entitled 'as of right' to an appeal of the judgment against him."[15]

Why have most jurisdictions, and the Committee, adopted this "remarkable doctrine"? Is it, in fact, remarkable? The two reasons commonly advanced for having appellate reviews are: (1) to see that justice is done to the appellant, and (2) to develop uniform and consistent legal standards for the jurisdiction. The first of these would seem to demand that review be available to any defendant who feels he has not been dealt with fairly, while the second would require review only of cases that present some novel legal question. Thus, in advocating the universal availability of review, the Committee seems to place emphasis on the courts' role of correcting misdeeds of human, hence fallible, trial judges. If that role for an appeal court is to be assigned any importance at all, then the Committee's position, *i.e.*, making the court available of right to all defendants, seems to follow logically. Implicit in the report is a rejection of the notion that certain convictions should be regarded as so trivial as to be governed by the principle *de minimis*.

The stance taken by the Standards leaves the door to the appeal court wide open for the most trivial of causes, for now the court must dispose of every case where the appellant feels he has been treated unfairly. Thus, the opinion of an emotionally involved, usually uneducated layman on the legal question of whether the appeal has merit can set the appellate process in motion. But attempts to control these by interposing threshold determinations of merit, frivolity, probable cause, and the like seem to collide with the right itself—if the defendant's right is to an appellate determination of his case, then the determination should not be made by other than the appeal court.[16] And if the determination *is* made by the appeal court, efficiency and due process cannot both be served by a preliminary determination which either disposes of the case without a full hearing, or sets it down for a full hearing, to consume the court's time another day.

13. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Burns v. Ohio, 360 U.S. 252, 257 (1959); Griffin v. Illinois, 351 U.S. 12, 20 (1956) (concurring opinion).

14. APPEAL STANDARDS at 16.

15. M. Mayer, THE LAWYERS 477 (1966).

16. Such determinations by the trial court have been uniformly held to be reviewable. *See* Coppedge v. United States, 369 U.S. 438 (1962); Ellis v. United States, 356 U.S. 674 (1958); Farley v. United States, 354 U.S. 521 (1957); Johnson v. United States, 352 U.S. 565 (1957); Fitzsimmons v. Yeager, 391 F.2d 849 (3d Cir. 1968). Thus, they may aggravate rather than alleviate the workload of the appellate court.

Furthermore, though the right to an appeal is only contemplated to extend to appellants who believe they have not been treated fairly, any inquiry into the appellant's "good faith"[17]—that is, whether he in fact possesses the required state of mind—must be another exercise in futility.[18] Whether the defendant believes he has meritorious grounds or not, the chances are good that he has not—yet there is the slight possibility that a contention the appellant privately believes to be entirely frivolous may be found to be grounds for a reversal. In short, the appellant's good faith is, or should be, irrelevant.

Thus the Standards proceed from the premise that relief from the burdens of frivolous appeals cannot be obtained by imposing new limitations on the defendant's basic right, because to do so would be either inconsistent with the primary function of correcting error in the courts below, or impractical, or both. This writer agrees with the Committee as to the basic function of courts of appeal in criminal cases, and concludes (with some regret) that a logical consequence of that premise is that the appellant should indeed be invested with the power to set the appellate machinery in motion for any (or no) reason. This is not to be taken to mean that appellants are somehow entitled to abuse the appellate process, but rather that economy and due process forbid inquiries into whether it is being so abused. Instead, emphasis should be placed on the development of procedures and techniques that will give each case only so much of the court's attention as its merits warrant, with a resulting disposition calculated to be conclusive of the matter. A secondary goal of such methods should be to deny to appellants such unintended fringe benefits as delay, time away from prison to attend court proceedings, and the ego-inflation of reported decisions.

III. Transition From Trial Court to Appellate Court—The Interim Period

The Committee next directs its attention to the period of time between judgment by the trial court and invocation of the court of appeals' jurisdiction. This period, the Committee recognizes, has been a source of great difficulty in appellate proceedings under present law because of the tendency on the part of both trial court and trial counsel to regard the matter as being at an end with the imposition of sentence.

A. *The Notice of Appeal—Opportunity Overlooked?*

The Standard proposed here is that "a definite time period . . . should be specified as the time during which appeals must be instituted.

17. 28 U.S.C. § 1915(a) and Fed. R. App. Pro. 24 deny leave to appeal in forma pauperis when the trial court certifies that the appeal is not taken in good faith.

18. Coppedge v. United States, 369 U.S. 438 (1962), provides a good example of the confusion courts have generated on this question:

> We hold, instead, that "good faith" in this context must be measured by an *objective* standard. We consider a defendant's good faith in this type of case demonstrated when he seeks appellate review of any issue not frivolous. *Id.* at 445.

The appellate court, however, should have power to entertain appeals taken after the prescribed time if the delay is found to be excusable."[19] The Standard goes on to suggest that it is "appropriate" for the trial court to assume the burden of informing the defendant of his right to an appeal with counsel, and of the time limitation.[20]

Apparently, this proposal means that the existing procedure for instituting appeals is adequate with a single change—filing of the notice within the required time is no longer to be thought of as "jurisdictional."[21] This in fact very closely approximates the present state of the law in federal courts under decisions which "dispense with literal compliance in cases where it cannot fairly be exacted."[22] Some of these cases have managed to do this without violence to the jurisdictional idea, by finding that the defendant did some act within the period which the court finds to be sufficient notice.[23] In other cases, resort has been had to the device of vacating the judgment and sentence and remanding for a new sentence from which a timely appeal may be taken.[24] In the Fifth Circuit, the formula is to have the case

> remanded to the trial court, there to be reinstated on the docket as of the date to be fixed by the trial court from which the time for appeal shall commence to run.[25]

Such decisions seem to put to rest any remaining vitality that the "jurisdictional" notion may have had. The state of the law—in federal courts at least—clearly is that out-of-time appeals are being allowed in the discretion of appeal courts, on grounds difficult or impossible to reconcile with the "jurisdictional" idea. The Standard here thus seems to propose nothing more than "telling it like it is." The additional suggestion that the trial court could "appropriately" inform the defendant of his rights relative to an appeal adds nothing new. This is a requirement in federal courts[26] and in those of Florida;[27] it is clearly "appropriate" anywhere.

But is "telling it like it is" enough in this vital area? It is this writer's opinion that a fresh look at the means now employed to institute appeals could yield new procedures that would substantially ease the burden of both trial and appellate courts.

First, is a "notice of appeal," filed on the initiative of the defendant and/or his counsel, the best way to invoke the appellate jurisdiction? It is suggested that it is not. The notice presumably appears in the right

19. APPEAL STANDARDS at 41.
20. *Id.* at 40.
21. United States v. Robinson, 361 U.S. 220, 224 (1960).
22. Advisory Committee's Note to FED. R. APP. PRO. 3, 43 F.R.D. 61, 126 (1968).
23. *See* Fullen v. United States, 378 U.S. 139 (1964); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964).
24. Rodriquez v. United States, — U.S. —, 89 S. Ct. 1715 (1969); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967).
25. Atilus v. United States, 406 F.2d 694 (5th Cir. 1969).
26. FED. R. CR. PRO. 32(a)(2).
27. FLA. R. CR. PRO. 1.670.

place at the right time if the defendant elects to appeal. But nothing appears otherwise. Can this "nothing" foreclose the defendant finally? Or did he perhaps not know of his right to an appeal? Or did he think his counsel was handling it for him? Uncertainty in this area is one of the prime reasons that criminal matters can be kept ping-ponging from one court to another, year after year.[28] This question of defendant's desire for an appeal could be foreclosed by replacing the present notice of appeal with a mandatory election, to be made a part of the trial court's findings of fact in every case.[29]

Other possibilities exist at this stage for procedural changes which would preclude attempts at factual determinations years after the original conviction. A small number of questions relating to events after conviction have provided grist for countless remands for evidentiary hearings.[30] These questions relate to the defendant's knowledge of his rights to appeal and to counsel on appeal,[31] the court's knowledge of the defendant's desire for an appeal, and the presence, absence, or waiver of counsel, or of "effective" counsel. Might it not be possible, by replacing the notice of appeal with a more informative document, to foreclose most of these questions? For such a procedure to be effective, it would be necessary for the trial court to retain not only jurisdiction, but active supervision of the case until the election whether to appeal has been made, and that the trial court's record continue through this period and contain express findings as to the advice to the defendant as to his rights on appeal, his desire for an appeal, and his status with respect to counsel. There would normally seem to be no reason to question or redetermine such factual findings in later proceedings. Of course, such a procedure would also help to assure that the defendant's rights receive the meticulous protection to which they are entitled.

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28. Baker v. Wainwright, 391 F.2d 248 (5th Cir. 1968), has a typical history. After Baker's conviction in January, 1965, his counsel (the public defender) concluded there was no basis for an appeal and did not take one. Baker's pro se appeal failed. Damron v. State, 182 So.2d 313 (Fla. 1st Dist. 1966). Baker then tried to obtain post-conviction relief under FLA. R. CR. PRO. 1.850, and the trial court denied relief. On appeal, this denial was affirmed. Baker v. State, 191 So.2d 284 (Fla. 1st Dist. 1966). Baker then instituted a habeas corpus proceeding in the Supreme Court of Florida without success. Baker v. Wainwright, 197 So.2d 291 (Fla. 1967). He next tried a habeas corpus proceeding in the Federal District Court. This was denied without a hearing and Baker appealed. The Fifth Circuit remanded the case to the district court for an evidentiary hearing on whether Baker's indigency and desire to appeal were made known to the trial court, and if so, whether he knowingly waived his right to appointment of appellate counsel. Baker v. Wainwright, 391 F.2d 248 (5th Cir. 1968). This case has been the subject of at least eight separate proceedings thus far. There is no reason to believe it is at an end.

29. A somewhat similar procedure is suggested in Coleman v. State, 215 So.2d 96, 103 (Fla. 4th Dist. 1968).

30. *See, e.g.*, Baker v. Wainwright, 391 F.2d 248 (5th Cir. 1968); Loper v. Beto, 383 F.2d 400 (5th Cir. 1967); Edge v. Wainwright, 347 F.2d 190 (5th Cir. 1965); Pate v. Holman, 341 F.2d 764 (5th Cir. 1965); State *ex rel.* Miller v. Wainwright, 213 So.2d 290 (Fla. 1st Dist. 1968).

31. Presumably, these two questions will be eliminated in Florida and federal courts by the rules requiring the court to inform the defendant.

If a procedure such as this were used, there might be less occasion to consider the question of out-of-time appeals.[32] The procedure should be so arranged that the invocation of appellate jurisdiction would come, if at all, when the trial court made the additional factual findings discussed above. Otherwise, there would still be a period of limbo during which such questions might again arise. Since this would be done on the initiative of the court, the question of delay by the appellant and whether or not it was excusable would not arise. If the election by the defendant is not to appeal and the other factual determinations are duly made, the most popular questions on which to base a collateral attack—what did or did not happen during this interim period—would be unavailable to the defendant.

B. *Counsel During the Interim Period*

Standard 2.2[33] concludes that, in the normal course of things, it would be preferable for trial counsel to stay with the case, counsel the defendant on the probable grounds for an appeal, and prosecute the appeal if the defendant so elects, rather than routinely to appoint new counsel for an appeal. It is pointed out that the more general practice at present is to appoint new counsel for the appeal, either for geographical reasons, or because the new counsel is better versed in appellate procedure, or for no obvious reason.

The Committee cites no cases in favor of, and four cases against, its recommendation that the decision whether or not to appeal should ultimately rest with the defendant rather than his counsel.[34] But, as is discussed *infra*, there is no reason that the Minimum Standards task should be likened to a restatement. The Standards should be responsive to the problems of today which are not adequately dealt with by the law as it exists. The cases cited are to the effect that the attorney has an ethical duty not to institute an appeal which he believes is without merit.[35] But of course, if the decision is ultimately out of the attorney's hands, no breach of duty can be attributed to him. The Standards analogize the situation to the defendant's personal decision whether or not to plead guilty. It might also be said that in the case of appointed counsel, where the defendant usually takes no part in the selection, logic does not demand that the defendant be bound by the decisions of his counsel to the same extent that might be required in the case of retained counsel. Of course, it could be said that this lowers the last barrier to an appeal

32. The "exhaustion of remedies" doctrine does not bar habeas corpus relief to a prisoner who has failed to take a timely appeal. Fay v. Noia, 372 U.S. 391 (1963).

33. APPEAL STANDARDS at 47.

34. Buxton v. Brown, 222 Ga. 56, 150 S.E.2d 636 (1966); Richardson v. Williard, 341 Ore. 376, 406 P.2d 156 (1965); *In re* Graham's Petition, 106 N.H. 545, 215 A.2d 697 (1965); People v. Buck, 6 App. Div. 2d 528, 179 N.Y.S.2d 1007 (3d Dep't 1958).

35. Florida cases to this effect: Coleman v. State, 215 So.2d 96 (Fla. 4th Dist. 1968); Mobley v. State, 215 So.2d 90 (Fla. 4th Dist. 1968); Smith v. State, 192 So.2d 346 (Fla. 2d Dist. 1966).

that the defendant knows to be completely lacking in merit, but how effective is the barrier? If his counsel refuses to take an appeal, there are several possibilities. The defendant might abide by his counsel's advice and never be heard from again; but more likely, he will institute the appeal himself. Having done so, it is clear under present law that he is now entitled to have new counsel appointed.[36] If he proceeds with the appeal on his own, he might later urge in collateral proceedings that he was denied counsel.[37] If he does not institute the appeal himself, he might allege in later proceedings that he was denied his right to an appeal. It seems clearly preferable to this writer to follow the approach adopted by the Standards and let the appeal be instituted by nothing more than the defendant's expression of a desire to do so. But if the defendant's entrance into the appeal court is to be made so easy, it seems essential that cases lacking in merit be given a speedy exit. The Committee's recommendations on this subject, discussed *infra*,[38] do not seem to meet this requirement.

If additional confusion is needed as to the present state of the law in this area, it is provided in federal courts by rule 32(a)(2) of the Federal Rules of Criminal Procedure. The Rule directs that the clerk of the court file notice of appeal for the defendant if he so requests. Thus, after counsel tells the defendant that his ethical obligations forbid him to take an appeal if he believes it to be without merit, the defendant can have the appeal instituted with a nod of his head to the clerk. While there are no cases to support the proposition that defense counsel is under a duty to institute an appeal he considers without merit, it is well settled that the appellant is entitled to counsel once the appeal is instituted,[39] and that counsel must play the role of advocate rather than amicus curiae.[40] There is also no doubt that counsel has the duty to advise the defendant on the possibilities for an appeal after he is convicted.[41] It would seem anomalous to say that counsel has a duty not to institute the appeal when his failure to do so, rather than preventing a useless proceeding, may open the way to later collateral proceedings based on denial of counsel. It seems better to say that by instituting the appeal, counsel is merely fulfilling a procedural requirement, and this should not be taken as an expression by him on the merits of the appeal. If counsel at the trial is not required to entertain a good faith belief in the defendant's innocence,[42] it seems doubtful that his belief that the trial proceedings were or were not free from error should be any more determinative of

36. Douglas v. California, 372 U.S. 353 (1963).

37. *See, e.g.*, Worts v. Dutton, 395 F.2d 341 (5th Cir. 1968).

38. Section IV *infra*.

39. Douglas v. California, 372 U.S. 353 (1963).

40. Anders v. California, 386 U.S. 258 (1967).

41. Cedillo v. Beto, 399 F.2d 667 (5th Cir. 1968); Merkel v. Beto, 387 F.2d 667 (5th Cir. 1968); Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966). *Cf.* Norvell v. Illinois, 373 U.S. 420, 424 (1963).

42. ABA CANONS OF PROFESSIONAL ETHICS, No. 11. *Cf. Id.* No. 15.

his conduct relative to the appeal. The reason for the rule in the trial court is, of course, that the defendant is entitled to have his case determined in a regular court proceeding with the aid of counsel, even if the facts are so damning that no lawyer could reasonably believe him innocent. While the reason for applying that reasoning to appellate proceedings entered into at the defendant's election may not be as strong, it is the opinion of this writer that the availability of counsel for an appeal should be coextensive with the availability of the appellate process; when the appellant no longer deserves the services of counsel, he deserves to be out of court. This is generally the position taken by the Standards. It may be justified on the additional practical ground that the irregularity and confusion caused by appellants representing themselves impairs the efficiency of the courts.[43]

In its consideration of the question of counsel for the appeal, the Committee seems to consider only two alternatives: continuation of the services of trial counsel, or the routine appointment of new counsel by the appeal court. The latter is said to have developed as the more usual procedure.[44] The Committee concludes that continuing the services of trial counsel on appeal would be preferable in most cases.[45] It is submitted that a third possibility which might serve to foreclose later questions about the adequacy of counsel was overlooked.

As one court has observed,

> [C]onvicted felons almost unanimously relish the prospect of putting to public judicial test the competence of their erstwhile defenders . . . . [E]ven trial counsel, having lost, can almost invariably enumerate what in the hindsight of disaster appear to have been errors.[46]

The feeling on the part of the defendant that trial counsel has "done him in" is seldom justified and is even less frequently grounds for relief, because the usual standard for inadequacy of counsel as a ground for reversal is a stringent one. Counsel's conduct of the case must be such as to reduce the trial to a sham or a mockery.[47] But the standard of competence and diligence required of counsel during the interim period after conviction is not so clearly established, and has provided issues for many post-conviction proceedings and appeals therefrom.[48] It is suggested that

43. *See, e.g.*, Gossett v. State, 191 So.2d 281 (Fla. 2d Dist. 1966).

44. APPEAL STANDARDS at 50.

45. *Id.* at 49.

46. Mitchell v. United States, 259 F.2d 787, (D.C. Cir. 1958), *cert. denied*, 358 U.S. 850 (1958).

47. *Id. See also* Williams v. Beto, 354 F.2d 698 (5th Cir. 1965).

48. Atilus v. United States, 406 F.2d 694 (5th Cir. 1969); Landry v. United States, 401 F.2d 145 (5th Cir. 1968); Beto v. Martin, 396 F.2d 432 (5th Cir. 1968); Worts v. Dutton, 395 F.2d 341 (5th Cir. 1968); Loper v. Beto, 383 F.2d 400 (5th Cir. 1967); Pierson v. State, 214 So.2d 17 (Fla. 1st Dist. 1968); State *ex rel* Miller v. Wainwright, 213 So.2d 290 (Fla. 1st Dist. 1968).

many such issues, meritorious and otherwise, could be averted by allowing the appellant the option of retaining trial counsel, or discharging him and having new counsel appointed by the trial court as a matter of course at any time during the post-conviction, pre-appeal period. This would be no more complex or expensive than routine appointment of new counsel by the appellate court. It should virtually eliminate appointments of new counsel by the appeal court once the case is there. It would give the defendant the opportunity to be told by a second lawyer that his appeal is without merit, if that is the case. And since the replacement would be granted as a matter of course, the defendant would be denied the opportunity of "putting to public judicial test the competence of his erstwhile defender," except to the extent that his substitute counsel undertakes to press the issue on direct appeal. If the defendant does not elect to have trial counsel replaced, he should be burdened with a very strong presumption that he was satisfied with the way the defense was conducted. Thus a step could be taken which would bring the indigent a large step nearer to equality with the rich man, which would not add appreciably to the cost or complexity of appellate review, and which would close the door on prisoners whose only purpose in raising such questions is "a chance to get out of prison for a week or two at the state's expense."[49]

C. *Frivolous Appeals—Pre-Appeal Screening*

The Standards reject the use of threshold determinations to eliminate frivolous appeals as unnecessary complications which create more problems than they solve. If such determinations are made by the trial court, then consistency with an appeal "as of right" demands that the determinations themselves be appealable.[50] If made by the appeal court, an unnecessary step is added to the process.

The commentary contains a good review of such screening devices and their rather dismal record in practice. To this is added a theme which recurs throughout the document—that if counsel would only take the trouble to inform the defendant in detail why his appeal cannot succeed, the defendant, being a good fellow, will decide not to appeal. After taking Mr. Justice Clark to task[51] for stating "We all know that the overwhelming percentage of *in forma pauperis* appeals are frivolous,"[52] the Committee arrives at the conclusion that "it is not evident that any significant number [of defendants] act contrary to counsel's evaluation of the case."[53] Certainly all would agree that counsel should undertake to dissuade his client from an appeal he considers hopeless, and perhaps many

49. Cerf, *The Federal Habeas Corpus Act and the Recent Amendments Limiting Its Use and Abuse by State Prisoners*, 22 U. OF MIAMI L. REV. 409, 419 (1967).

50. Coppedge v. United States, 369 U.S. 438, 458 (1962) (concurring opinion).

51. APPEAL STANDARDS at 61 n.11.

52. Douglas v. California, 372 U.S. 353, 358 (1963) (dissenting opinion).

53. APPEAL STANDARDS at 63.

fail to do so or do so inadequately. But to offer this as any sort of solution to the existing problem of frivolous appeals seems to this writer extremely naive.

The Standards also discuss, and reject, the possibility of imposing some kind of penalty on an appellant if the appeal court finds his case to have been exceptionally unmeritable.[54] The impracticality of such a measure is fairly obvious. Such a sanction could only be imposed fairly on an appellant who takes an appeal with foreknowledge that his claim is frivolous. But as was discussed previously,[55] this difficult factual inquiry should be viewed as irrelevant and not determinative of anything.

IV. PROCESSING THE APPEAL—"GREATER WISDOM"?

A. *Supervision During the Preparation of Cases*

The Standards recommend that closer supervision of pending cases be maintained by the court by assigning each case to a single judge who, with the help of an administrative aide, is to "resolve the procedural questions that arise."[56] This would permit disposition of a number of questions on motion without a hearing by the full court. Such a procedure would be clearly permissible under present federal rules,[57] but apparently it would not be so under Florida rules.[58]

The proposed Standard would surely speed up the processing of appeals, but it would be of no assistance in allowing the court to dispose summarily of appeals which lack any basis. This is for the reason that the power of the single appointed judge would be limited to resolving procedural questions. Consistent with this position, the Federal Rules of Appellate Procedure provide that "a single judge may not dismiss or otherwise determine an appeal."[59]

Why must the final determination be made by a multi-judge panel? That idea seems to be deeply ingrained in most appellate processes; but these processes developed in times when non-meritorious criminal appeals did not impose a substantial burden on the courts. The Committee adopts the view of an earlier American Bar Association report[60] which "criticized as unsound any practice of one appellate judge reviewing the action of one trial judge."[61] The logic supporting this view seems to be that the reason appeal courts are less fallible than trial courts (and one must

54. *Id.* at 70.

55. *See* text accompanying note 17 *supra.*

56. APPEAL STANDARDS at 72.

57. FED. R. APP. PRO. 27(c).

58. FLA. APP. R. 2.2(a)(1): "Three judges shall constitute a panel for and shall consider each case . . . ." FLA. APP. R. 3.9(d): "[T]he *Court* will hear (motions) . . . ." (Emphasis added.)

59. FED. R. APP. PRO. 27(c).

60. A.B.A., SECTION OF JUDICIAL ADMINISTRATION, REPORT OF INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS (1961).

61. APPEAL STANDARDS at 24.

assume that they are to justify their superior position in the hierarchy) is that they "provide an opportunity for several minds to check the trial decisions of one mind."[62] In the opinion of this writer, one who accepts that idea must be prepared to swallow also the analogous proposition that a jury is less fallible than a judge. If appeal courts are less fallible than trial courts, the essential reason must be that they are staffed by better minds.

B. *Omission of Oral Argument and Written Opinion—the Fifth Circuit Rules*

Even if one accepts the Committee's premise that the decisions of multiple judge panels provide "greater wisdom,"[63] would it not be wise to provide a ready means for disposing of causes which require no wisdom at all? The proposal for placing each case in the hands of a single judge appears to be a sound one, but real improvement in the handling of frivolous appeals might be had if the judge's authority were expanded to allow him to rule on motions to affirm by the prosecution. This means of expeditiously determining frivolous appeals need not collide with any constitutional requirement, nor would it operate in a discriminatory fashion against indigents. An appellant has no more constitutional right to be heard by a multi-judge panel than he has to be heard by the court sitting en banc.[64]

One writer has suggested that a single judge might perform a pre-appeal screening process, rejecting on his own initiative cases that are without merit.[65] It would seem, however, that such a procedure as that might go too far, too fast. It would take less effort on the part of the Court to let the prosecution assume its normal adversary role, by accompanying its initial brief with a motion to affirm if it thought that the case is entirely without merit. Until this occurs, the assigned judge would take no action, giving the case the benefit of a presumption that it has some merit. The prosecution should be made to understand that such a motion will succeed only if it clearly appears that the appellant is not entitled to any relief. That is to say, the prosecution should be discouraged from making such motions a matter of routine, which would amount to an additional step in each and every case.

If the motion to affirm is successful it would have the force of a final disposition on the merits, not reviewable by a multiple-judge panel of the court. Otherwise, the motion procedure would be no more than another intermediate step. The only resort should be to whatever higher appellate body is available. That, of course, would be a discretionary review in most jurisdictions.

If the appellant's case survives the motion to affirm, or if no motion

62. Operating Procedures of Appellate Courts, *supra* note 59, at 14.

63. APPEAL STANDARDS at 24.

64. *Cf.* FED. R. APP. PRO. 35: "Such a hearing is not favored and ordinarily will not be ordered . . . ."

65. P. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 575 (1969).

is made, the case would be set down for decision by a three-judge panel. It should be anticipated that a significant percentage of cases reaching this stage would nevertheless not be of such a nature as to present to the court any really difficult question. It should be within the power of the court to deny oral argument, and the court should decide the case without opinion or with the briefest of memorandum opinions unless the case has some aspect that cannot be determined by obvious analogy to one or two precedents.

The United States Court of Appeals for the Fifth Circuit has recently promulgated local rules that appear to be a step in this direction.[66] Fifth Circuit rule 17 provides for appointment of "panels to review pending cases for appropriate assignment or disposition . . . under Rules 18, 19, and 20 . . . ."

Rule 18 permits transfer of cases in the court's discretion to a "summary calendar" for decision without oral argument. Provision is made for notice to parties that their case has been so docketed, but it does not appear that a party is guaranteed an opportunity to contest this decision. Rule 19 provides for dismissal[67] or affirmance[68] on motion by the appellee. These motions, which are normally to be filed within fifteen days after the appeal is docketed, are generally not argued orally in the Fifth Circuit.[69] Under rule 20 the court may, "as a result of a review under Rule 17," find an appeal to be frivolous and without merit and dismiss it without notice.

These new rules appear to give the Fifth Circuit some additional flexibility in giving trivial cases no more attention than they deserve. However, there is some question whether rule 18 conflicts with the Federal Rules of Appellate Procedure.[70] Rule 34 of the federal rules provides for thirty minutes oral argument per side "[u]nless otherwise provided for by rule," and allows the court to terminate oral argument "whenever in its judgment further argument is unnecessary."[71] But the Advisory Committee's note to the rule states that the "spirit of the rule [is] that a reasonable time should be allowed."[72] On the other hand, the Supreme Court has said that "[o]ral argument on appeal is not an essential element of due process."[73] The reasoning of the Fifth Circuit, in invoking this rule without challenge,[74] does not appear to conflict with the federal rule:

66. 5TH CIR. R. 17, 18, 19, 20 (Adopted Dec. 1968).

67. On the ground that the court lacks jurisdiction. 5TH CIR. R. 19(a).

68. On any other ground. *Id.*

69. 5TH CIR. R. 10.

70. FED. R. APP. PRO. 47 gives courts the power to make local rules not inconsistent with the Federal Rules.

71. FED. R. APP. PRO. 34(b).

72. *Federal Rules of Appellate Procedure, Report of Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, 43 F.R.D. 61, 152 (1968).

73. Price v. Johnston, 334 U.S. 266, 286 (1948); *see also* Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 276 (1949); Magnesium Casting Co. v. Hoban, 401 F.2d 516 (1st Cir. 1968).

74. Wittner v. United States, 406 F.2d 1165 (5th Cir. 1969); Groendyke Transport v. Davis, 406 F.2d 1158 (5th Cir. 1969).

> When a case is frivolous or its outcome so certain as a practical matter the appellate court is not compelled to sacrifice either the rights of other waiting suitors, its own irreplaceable judge-time, or administrative efficiency in judicial output by a traditional submission with all the trappings.[75]

The federal rule allows the court "to terminate the argument whenever in its judgment further argument is unnecessary."[76] If in its judgment no argument at all is necessary, why should "the spirit of the rule" dictate the allowance of "a reasonable time?"[77] In the opinion of this writer, denial of oral argument is a powerful weapon which properly belongs in the court's arsenal of defenses against those who would trespass on its time.

The Standards consider omission of oral argument only in terms of waiver by appellant's counsel to avoid oral argument of contentions that are weak or hopeless. "In that case it is said that counsel should not have to stand up in court and attempt to make an oral argument that conceals the deficiencies in the case."[78] But where such an elected course might make it appear that the action of the appellant's counsel was adverse to his client, and might communicate to the court that counsel was aware of the weakness of his client's position, the denial of oral argument by the court could only mean that the court did not believe the need for further information in order to reach its decision.

Another method discussed in the Standards that might speed the disposition of cases is the more extensive use of short opinions or per curiam orders. Appellate courts should certainly make long opinions the exception rather than the rule. In this regard, it might be worth noting that a decision which was not reported at all would take some of the fun out of appealing, by denying the appellant the pleasure of seeing his name in the reporter, pitted fearlessly against the "director of prisons," the "state," or even the whole United States.

It might be wise for appellate judges to check their past opinions in Shepard's Citations periodically to see if others think they have added anything to the law. If a case is not cited by someone else within a reasonable period of time, the judge should ask himself whether writing the opinion was a justifiable expenditure of his time.

C. *Counsel on Appeal*

The position taken by the Standards is that the defendant should have the "assistance of counsel at all stages of appeal."[79] If counsel is

75. Groendyke Transport v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).

76. FED. R. APP. PRO. 34.

77. FLA. APP. R. 3.10(e) gives the court broad discretion to "require, or dispense with, oral argument," and Fla. App. R. 3.9(e) denies oral argument on a motion to quash an appeal as frivolous unless the court specifically orders it.

78. APPEAL STANDARDS at 82.

79. APPEAL STANDARDS at 73.

convinced that the appeal lacks merit, but cannot persuade the client to abandon it, he is to stay with the case and should not seek to withdraw. He may, however, suggest that the case be submitted on briefs without oral argument.

The proposed standard seems to be a sound one. As long as an appeal is before the appellate body, neither the interest of the court nor that of the defendant is advanced by withdrawal of counsel. Florida courts have frequently complained of the difficulty attending such cases when the appellant continues pro se.[80]

It seems clear that the question to be determined should be whether, at a given stage, the case could be resolved without further inquiry, not whether counsel should abandon the cause and allow the appellant and the court to cope with it as best they can.

The Standard certainly seems preferable to the procedure laid down by the Supreme Court in *Anders v. California*.[81] In *Anders*, after counsel filed notice of appeal, he notified the court that he would file no brief because he felt that the case lacked merit. Counsel was thereupon allowed to withdraw. Appellant proceeded pro se after the court refused to appoint new counsel. The Supreme Court found that this procedure denied the appellant the assistance of "counsel acting in the role of advocate"[82] and that counsel had acted "merely as amicus curiae."[83] To that extent the *Anders* decision was clearly defensible, but the Court then went on to volunteer a set of ground rules for allowances of withdrawal by counsel from an appeal he considers frivolous. The rules require counsel to accompany his request for withdrawal with a brief setting forth, as favorably to appellant as possible, the points on appeal that are arguable. The appellant is to receive a copy of this brief and be allowed time in which to raise any points he chooses. But, as was noted by Mr. Justice Stewart:

> [I]f the record did present any such arguable issues, the appeal would not be frivolous and counsel would not have filed a no-merit letter in the first place.[84]

The conclusion seems inescapable that if counsel is allowed to withdraw under the *Anders* formula, it follows that the case should be dismissed or otherwise disposed of summarily. This is the usual result.[85] But if that is so, regardless of the attorney's ability to concoct a brief that advocates

80. *See, e.g.*, Bashlor v. Wainwright, 189 So.2d 800 (Fla. 1966); Smith v. State, 192 So.2d 346 (Fla. 2d Dist. 1966); Gossett v. State, 191 So.2d 281 (Fla. 2d Dist. 1966). *Cf.* Garcia, *Defense Pro Se*, 23 U. MIAMI L. REV. 551 (1969).

81. 386 U.S. 258 (1967).

82. *Id.* at 743.

83. *Id.* at 743.

84. *Id.* at 746.

85. The United States Court of Appeals for the District of Columbia employs a printed "[s]tatement to be handed by the clerk to appointed counsel" which outlines the *Anders* procedure for requesting withdrawal and adds that the appellant should be informed that, if the withdrawal is granted, the appeal will ordinarily be dismissed.

his client's position while he tells the court by his withdrawal request that the position is indefensible, counsel's request for withdrawal amounts in practical effect to a motion for dismissal or affirmance.[86] The proposed Standard would not permit counsel to take such an action, and thus leaves the initiative for such summary disposition where it belongs—on the appellee or on the court itself.

The Standard also avoids the difficulty inherent in the *Anders* requirement that the indigent be permitted to raise any points he chooses after counsel has filed his *Anders* brief. That procedure would have counsel and client assuming adverse positions which would strain their relationship to an extent from which it could hardly be expected to recover if the permission to withdraw should be denied. As the Standard concludes, it is better for the attorney to present on appellant's behalf any claims from which he is unable to dissuade his client. But the presentation should be made in a manner which, in the judgment of counsel, will do the most good (or the least harm) for the client's cause. In the case of a contention that is wholly without merit, this obviously means that he should present it succinctly in the brief, omitting oral argument unless the courts asks for it.

The Standards recognize that the proposed approach conflicts with ethical requirements that counsel refrain from presenting frivolous contentions.[87] Apparently it is felt that such requirements should be amended to conform with the Standard. Instead of making it counsel's duty not to present frivolous contentions to the court, counsel's duty as to every contention, frivolous or not, should be to present it to the court, supported by everything that he can find in its favor. If there is nothing to support it, counsel should present it in such a way that it can be evaluated by the court without causing delay, inconvenience, or irritation which might do harm to the client's cause.

On the question of dismissal of appointed counsel and appointment of a substitute, the Standards state that such requests by appellants are to be viewed with disfavor. Here the indigent's status necessarily deviates from that of a person with unlimited funds. If money were no object, one

86. At least one court seems to have reduced this to a matter of routine. The following cases were disposed of by the Florida Third District Court of Appeals within a sixty-day period by a form per curiam opinion reciting that the public defender has filed a brief in accordance with the requirements of *Anders*, that his motion to withdraw is granted, and that the case is affirmed: Fields v. State, 215 So.2d 893 (Fla. 3d Dist. 1968); Alexander v. State, 215 So.2d 85 (Fla. 3d Dist. 1968); Myers v. State, 214 So.2d 895 (Fla. 3d Dist. 1968); Sharretts v. State, 214 So.2d 774 (Fla. 3d Dist. 1968); Arline v. State, 214 So.2d 514 (Fla. 3d Dist. 1968); Jones v. State, 214 So.2d 510 (Fla. 3d Dist. 1968); West v. State, 214 So.2d 379 (Fla. 3d Dist. 1968); Haywood v. State, 214 So.2d 378 (Fla. 3d Dist. 1968); Byrd v. State, 214 So.2d 346 (Fla. 3d Dist. 1968); Francis v. State, 214 So.2d 346 (Fla. 3d Dist. 1968).

87. A.B.A. CANONS OF PROFESSIONAL ETHICS, No. 44. *Cf.* Mitchell v. United States, 259 F.2d 787 (D.C. Cir. 1958); Coleman v. State, 215 So.2d 96 (Fla. 4th Dist. 1968); Mobley v. State, 215 So.2d 90 (Fla. 4th Dist. 1968); Nelson v. State, 208 So.2d 506 (Fla. 4th Dist. 1968); Smith v. State, 192 So.2d 346 (Fla. 2d Dist. 1966).

might select, become disenchanted with, and dismiss an endless line of attorneys. But the amount of actual benefit to the appellant's case that could accrue from such conduct would diminish rapidly to positive harm after the first or second replacement. The commentary suggests that where "the defendant has a creditable reason for seeking different counsel"[88] this should be allowed. Under the procedure suggested herein, that is, allowing defendant to elect at the close of the trial whether to keep or replace trial counsel, there would be very few "creditable reasons" for allowing further substitution.

V. CONCLUSION

The fundamental ideas from which the Standards proceed appear to be sound: that a defendant should have the right to have alleged errors in his trial reviewed by a higher court; that the nature of the right together with practical considerations make it inadvisable to interpose preliminary inquiries as to merit, probable cause, and the like between the defendant and a final disposition by the appellate court; that the right to counsel should be coextensive with the right to appeal. But the Committee seemed unwilling to endorse any change in the implementation of these ideas that might give courts the needed power to dispose finally of a trivial appeal with a trivial amount of effort.

In the opinion of this writer, the Committee should have taken upon itself the duty to innovate, to propose new ways to stem this waste of judicial manpower and taxpayers' money. The alternatives contended for herein represent only examples of what is needed. It is hoped that the Tentative Draft will be revised before final adoption to reflect a more realistic appraisal of the magnitude of the frivolous appeal problem and a more fundamental emphasis on workable proposals for its solution.

88. APPEAL STANDARDS at 83.