The Burger Court Opinion Writing Database

Evitts v. Lucey

469 U.S. 387 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

January 11, 1985

Re: 83-1378 - Evitts, Superintendent v. Lucey

Dear Bill:

I regret that my separate writing can't be cleared in time to announce this case this week.

Regards,

WEB

Justice Brennan

Copies to the Conference

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

January 16, 1985

CHAMBERS OF
THE CHIEF JUSTICE

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

Dear Bill,

I will add this brief "snapper."

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

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

Regards,

WEB

Justice Brennan

Copies to the Conference

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

From: **The Chief Justice**

Circulated: JAN 18 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No.83-1378

RALPH W. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS *v.* KEITH E. LUCEY

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

[January ——, 1985]

CHIEF JUSTICE BURGER, dissenting.

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

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

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 12, 1984

No. 83-1378

Kavanaugh v. Lucey

Dear Chief,

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

Sincerely,

Bill

The Chief Justice

Copies to the Conference

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

From: **Justice Brennan**

Circulated: NOV 29 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1378

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

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

[December ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

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

I

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

[1] Kentucky Rule of Appellate Procedure 1.090 provided:

"In all cases the appellant shall file with the record on appeal a statement setting forth: (a) The name of each appellant and each appellee . . . (b) The name and address of counsel for each appellant and each appellee. (c) The

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 30, 1984

No. 83-1378

Kavanaugh v. Lucey

Dear Sandra:

Thank you so much for your suggestions in the above. I think they're all well taken and have made revisions at pages 8 and 9, which I hope will meet with your approval.

I am not circulating to the Conference until I've heard from you.

Sincerely,

Bill

Justice O'Connor

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 30, 1984

No. 83-1378

Kavanaugh v. Lucey

Dear John,

I bow my head in shame. We had every intention of citing your magnificent opinion in Macon v. Lash, but there was a foul-up and I'll not say who was responsible. Anyway, it's going to be cited in the next circulation. It really gives us a controlling analysis.

I think I would prefer not to refer to John Harlan's due process practice rationale because his use of it in Douglas and Griffin came out differently than I think we would.

Sincerely,

Bill

Justice Stevens

p. 8, 9, 10

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

From: **Justice Brennan**

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1378

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

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

[December ——, 1984]

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 10, 1984

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

Dear Harry:

Thanks so much for your suggestions. They will be incorporated in the next draft.

Sincerely,

W.J.B.,Jr.

Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1378

RALPH W. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS *v.* KEITH E. LUCEY

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

[December ——, 1984]

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

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 7, 1985

MEMORANDUM TO THE CONFERENCE

No. 83-1378

Evitts v. Lucey

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

Sincerely,

Bill

STYLISTIC CHANGES

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

From: **Justice Brennan**

Circulated: _____

Recirculated: JAN 8

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1378

RALPH W. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS *v.* KEITH E. LUCEY

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

[January ——, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

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

I

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

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"In all cases the appellant shall file with the record on appeal a statement setting forth: (a) The name of each appellant and each appellee . . . (b) The name and address of counsel for each appellant and each appellee. (c) The

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 17, 1985

No. 83-1378

Evitts v. Lucey

Dear Chief,

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

Sincerely,

The Chief Justice

Copies to the Conference

HAB

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 20, 1985

MEMORANDUM TO THE CONFERENCE

No. 84-321 -- Alabama v. Sturdivant

This case was held for Evitts v. Lucey, No. 83-1378. After a conviction on second degree robbery charges, respondent had several conversations with his appointed counsel concerning whether he wanted to appeal. Counsel "advised his client to the effect that, if he should succeed on appeal, he would probably be retried and could possibly be convicted of the more serious offense of robbery in the first degree." Pet. for Cert. at 9 n.3 (quoting Alabama Supreme Court opinion). Although there is dispute as to whether this advice was given, the Alabama Supreme Court evidently believed that it was. And the parties seem to concede that if given it was "incompetent." See App. to Pet. for Cert. at 25. See Price v. Georgia, 398 U.S. 323 (1970). Because counsel saw little likelihood of success on the appeal, he advised against it. Respondent alleges that he told his attorney that he wanted to file an appeal anyway. His counsel alleges that respondent merely said that he would "go and build his time and get it over with." App., at 6. Counsel failed to perfect an appeal. One week later, respondent told counsel that he wanted to appeal after all, but the time for appeal had expired. Respondent then brought a coram nobis petition in state court, seeking inter alia reinstatement of his appeal on the ground that he had been denied effective assistance of counsel on appeal. The state trial court denied the petition and the Court of Criminal Appeals affirmed without opinion.

The Alabama Supreme Court reversed and remanded to permit respondent to file an out-of-time appeal. The court did not explicitly resolve the factual question whether respondent had requested an appeal. Instead, the court held that "his statement that he would 'go and build his time' did not necessarily mean that he did not wish to contemporaneously proceed with the appeal; thus his counsel was not relieved of his duty to either appeal the conviction or to withdraw from the case after following the guidelines of Anders[v. California, 386 U.S. 738 (1967)." App. at 10.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 4, 1984

83-1378 - Kavanaugh v. Lucey

Dear Bill,

I shall await Bill Rehnquist's dissent.

Sincerely yours,

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 9, 1985

Re: 83-1378 - Evitts v. Lucey

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 29, 1984

Re: No. 83-1378-Kavanaugh v. Lucey

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 1984

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

Dear Bill:

In a separate note, I am joining your opinion for this case. The following comments have to do primarily with style and, for the most part, are trivial. Nevertheless, I would appreciate your considering them.

1. Kentucky, like Massachusetts, Pennsylvania, and Virginia, likes to think of itself as a Commonwealth rather than a State. I know they are sensitive about this out there. Whether you would wish to change your references to Kentucky, I do not know. I shall leave this to you.

2. Like John, I would appreciate your adding to the string cite, in your footnote 9, the case of Williams v. United States, 402 F.2d 548 (CA8 1968). I did not write that opinion, but I sat on the case and thus am on record. It was, I believe, the first Eighth Circuit case to this effect, and the Robinson case, which you do cite, relied heavily on it. It would please me to have the earlier case mentioned.

3. The first sentence in the first full paragraph on page 13 shows up every Fall with a new generation of clerks. It is one of my "least favorites." Do you think it could be omitted or replaced?

Sincerely,

Harry

Justice Brennan

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 1984

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

Dear Bill:

Please join me.

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

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 7, 1984

83-1378 KAVANAUGH v. LUCEY

Dear Bill:

Please join me.

Sincerely,

L. Lewis

Justice Brennan

Copies to the Conference

LFP/vde

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 15, 1984

Re: No. 83-1378 Kavanaugh v. Lucey

Dear Chief,

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

Sincerely,

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 29, 1984

Re: No.83-1378 Kavanaugh v. Lucey

Dear Bill,

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

Sincerely,

WHR/jpc

Justice Brennan

cc: The Conference

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

From: **Justice Rehnquist**

Circulated: JAN 2 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1378

RALPH W. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS *v.* KEITH E. LUCEY

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

[December ——, 1984]

JUSTICE REHNQUIST, dissenting.

In this case the Court creates virtually out of whole cloth a Fourteenth Amendment due process right to effective assistance of counsel on the appeal of a criminal conviction. The materials with which it works—previous cases requiring that indigents be afforded the same basic tools as those who are not indigent in appealing their criminal convictions, and our cases interpreting the Sixth Amendment's guarantee of the "assistance of counsel" at a criminal *trial*—simply are not equal to the task they are called upon to perform.

The Court relies heavily on the statement in *Ross* v. *Moffitt*, 417 U. S. 600, 608–609 (1974), that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause . . . and some from the Due Process Clause." But today's Court ignores the conclusion of the six Justices who joined in *Ross*:

> "Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis." *Id.*, at 611.

STYLISTIC CHANGES THROUGHOUT

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: 1/11/85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1378

RALPH W. EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX AND DAVID L. ARMSTRONG, ATTORNEY GENERAL, PETITIONERS *v.* KEITH E. LUCEY

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

[January ——, 1985]

JUSTICE REHNQUIST, dissenting.

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The Court relies heavily on the statement in *Ross* v. *Moffitt*, 417 U. S. 600, 608–609 (1974), that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause . . . and some from the Due Process Clause." But today's Court ignores the conclusion of the six Justices who joined in *Ross*:

> "Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis." 417 U. S., at 611.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 29, 1984

Re: 83-1378 - Kavanaugh v. Lucey

Dear Bill:

Please join me.

Respectfully,

JPS

Justice Brennan

Copies to the Conference

HAB

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 29, 1984

Re: 83-1378 - Kavanaugh v. Lucey

Dear Bill:

Your opinion is excellent and my join is unconditional, but I have a thought which you may wish to consider. The argument in Part III-C beginning on page 14 might be buttressed by reference to the fact that Justice Harlan relied on a due process rationale in some of the critical cases. Moreover, as early as 1972, some Courts of Appeals (particularly including the Seventh Circuit) read this Court's cases as resting in part on the Due Process Clause. See e.g., my opinion in Macon v. Lash, 458 F.2d 942, at 949-950.

Even if you decide not to touch Part III-C--and it surely is strong enough to stand as it is--I would like to suggest that you at least include the Seventh Circuit case in your footnote 8 string-cite of lower federal courts that previously decided this issue correctly.

Finally, I would like to suggest that you substitute the word "is" for the word "are" in line 3 of page 5.

Respectfully,

Justice Brennan

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 29, 1984

Re: No. 83-1378 Kavanaugh v. Lucey

Dear Bill:

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

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

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

Sincerely

Sandra

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 3, 1984

No. 83-1378 Kavanaugh v. Lucey

Dear Bill,

I have reviewed your proposed revisions for pages 8 and 9 of your draft. They address my concerns and I will be happy to join your opinion with those changes.

Sincerely,

Sandra

Justice Brennan

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 4, 1984

No. 83-1378 Kavanaugh v. Lucey

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference